

J. MORGAN PHILPOT (UT-11855)  
JM Philpot Law, PLLC  
620 E 100 N  
Alpine, UT 84004  
Telephone: (801) 891-4499  
Email: [morgan@jmphilpot.com](mailto:morgan@jmphilpot.com)  
*Attorney for Plaintiffs*

Discovery Tier 2

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IN THE DISTRICT COURT OF UTAH,  
FOURTH JUDICIAL DISTRICT, UTAH COUNTY, PROVO DEPARTMENT,  
125 N 100 W, PROVO, UTAH 84601

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JANELLE M. MARTIN, DEVIN J.  
MARTIN, KATHRYN KIST, MINDY  
KROPF, SUZANNA L. LELAND,  
KATHERINE M. JOHNSON, SIRI D.  
DAVIDSON, HEATHER K.  
BELCHER,

*Plaintiffs,*

vs.

GARY R. HERBERT, in his official  
capacity, the UTAH DEPARTMENT  
OF HEALTH, RICHARD G.  
SAUNDERS, in his official capacity,  
and the STATE OF UTAH,

*Defendants.*

**COMPLAINT and REQUEST for  
DECLARATORY JUDGMENT and  
INJUNCTIVE RELIEF.**

**ALTERNATIVELY,  
a PETITION FOR WRIT OF MANDAMUS**

Case No.

Judge:

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**INTRODUCTION & PRAYER FOR RELIEF**

1. The Utah Constitution does not diminish in times of trouble, instead it stands as the vigilant bastion between Utah's government and the eternal and unalienable rights of her people. Its promise of liberty is steady and uninterrupted.

2. Plaintiffs, a coalition of Utah parents, acting on behalf of themselves and their children, have a right to expect the Governor of the State of Utah to follow the law and to protect their

rights. Instead, the Governor has wrongfully usurped authority, violated the law and like so many would-be martial leaders of old, refuses to relinquish his new-found powers.

3. This civil suit seeks immediate court action to vindicate Plaintiffs' rights and the rights of the many other Utah families, parents, and children that Plaintiffs represent.

4. The grounds for this action arise from the Governor's failure to abide by his duties under Utah's Constitution and the law as outlined below and the fact that the Governor has harmed, and will continue to harm Plaintiffs, their children and the people of Utah by his continued violation of, and refusal to act in accord with the Utah Constitution and U.C.A. Title 53 Chapter 2a.

5. Therefore, Plaintiffs here complain against Governor Gary R. Herbert (sometimes "Gov. Herbert"), in his official capacity; the Utah Department of Health; Richard G. Saunders, in his official capacity; and all other executive departments, agencies and persons working on behalf of the state as contemplated hereunder; seeking declaratory and injunctive relief; and alternatively, Petition the court for a Writ of Mandamus to compel Gov. Herbert, et al, to cease from acting outside the bounds and authority of their offices and the law; and furthermore that he be restrained to the performance of his lawful duties and obligations under the Utah Constitution and Utah Code as follows:

### **LEGAL STANDARD**

#### **Overview of Declaratory and Injunctive Relief Requested**

6. Plaintiffs seek a court declaration confirming that Gov. Herbert, et al, have failed to carry out their lawful duties under various provisions of the Utah Constitution and the Utah Public Safety Code; that Gov. Herbert, et al, are in violation of the statutory and constitutional rights of the Plaintiffs and the citizens of Utah as represented by Plaintiffs. Further, Plaintiffs seek

injunctive relief immediately requiring Gov. Herbert, et al to strictly follow the Utah Code and to abide by the provision of the Utah Constitution; to cease from entering into any agreements pursuant to the circumstances and acts described hereunder;

7. This includes but is not limited to an order that also:

- a. Enjoins Gov. Herbert, et al from enforcing and/or carrying out any and all Executive Orders, including all Rules and Regulations in connection with those orders, that were issued in conjunction with the state of emergency declared by the governor on/or after March 6, 2020 and extended by him on August 20, 2020;
- b. Enjoins Gov. Herbert, et al from issuing any new Executive Orders, including all Rules and Regulations in connection with those orders, that may be issued in contemplation of the state of emergency declared by the governor on March 6, 2020 and extended by him on August 20, 2020;
- c. Renders null and void all actions taken in relation to and derived from the Executive Orders, including all Rules and Regulations in connection with those orders, that were issued in conjunction with the state of emergency declared by the governor on/or after March 6, 2020 and extended by him on August 20, 2020;
- d. Any other relief that the court finds appropriate.

### **Overview of Mandamus Relief Requested**

8. In the alternative to declaratory and injunctive relief sought above, the court, via writ of mandamus, should accomplish the same above restrictions and injunctions by compelling Gov. Herbert, et al to follow the law; to cease enforcement of the unlawful executive orders, rules and regulations issued by Gov. Herbert, et al; to cease making unlawful executive orders, rules

and regulations in violation of the Utah Code and Constitution, including but not limited to orders, rules and regulations derived from the unlawful *Phased Guidelines for the General Public and Businesses to Maximize Public Health and Economic Reactivation*; and to cease from making any agreements pursuant to orders related to his declared state of emergency; to compel Gov. Herbert, et al to strictly perform the statutory duties assigned by Utah's Code and Constitution as specifically identified herein, and further compelling Gov. Herbert, et al to immediately cease and desist their refusal, or deliberate failure, to carry out their required duties under the Utah Constitution and Code. The court should also compel Gov. Herbert, et al to publicly renounce the unlawful orders and actions undertaken as explained herein.

#### **PARTIES AND STANDING**

9. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

10. In addition to the particular standing interests alleged below, Plaintiffs are also appropriate parties to bring this action under the public interest standing doctrine and they each and together have an interest necessary to effectively assist the court in developing and reviewing all relevant and legal factual questions and no one has a greater interest in the outcome than Plaintiffs.

11. Plaintiffs are adult residents and citizens of the state of Utah.

- a. Janelle M. Martin is a resident of Utah County, Utah.
- b. Devin J. Martin is a resident of Utah County, Utah.
- c. Kathryn Kist is a resident of Summit County, Utah.
- d. Mindy Kropf is a resident of Iron County, Utah.

- e. Suzana L. Leland is a resident of Weber County, Utah.
- f. Katherine M. Johnson is a resident of Summit County, Utah.
- g. Siri D. Davidson is a resident of Utah County, Utah.
- h. Heather K. Belcher is a resident of Salt Lake County, Utah.

12. Plaintiffs, in their own person, have been deprived of their fundamental rights, under threat of force and criminal prosecution, by the unlawful acts of the Defendants. These rights will be more fully discussed hereunder and also effect all the citizen of the State of Utah.

13. Plaintiffs are also parents of school age children who attend the public schools of the state of Utah. Plaintiffs' children, of varying age and ability, attend their respective public schools within their counties.

14. Plaintiffs' children are being deprived of their constitutional right to free and open schools because of the unlawful acts of the Defendants; which acts include, but are not limited to, exercising unlawful powers, issuing unlawful orders and decrees, and doing all of these things through the unjustifiable use of threat and force of law.

15. Plaintiffs are also being deprived of the exercise of their fundamental right over the care, custody, control, and management of their child's education.

16. The school districts of these parents have also been fraudulently induced and subsequently required, under threat of force of law, to implement mandates pursuant to the dictates and unlawful exercise of governmental powers by the Defendants.

17. Plaintiffs and their children have suffered harm where their rights of education have been severely damaged and hindered by the Defendants who have placed the teachers, administrators, and employees of their respective schools under fear, and threat of criminal

prosecution, for failing to carry out the unlawful actions, dictates and orders of the Defendants. These unlawful acts have created unhealthy environments in Utah's system of public education.

18. The Defendants, through their unlawful acts, orders, and mandates, have deprived Plaintiffs of their right to be free from any governmental action that is in opposition to their educational desires for their children, particularly where parent's in Utah have a constitutional entitlement to heightened protection against such interference.

19. Plaintiffs' children are being subjected to mental and emotional abuse at their schools by the Defendants for secretive and undisclosed purposes, which secret and undisclosed purposes have been justified through fear, threat, and force of law. This is particularly harmful given recent disclosures made by the Center for Disease Control about the de minimis effects of COVID-19 on school age children.

20. Defendants have perpetrated a campaign of false information related to school age children and the respective risks that the Plaintiffs, their children, and the public system of education face during the unlawful state of emergency that was declared by Gov. Herbert through the exercise of powers prohibited to him.

21. The actions of the Defendants constitute a form of governmentally enforced mental, emotional, and social child abuse that is harming Plaintiffs, their children, and depriving the people of Utah of their rights to free and open schools.

22. Additionally, Plaintiffs and their families have been unlawfully deprived of other fundamental rights and freedoms by the unlawful acts of the Defendants, as will be shown hereafter.

## **JURISDICTION AND VENUE**

23. This court has subject-matter jurisdiction respecting this complaint and petition pursuant to U.C.A. § 78A-5-102(2).

24. This court has personal jurisdiction over the defendants.

25. Venue is proper in this court under U.C.A. § 78B-3-307.

26. Under Article VIII, Section 5, U.C.A. § 78B-6-4, and the Utah Rules of Civil Procedure Rule 57, 65A, and 65B this Court has power to issue extraordinary writs, declaratory and extraordinary relief, and to issue injunctions.

## **NATURE OF THE CASE**

27. The founders of Utah and the framers of its Constitution came to Utah seeking temporal and spiritual refuge in the mountains. They ventured here to build a community, form their own government, and to establish laws that would secure their right and that of their posterity to live and worship according to their own conscience. It is open and plain to be seen that the Utah's Constitutional founders believed in the paramount importance of perpetuating the fundamental principles of free government.<sup>1</sup>

28. In framing the Utah Constitution, they first and foremost acknowledged Almighty God for the gift of life and liberty. Most of the early framers of Utah's Constitution held to a belief that this land was consecrated by God himself as "a land of liberty,"<sup>2</sup> that liberty included the

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<sup>1</sup> Utah Constitution Article I, § 27.

<sup>2</sup> 2 Nephi 1:7, The Book of Mormon, Another Testament of Jesus Christ. *See also* Preamble, Utah Constitution. Utah's constitutional convention convened on March 4, 1895, in Salt Lake City. 1 Official Report of the Proceedings and Debates of the Convention 3 (Salt Lake City, Star Printing Co. 1898). Of the 107 delegates, 28 were not members of the Church of Jesus Christ of Latter-day Saints. *See Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 928 (Utah 1993).

right to “worship God according to their desires,” and that human law did not have a right to “dictate forms for public or private devotion.”<sup>3</sup>

29. Central to their fundamental beliefs and their worship was the eternal nature and importance of family, and that the cause of liberty included the right to protect and defend “their wives and their children, and their all, yea, for their rites of worship and their church,” and that they were charged by God to “defend [their] families even unto bloodshed.”<sup>4</sup>

30. The posterity of these early pioneers carried on this legacy and solemnly called upon the officers of government to “promote those measures designed to maintain and strengthen the family as the fundamental unit of society;” and, “that the disintegration of the family will bring upon communities and nations the calamities foretold by ancient and modern prophets.”<sup>5</sup>

31. Rarely, if ever, has a court of law been so blessed with an abundantly clear and available record of a state Constitution, including its history, principles, and ideals.

32. The Utah Legislature has expressly recognized these fundamental truths. Specifically, under the United States Constitution and the Utah Constitution, parents possesses a fundamental liberty interest in the care, custody, and management of their children and that government must not support any action in opposition to the desires of a parent without evidence to satisfy a parent’s constitutional entitlement to heightened protection against government interference with **the parent’s fundamental rights and liberty interests**. Further, it is the public policy of the

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<sup>3</sup> Alma 43:9, The Book of Mormon; Section 134:4, The Doctrine & Covenants; see also Art. I § 4.

<sup>4</sup> Alma 43:45-47, The Book of Mormon.

<sup>5</sup> The Family A Proclamation to the World, The First Presidency and the Council of the Twelve Apostles of the Church of Jesus Christ of Latter-Day Saints.



state of Utah that parents retain the fundamental right to exercise primary control over the education of their children. See U.C.A. § 62A-4a-201.<sup>6</sup>

33. Utah’s highest Court has recognized these fundamental truths. Referring specifically to Article I, § 25 of the Utah Constitution, the Utah Supreme Court stated:

“the rights inherent in family relationships-husband-wife, parent-child, and sibling-are the most obvious examples of rights retained by the people. They are “natural,” “intrinsic,” or “prior” in the sense that our Constitutions presuppose them, as they presuppose the right to own and dispose of property.

Blackstone deemed “the most universal relation in nature ... (to be) that between parent and child.” 1 W. Blackstone, Commentaries \* 446.

This parental right transcends all property and economic rights. It is rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct.”

*In re J. P.*, 648 P.2d 1364, 1372–74 (Utah 1982).

### UTAH’S CONSTITUTIONAL SAFEGUARDS

34. Utah courts have long recognized important safeguards against the abuse of power by the government and its respective branches. The Utah Supreme Court observed that:

“Article 5, § 1, provides that “the powers of the government of the state of Utah shall be divided into three distinct departments... and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise *any* functions appertaining to... the others, except in the cases herein expressly directed or permitted.”

“...[T]he *provisions of the constitution are mandatory and prohibitory*, unless by express words they are declared otherwise.” The powers conferred upon each house of the legislature... *are forbidden to be exercised*, by article 5, § 1, by any person in the exercise of powers belonging to a different department of the government.”

*Ellison v. Barnes*, 23 Utah 183, 63 P. 899, 900 (1901) (emphasis added).

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<sup>6</sup> A clear expression by the Utah Legislature as to a parent’s fundamental liberty interest under the Utah Constitution. (Emphasis added).

35. The purpose of separating the powers of government, particularly the lawmaking power from the executive power “...was to prevent the evils that would arise if all were concentrated and held by the same hand. Such a **concentration of power** would give to the class of officers possessing it absolute power, and that **would amount to a despotism.**” *In re Handley's Estate*, 15 Utah 212, 49 P. 829, 830 (1897) (emphasis added).

36. Utah’s delegated powers were purposefully divided into three departments of government to secure “...enduring liberty and freedom from tyranny” and provisions were written into the Utah Constitution such as Article V, Section 1, “...**which absolutely prevent** any person charged with powers properly belonging to one department from exercising any of the functions appertaining to either of the others—except where the power was expressly so granted in the Constitution itself.” *Rampton v. Barlow*, 23 Utah 2d 383, 389–90, 464 P.2d 378, 382–83 (1970) (emphasis added).

37. When any party asserts a claim under the Utah and the federal Constitutions, Utah courts ordinarily determine “...the issue under the Utah Constitution and only resorts to the federal Constitution if the state constitution is not dispositive.” *See West v. Thomson Newspapers*, 872 P.2d 999, 1004–07 (Utah 1994). *Jeffs v. Stubbs*, 970 P.2d 1234, 1248 (Utah 1998).

## **BACKGROUND**

38. Since March 6, 2020, Gov. Herbert has issued approximately 63 executive documents; more than any other Governor in memory.<sup>7</sup> Two of those executive orders (2020-1 and 2020-51) were issued pursuant to Utah Code Title 53 Chapter 2a, Emergency Management Act (“EMA”), Part 2, Disaster Response and Recovery Act (“DRRA”) and declared states of emergency due to

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<sup>7</sup> Utah Office of Administrative Rules, <https://rules.utah.gov/executive-documents/> (Aug. 25, 2020).

COVID-19. The first of the orders mandatorily expired by law and the subsequent order was an illegal extension by the Governor in contravention of his duties and the law.

39. On March 6, 2020, Gov. Herbert issued an executive order and declared a state of emergency “due to the infectious disease COVID-19 novel coronavirus.” Utah Executive Order No. 2020-1.<sup>8</sup> Gov. Herbert cited the Disaster Response and Recovery Act found in Title 53, Chapter 2a of the Utah Code Annotated 1953, as amended, for his authority to declare a state of emergency.

40. On March 12, 2020, the Utah Legislature unanimously passed H.J.R. 024 - Joint Resolution Extending the State of Emergency Due to Infectious Disease Covid-19 Novel Coronavirus, and thereby extended the Governor’s March 6, 2020 state of emergency until June 30, 2020.

41. The Utah Legislature expressly stated in H.J.R. 024 that they were passing the joint resolution because the state of emergency “...may not continue for longer than 30 days unless extended by joint resolution of the Legislature.” H.J.R. No. 24, at 30-33 (2020).

42. On June 18, 2020, the Utah Legislature passed H.J.R. 504, thereby extending the Governor’s March 6 state of emergency until August 20, 2020. The legislature once again stated that the state of emergency “...may not continue for longer than 30 days unless extended by joint resolution of the Legislature.” H.J.R. No. 504, at 32-34 (2020).

43. On June 26, 2020, the Governor issued Utah Executive Order No. 2020-34 requiring face coverings in state facilities. This order on face coverings was the first in a series of orders that each rescinded the previous and that dealt with face covering requirements. *See also* Utah

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<sup>8</sup> Published 03/15/2020.

Executive Order No. 2020-35 (June 29, 2020), Order No. 2020-36 (June 30, 2020), Order No. 2020-41 (July 10, 2020), Order No. 2020-45 (July 23, 2020), Order No. 2020-48 (August 8, 2020).

44. On August 20, 2020, during the sixth special session of the 63<sup>rd</sup> Utah Legislature refused to extend the Governor's March 6 state of emergency.

45. Regarding their refusal to extend, the Speaker of the House of Representatives stated that the emergency powers,

“granted to the executive, they have historically been for short periods of time, typically to address natural disasters. ***These powers were never contemplated to span months or longer.*** At this time, the Legislature has decided to not consider extending the emergency declaration. As legislative leaders, we are having ongoing discussions with the Governor's Office about the appropriate use of emergency powers and will evaluate this policy over the coming months.”<sup>9</sup>

(Emphasis added).

46. Utah State Senator Anderegg announced in the Political Subdivisions Committee meeting that:

“[b]etween the caucuses, the majority caucuses, and House and Senate leadership, there is not support for modifications at this time, ***nor is there support*** from the Legislature at this time ***to extend the state of emergency.***”<sup>10</sup>

(Emphasis added).

47. On August 20, 2020, Gov. Herbert ignored the Utah Legislature and the law and unilaterally extended the March 6, 2020 executive order - state of emergency “due to the ongoing COVID-19 pandemic.” See Utah Executive Order No. 2020-51. Gov. Herbert cited the Disaster

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<sup>9</sup> *Utah's lawmakers won't extend COVID-19 state of emergency*, The Salt Lake Tribune, August 20, 2020.

<sup>10</sup> *Id.*

Response and Recovery Act found in Title 53, Chapter 2a-206(1) of the Utah Code Annotated 1953, as amended, for his authority to declare a state of emergency.

48. In his August 20 executive order Gov. Herbert specifically referenced the March 6 Executive Order (2020-1) and stated that he was extending the state of emergency because the March 6 order was expiring. In his ‘new’ order, he stated that COVID-19 was “*a continuing threat*” and that there were emergency conditions sufficient to constitute a disaster “*within the intent*” of the DRRRA. He also called for the “*continued*” execution of the State Emergency Operations Plan; the “*continued*” dissemination of timely and accurate information by state agencies; the “*continued*” outreach and assistance to the populations most vulnerable to COVID-19; and also that it would take effect “*immediately upon the expiration of*” the March 6, 2020 Executive Order 2020-1 and it was to remain in effect until September 19, 2020.

#### **GOV. HERBERT IMPERMISSIBLY CONTINUED THE STATE OF EMERGENCY**

49. The Governor’s attempt to continue the state of emergency via Executive Order 2020-51 is unlawful and is null and void.

50. When faced with a question of statutory interpretation, it is well settled law that the primary goal of the court “...is to evince the true intent and purpose of the Legislature,” and the “...best evidence of the legislature's intent is ‘the plain language of the statute itself.’” *Marion Energy, Inc. v. KFJ Ranch P’ship*, 2011 UT 50, ¶ 14, 267 P.3d 863, 866.

51. Thus, when the court interprets a statute, the court assumes “...that the legislature used each term advisedly according to its ordinary and usually accepted meaning[,]” and, the Court will also presume that the expression of one term should be interpreted to exclude others. *Id.*

52. A state of emergency may be declared by the governor through executive order pursuant to Utah Code § 53-2a-206(1) which reads: “[a] state of emergency may be declared by executive order of the governor if the governor finds a disaster has occurred or the occurrence or threat of a disaster is imminent... in which state government assistance is required....”

53. Under the DRRA (U.C.A. § 53-2a-2), the Governor may continue a state of emergency until he finds “the threat or danger has passed or the disaster reduced to the extent that emergency conditions no longer exist.” U.C.A. § 53-2a-206(2).

54. However, the Governor’s ability to continue the state of emergency is strictly limited and “***may not continue*** for longer than 30 days unless extended by joint resolution of the Legislature, ***which may also*** terminate a state of emergency by joint resolution at any time.” U.C.A. § 53-2a-206(3) (Emphasis added), *see also* U.C.A. § 53-2a-216.

55. The Governor has no authority to continue a state of emergency for longer than 30 days because this power is reserved to the Legislature and barring some express permission (there is none), the provisions of the Utah Constitution are mandatory and prohibitory. *Ellison v. Barnes*, 23 Utah 183, 63 P. 899, 900 (1901) (emphasis added). Thus, the Governor is forbidden from extending and/or continuing the state of emergency that was originally declared by Executive Order 2020-1.

56. On August 24, 2020, Gov. Herbert issued an official statement about Order 2020-51 wherein he admits that Utah has been under a state of emergency due to the coronavirus for the past 170 days. This statement was released several days after the Legislature refused to extend the state of emergency at the 167-day mark, i.e. on August 20, 2020. Gov. Gary R. Herbert, *Why*

*Utah Remains in A State of Emergency*, August 24, 2020, <https://governor.utah.gov/2020/08/24/why-utah-remains-in-a-state-of-emergency/>.

57. By law, the Governor can declare a state of emergency, but he has no power to continue that state of emergency beyond 30 days. The Legislature may extend the state of emergency past 30 days, and they may terminate the state of emergency at any time regardless of the Governor's opinion. Therefore, once the Legislature declined to extend the Governor's May 6 state of emergency, he had no power to continue the state of emergency for any amount of time because approximately 170 days had already passed.

58. In addition to his plain statement that Utah will be "remaining" in a state of emergency, the Governor also poses two revealing questions in his August 24, 2020, "*Why Utah Remains in A State of Emergency*" letter:

*"Why Has Utah Been in One for So Long;" and,*

*"What are the Benefits of **Extending** the State of Emergency?"*

*Id.*

59. While the March 6 and August 20 executive orders may be different pieces of paper, they are the same state of emergency and are characterized and accompanied by the same corollary documents and orders focused on "restriction levels", "phased guidelines" and "face coverings." These orders and documents all sought to "continue," "update" or "reauthorize" the now defunct March 6 order.

60. Consider the following table<sup>11</sup> comparing the March 6 and August 20 executive orders along with their corollaries that clearly demonstrates that Gov. Herbert has continued the same state of emergency contrary to the 30-day limitation:

March 6, 2020 03/06/2020: Declaring a State of Emergency Due to Infectious Disease COVID-19 Novel Coronavirus, Utah Executive Order No. 2020-1 [published 03/15/2020]	08/20/2020: Declaring a State of Emergency Due to the Ongoing COVID-19 Pandemic, Utah Executive Order No. 2020-51, [published 09/01/2020]
03/17/2020: Temporarily Suspending Utah Administrative Code R671-302 Regarding Public Access to Board of Pardons and Parole Hearings, Utah Executive Order No. 2020-3 [published 04/01/2020]	08/20/2020: <b>Reauthorizing</b> the Suspension of Utah Administrative Code R671-302 Regarding Public Access to Board of Pardons and Parole Hearings, Utah Executive Order No. 2020-52, [published 09/01/2020]
03/30/2020: Suspending Provisions of the Utah Postretirement Reemployment Restrictions Act, Utah Executive Order No. 2020-9 [published 04/15/2020]	08/20/2020: <b>Reauthorizing</b> the Suspension of Enforcement of Provisions of the Utah Postretirement Reemployment Restrictions Act, Utah Executive Order No. 2020-53, [published 09/01/2020]
05/08/2020: Suspending Enforcement of Utah Code Section 32B-5-309 Regarding Ceasing Operation of Certain Retail Licensees, Utah Executive Order No. 2020-21 [published 05/15/2020]	08/20/2020: <b>Reauthorizing</b> the Suspension of Enforcement of Utah Code Section 32B-5-309 Regarding Ceasing Operation of Certain Retail Licensees, Utah Executive Order No. 2020-54, [published 09/01/2020]
03/25/2020: Suspending Enforcement of Statutes Relating to Telehealth Services, Utah Executive Order No. 2020-7 [published 04/01/2020]	08/20/2020: <b>Reauthorizing</b> the Suspension of Enforcement of Statutes Relating to Telehealth Services, Utah Executive Order No. 2020-55, [published 09/01/2020]

<sup>11</sup> Verbatim from the Utah Office of Administrative Rules, 2020 Executive Documents, <https://rules.utah.gov/executive-documents/>, August 30, 2020. (Emphasis added).



06/26/2020: Requiring Face Coverings in State Facilities, Utah Executive Order No. 2020-34, [published 07/01/2020]	08/20/2020: <b>Updating</b> the State Facilities Face Covering Requirement, Utah Executive Order No. 2020-56, [published 09/01/2020]
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61. It is plain to see, and the Governor expressly acknowledges, that he unilaterally continued the pre-existing state of emergency that had been ongoing for over five months.

62. The Governor’s unilateral extension of the state of emergency under Executive Order 2020-51 violates the spirit and letter of Utah law because his actions violate the DRRRA and the critical safeguards in the Utah Constitution. Gov. Herbert has no right to assume the powers of the Legislature nor to interpret the law to assume powers unto the executive. The provisions of the Utah constitution are presumptively mandatory and prohibitory, and the powers conferred upon each house of the legislature are forbidden to be exercised by any person in the exercise of powers belonging to a different department of the government. *Ellison v. Barnes*, 23 Utah 183, 63 P. 899, 900 (1901), *see also* Article V, § 1; and Article I § 26.

63. The Governor was acting outside of his authority when he issued the August 20, 2020 Executive Order 2020-51. Therefore, Executive Order 2020-51 and its dependent and corollary orders and reauthorizations (including but not limited to Executive Orders 2020-52 through 2020-57) are null and void.<sup>12</sup>

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<sup>12</sup> Reauthorized the Suspension of Utah Administrative Code R671-302 Regarding Public Access to Board of Pardons and Parole Hearings, Utah Executive Order No. 2020-52 – 08/20/2020; Reauthorized the Suspension of Enforcement of Provisions of the Utah Postretirement Reemployment Restrictions Act, Utah Executive Order No. 2020-53 – 08/20/2020; Reauthorized the Suspension of Enforcement of Utah Code Section 32B-5-309 Regarding Ceasing Operation of Certain Retail Licensees, Utah Executive Order No. 2020-54 – 08/20/2020; Reauthorized the Suspension of Enforcement of Statutes Relating to Telehealth Services, Utah Executive Order No. 2020-55 – 08/20/2020; Updated the State Facilities Face Covering Requirement, Utah Executive Order No. 2020-56 – 08/20/2020; Extended the Utah COVID-19 Level of Restriction, Utah Executive Order No. 2020-57 – 08/20/2010.

## **GOV. HERBERT'S ORDERS ARE ULTRA VIRES ACTS**

64. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

65. Given the provisions of the Utah Constitution and the clear statutory provisions of the DRRRA, Gov. Herbert not only exceeded his authority as far back as March 6, 2020 state of emergency, but also when he:

- Issued Executive Order 2020-51 Declaring a State of Emergency Due to the Ongoing COVID-19 Pandemic – 08/20/2020;
- Updated the State Facilities Face Covering Requirement, Utah Executive Order No. 2020-56 – 08/20/2020; and
- Extended the Utah COVID-19 Level of Restriction, Utah Executive Order No. 2020-57 – 08/20/2010, and
- Entered any other order, rule or regulation related to the state of emergency and/or COVID-19 on or before August 20, 2020.

### **Executive Order 2020-51 Declaring a State of Emergency**

66. In Order 2020-51, Gov. Herbert ordered:

- The continued execution of the State Emergency Operations Plan; Assistance from State government to political subdivisions as needed and coordinated by the Utah Department of Health, the Utah Department of Public Safety, and other state agencies as necessary;
- The continued dissemination of timely and accurate information by state agencies to the public that will mitigate the spread of COVID-19, prevent unnecessary confusion and alarm, and mitigate impacts to the economy;

- The continued outreach and assistance to the populations most vulnerable to COVID-19; and
- Coordination with local authorities and the private sector to maximize access to appropriate medical care while preserving critical services for those most in need.

67. Gov. Herbert cited the Disaster Response and Recovery Act (U.C.A. §§ 53-2a-206(1), 53-2a-102(5), and 53-2a-102(13)) for his authority to continue the state of emergency under Executive Order 2020-51. Tellingly, only one of the provisions of the order just mentioned, order #2, is even contemplated by § 53-2a-204 – Authority of governor.

68. The people of Utah cannot ignore despotic exercises of power that give full force and effect to documents,<sup>13</sup> orders, rules, and regulations without any respect to the people's retained rights and/or those delegated to other branches of government. Nothing within the DRRA or the Utah Constitution gives the Governor, let alone any branch of government in Utah, such power.

69. Instead, Gov. Herbert has assumed the right to act with almost unlimited authority under the auspices of his self-interpreted emergency powers assumed during the COVID-19 pandemic.

70. What makes this assumption of power most troubling is not just the Legislative declination that Gov. Herbert ignored but the recent report issued by the Center for Disease Control that seems to substantiate the Legislature's decision to not extend the state of emergency. Specifically, that:

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<sup>13</sup> Bureau of Emergency Medical Services and Preparedness, State Emergency Operations Plan, <https://site.utah.gov/bemsp/wp-content/uploads/sites/34/2017/04/Utah-EOP-ESF8-Public-Health-and-Medical-June-2016.pdf>, (accessed August 30, 2020).

- **6% (9,684 approximately) of the total COVID deaths reported (161,392) across the United States as of August 22, 2020 were due solely to COVID-19.**<sup>14</sup>

71. The CDC also provides a data visualization webpage that allows anyone to examine the number of COVID-19 deaths by each age group in any state.<sup>15</sup>

- **As to the school age children of Utah (ages 0-24), the CDC registers no deaths to the International Classification of Disease Code for an identified COVID-19 case; U071.**<sup>16</sup>

72. Utah also reports no mortality rate in the 0-24 age group.<sup>17</sup>

73. The plain language of U.C.A. § 53-2a-202 indicates that the Legislature intended to grant to the governor of this state and its political subdivisions strictly limited special emergency disaster authority. The DRRA, U.C.A. § 53-2a-204(a-o), dictates the limited parameters of the governor's authority when he issues an executive order declaring a state of emergency.

74. The language of the statute also clearly indicates that the Legislature has not ever given broad and sweeping powers to the governor under the DRRA; the executive is not allowed to: extend emergencies, assume legislative functions, exercise arbitrary discretion in making 'orders'. Rather, the Legislature strictly limited emergency disaster authority to the governor while retaining all other power. In fact, the Legislature made an express reservation for themselves to approve all other actions "the governor considers to be necessary to address a state

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<sup>14</sup> Center for Disease Control, *Weekly Updates by Select Demographic and Geographic Characteristics*, Table 3, Updated: August 26, 2020.

<sup>15</sup> *Id.*, at <https://data.cdc.gov/d/hk9y-quqm/visualization>

<sup>16</sup> *Id.*, at <https://data.cdc.gov/d/hk9y-quqm/visualization>, see also World Health Organization, *Emergency Use ICD Codes for COVID-19 Disease Outbreak*, <https://www.who.int/classifications/icd/covid19/en/#:~:text=The%20COVID%2D19%20disease%20outbreak,%2D10%20code%20of%20U07>, September 1, 2020.

<sup>17</sup> Utah Department of Health, *Hospitalizations & Mortality*, <https://coronavirus.utah.gov/case-counts/>, accessed on September 1, 2020.

of emergency;” and even recently enacted law to further limit the governor’s authority regarding any executive action or directive. See §§ 53-2a-204 and 53-2a-216 – Termination of an executive action or directive.

75. The Legislature also proscribed the authority of the governor to issue any other orders than those specified in the DRRA. The word “order” is not defined under the DRRA and thus cannot be unlimited in nature nor subject to contortion by the executive. § 53-2a-204 – Authority of governor.

### **The DRRA Authority of Governor Clause Only Allows Three Types of Orders**

76. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

77. There are three types of orders contemplated by the DRRA.

- a. The executive order declaring a state of emergency (U.C.A. § 53-2a-206(1));
- b. An executive order issued during a declared state of emergency that temporarily suspends or modifies any public health, safety, zoning, transportation, or other requirement of a statute or administrative rule within this state if such action is essential to provide temporary housing described in Subsection (1)(h)(i). U.C.A. § 53-2a-204(1)(j); and
- c. an executive order suspending the enforcement of a statute pursuant to U.C.A. 53-2a-209(4)(a). Such a suspension is subject to a valid declaration of a state of emergency and strict compliance with the following requirements; 1) the governor must determine that suspending the enforcement of the statute is directly related to the state of emergency described in the executive order, and is necessary to address the state of emergency; 3) the executive order must describe how the suspension of the enforcement of the statute is directly related to the state of emergency and is necessary to address the state of emergency; and the executive order must provide the citation of the statute that is the subject of suspended enforcement; 4) the governor must act in good faith; 5) the governor must provide notice of the suspension of the enforcement of the statute to the speaker of the House of Representatives and the president of the Senate no later than 24 hours after suspending the enforcement of the statute; and 6) the governor must make the report required by Section 53-2a-210.

78. Further limiting the governor's orders, powers and authority during a state of emergency, U.C.A. § 53-2a-209 mandates that ALL orders, rules, and regulations promulgated by the governor (or any other agency authorized by the same part to carry out directives, make rules, and regulations) must not conflict with existing laws, except and unless provided in the DRRA. Orders, rules, and regulations that conflict with existing laws are to have no force or effect.

79. The governor cannot suspend the provisions of the United States or Utah Constitution nor create new laws and statutes by executive order under the DRRA – he is not authorized to do so. Any such act would offend the Utah Constitution as previously addressed. *Ellison*, 23 Utah 183, 63 P. 899, 900 (1901), see also Article V, § 1; and Article I § 26.

80. Similarly, neither the governor nor any state agency may undertake to do these things by the promulgation of a rule or regulation – no such authorization exists under the DRRA and the Utah Constitution forbids such actions.

81. Assuming, for argument sake, that Gov. Herbert's August 20 Executive Order 2020-51 was valid, which it is not, it still does not justify the acts that have preceded it and/or those that have followed.

#### **Executive Order 2020-56: The Face Covering Requirement**

82. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

83. On August 20, 2020, Gov. Herbert issued Executive Order 2020-56 Updating the State Facilities Face Covering Requirement which purported to replace and/or update the August 8, 2020 Executive Order 2020-48 Extending Face Coverings Requirement in State Facilities.

84. Gov. Herbert acknowledged that all the executive orders that were issued prior to August 20, 2020, would expire when the state of emergency expired at midnight August 20, 2020.<sup>18</sup>

85. Executive Order 2020-56 purported to be issued pursuant to Executive Order 2020-51 (the governor's Aug. 20 state of emergency declaration) because of the expired Executive Order 2020-1, the original state of emergency declaration, that was issued on March 6, 2020.

86. The dictates of Order 2020-51 claim to be authorized by Utah Code § 53-2a-209(1), and it declares that orders and rules "issued" by the governor under Title 53, Chapter 2a, Part 2, Disaster Response and Recovery Act, have the "full force and effect of law."

87. However, this is incorrect. The relevant provision, § 53-2a-209(1), states that orders and rules "promulgated" by the governor that are "not in conflict with existing laws" shall have the full force and effect of law during a state of emergency.

88. To promulgate means to publish or to announce officially.<sup>19</sup> It does not give the governor a license to create laws at all, let alone allow him to create laws, rules, and regulations carte blanche. Such actions are not permissible because they would conflict with the laws of Utah, particularly constitutional law. The Utah Constitution "absolutely" forbids the governor from exercising his imaginary DRRA order-issuing authority and/or to assume the powers of the legislative branch.

89. "Utah's delegated powers have been divided into three departments of government... the people wisely wrote into their constitutions provisions similar to our own Article V, Section 1,

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<sup>18</sup> Governor Gary Herbert, *Governor Herbert Reissues Seven Executive Orders*, <https://governor.utah.gov/2020/08/21/governor-herbert-reissues-seven-executive-orders/> (stating, "Today, Gov. Gary R. Herbert has issued seven Executive Orders. All the executive orders that were issued today replace orders that will expire when the current state of emergency expires at midnight tonight."), accessed September 1, 2020.

<sup>19</sup> <https://thelawdictionary.org/>

which **absolutely prevent** any person charged with powers properly belonging to one department from exercising any of the functions appertaining to either of the others....” *Rampton v. Barlow*, 23 Utah 2d 383, 389–90, 464 P.2d 378, 382–83 (1970) (emphasis added).

### **Executive Law-Making Under the DRRA**

90. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

91. The governor also cites as authority § 53-2a-204(1)(a), which he claims authorizes his utilization of all available resources of state government, as reasonably necessary to cope with a state of emergency; and § 53-2a-204(1)(b) which he claims authorizes him to employ measures and give direction to state and local officers and agencies that are reasonable and necessary for the purpose of securing compliance with his orders that he makes during his self-extended states of emergency.

92. This offends the most fundamental notions of our American and Utah Constitutional Republic. As explained above, the DRRA only specifically allows three orders that a governor can issue during a state of emergency: 1) the executive order declaring a state of emergency (U.C.A. § 53-2a-206(1)); 2) an executive order suspending or modifying any public health, safety, zoning, transportation, or other requirement of a statute or administrative rule within this state if such action is essential to provide temporary housing described in Subsection (1)(h)(i). U.C.A. § 53-2a-204(1)(j); and 3) an executive order suspending the enforcement of a statute pursuant to U.C.A. 53-2a-209(4)(a).

93. However, Gov. Herbert assumed unto himself so much more – such as, but not limited to, the right to define what is a: Face covering, Face mask, Face shield, State facility, State



governmental entity. He presumed by force of law to require that every free person in Utah who enters a state facility shall wear what he demands. *See* Executive Order 2020-56 Updating the State Facilities Face Covering Requirement.

94. Gov. Herbert assumed by personal fiat the right to mandate that the government of the people would now discriminate against and refuse service to any individual who does not wear a mask in a state facility. *Id.*

95. Gov. Herbert assumed by personal fiat the right to mandate that all employees and inmates at a state prison or state community correctional center must wear face coverings. *Id.*

96. Gov. Herbert assumed by personal fiat the right to mandate that all employees and detainees in a detention facility or secure facility operated by the Division of Juvenile Justice Services must wear face coverings. *Id.*

97. Gov. Herbert assumed by personal fiat the right to mandate that state government employees must disclose personal and private medical information to be exempt from wearing masks. *Id.*

98. Gov. Herbert assumed by personal fiat the right to make students at state institutions of higher education must disclose confidential medical information to qualify for a mask exemption. *Id.*

99. At the same time, Gov. Herbert also declared that these rules do not apply to the places frequented by our public officers including the buildings and structures of the legislative branch of the state; the judicial branch of the state; the Attorney General's Office; the State Auditor's Office; the State Treasurer's Office; or an independent entity as defined in Utah Code § 63E-1-102. *Id.* In moments such as these, whether well-intentioned or not, it behooves public servants

to avoid the appearance of any Napoleonic sympathy that “some animals are more equal than others.”<sup>20</sup>

“Utah’s delegated powers have been divided into three departments of government... *to secure... enduring liberty and freedom from tyranny*, the people wisely wrote into their constitutions provisions similar to our own Article V, Section 1, *which absolutely prevent any person* charged with powers properly belonging to one department *from exercising any of the functions* appertaining to either *of the others*—except where the power was expressly so granted in the Constitution itself.”

*Rampton v. Barlow*, 23 Utah 2d 383, 389–90, (1970) (emphasis added).

100. The law-making powers that Gov. Herbert has assumed are not his to take, they have not been granted to the governor by the Utah Constitution. Thus, any power, order, rule, or law that may has been issued by the governor must be null and void.

#### **Executive Order 2020-57 – The Great Violator of Fundamental Rights**

101. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

102. On August 20, 2020, Gov. Herbert issued Executive Order 2020-57 – Extending the “Utah COVID-19 Level of Restrictions.”

103. Order 2020-57 was issued pursuant to the governor’s unlawful continuation of his state of emergency and draws upon the defunct Order 2020-50 that was mooted by the Legislature’s refusal to extend the state of emergency along with the ever-illegal provisions of the “Utah COVID-19 Level of Restrictions.”

104. At first glance, one may not realize that the term “Utah COVID-19 Level of Restrictions” contained in Order 2020-57 is a term of art coined originally by the governor in Order 2020-50

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<sup>20</sup> George Orwell, *Animal Farm*, 1945.

known as “Phased Guidelines for the General Public and Businesses to Maximize Public Health and Economic Reactivation.” These are respectively outgrowths of the March 6 Order 2020-1 and the August 20 Order 2020-51 (both declaring states of emergency).

105. Order 2020-57 attempts to unlawfully extend the “Utah COVID-19 Level of Restrictions,” adopted under the August 8, 2020 Order 2020-50 which by its own terms expired at 11:59 p.m. on August 20, 2020. Order 2020-57 did nothing to re-adopt these provisions let alone adopt them pursuant to a lawful state of emergency as is required by the DRRA.

106. Orders 2020-51 and 2020-57 both purport to be orders issued pursuant to U.C.A. §§ 53-2a-204(1)(a-b) and 53-2a-209(1). However, neither fall within the orders contemplated and permitted (as previously mentioned) under the DRRA. For example, § 53-2a-204 does not permit the governor to draft, propose and pass legislation all by himself nor does it contemplate any orders other than an “executive order declaring a state of emergency” pursuant to § 53-2a-204(1) along with the actions that the Legislature has permitted the governor to take under the sub-provisions of a state of emergency order. *See* U.C.A. § 53-2a-204(1)(a-o). Even assuming that other orders are allowed, no branch of government in Utah can set aside the Constitution and assume the powers of another. This was restricted by the People.

107. Additionally, U.C.A. § 53-2a-209(1) does not authorize orders such as 2020-50 and 2020-57. In fact, it expressly prohibits all orders, rules, and regulations that conflict with existing laws such as the Utah Constitution. U.C.A. § 53-2a-209(1) also does not recognize any order, rule or regulation as having the full force and effect of law unless it is issued “during the state of emergency.”

108. Order 2020-57 also states, without any explanation, that:

- “the State must establish minimum standards to address a statewide emergency,” and that,
- “local authorities [need] to impose directives and orders to address the unique circumstances in different locations in Utah; and that
- “the Utah Department of Health has determined that the Utah COVID-19 Level of Restriction set forth in Executive Order 2020-50 should be maintained.”

109. One can search in vain in U.C.A. §§ 53-2a-204(1)(a-b) and 53-2a-209(1) for a mandate under which:

- the State must establish minimum standards to address a statewide emergency, or more poignantly some mandate that gives the governor and/or the Department of Health the right to establish the standards that Utah’s executive has imposed; or
- for any provision that allows the governor to give local authorities the right to impose directives and order; and
- under which the Utah Department of Health – an unelected body – is allowed to so comprehensively violate the people’s most fundamental rights, as they have certainly done, in league with the governor under their many unlawful orders, mandates and threats of criminal prosecution.<sup>21</sup>

110. Not only are these orders and actions rendered null and void by application of the statutes and constitutional principles heretofore discussed, but § 53-2a-206 - the state of emergency declaration provision, expressly mandates that every state of emergency executive order shall include: (a) the nature of the state of emergency; (b) the area or areas threatened; and (c) the conditions creating such an emergency or those conditions allowing termination of the state of emergency.

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<sup>21</sup> The Salt Lake Tribune, *Utah students and staff who don’t wear masks in schools can be charged with a misdemeanor*, August 23, 2020.

111. Instead, Gov. Herbert has made overly broad and general assertions that allow him to assume an unprecedented level of despotic power. It does not matter if his actions are innocent and/or exigent; they are NOT allowed by the Utah Constitution.

**The Unconstitutional “Utah COVID-19 Level of Restrictions”**

112. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

113. Incredibly troubling is what is contained in the “Utah COVID-19 Level of Restrictions” and/or the “Phased Guidelines for the General Public and Businesses to Maximize Public Health and Economic Reactivation.”<sup>22</sup> Phased Guidelines for the General Public and Businesses to Maximize Public Health and Economic Reactivation Version 4.10, Coronavirus.Utah.Gov, August 12, 2020.

114. The “Utah COVID-19 Level of Restrictions,” supposedly authorized by U.C.A. §§ 53-2a-204(1)(a-b) and 53-2a-209(1) – there is no such authorization – were developed by the Governor’s Office of Management and Budget, the Utah Department of Health, and the private company Leavitt Partners as, “recommendations to support the roadmap for reactivation of the Utah economy while stabilizing public health.” *Id.*, at p. 1. These ‘recommendations,’ developed contrary to the requirements of the DRRA, and in conflict with existing laws and the Utah Constitution, were given the full force of law by Gov. Herbert’s unilateral commands – before and after Legislature declined to extend the state of emergency.

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<sup>22</sup> [https://coronavirus-download.utah.gov/Health/Phased\\_Guidelines\\_Version-4.10.pdf](https://coronavirus-download.utah.gov/Health/Phased_Guidelines_Version-4.10.pdf)

115. The “Utah COVID-19 Level of Restrictions,” regardless of any state of emergency, are not allowed to diminish, let alone override, the fundamental rights protected by the Utah Constitution.

116. Normally, one might approach this issue from the perspective of a challenge to the constitutional validity of the laws involved,<sup>23</sup> but here there can be no presumption that laws made by the Governor are valid. Similarly, when the governor undertakes to make orders or laws that suspend the law and or the constitution, such orders and attempted laws are null and void. These orders and ‘laws’ are also mooted by the self-executing provisions of the DRRA (as previously discussed) as triggered by the Legislature’s inaction.

117. The governor, the Utah Department of Health, and the private company of ‘Leavitt Partners’ are all “absolutely prevent[ed]... from exercising any of the functions appertaining to [the Legislature] ... unless the power exercised was expressly so granted in the Constitution itself.” *Rampton v. Barlow*, 23 Utah 2d 383, 389–90, 464 P.2d 378, 382–83 (1970) (emphasis added). No such power has been granted by the Utah Constitution.

118. The actions of Gov. Herbert, the Utah Department of Health, and the other state agencies and private parties involved, whether known at this time or not, constitute a secret and illicit union of government and private actors.

119. This combination of power brokers has taken advantage of the people of Utah during a time when the people of Utah need their public officers and agents to daily remember that: **“[f]requent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.** Utah Constitution, Article I, Section 27.

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<sup>23</sup> See *Jeffs v. Stubbs*, 970 P.2d 1234, 1248 (Utah 1998).

120. Right now, Utahns are confronted with daily images and reports of sickness, riots, natural disasters, political corruption at the highest levels of government, and discontent that includes peaceful and violent protests aimed at altering and reforming the fundamental nature of American government.

121. Instead, the people of Utah must now worry that their governor would have them believe that the DRRRA bestows upon him, and other state agencies, the power to issue unbounded executive orders that have the full force and effect of law.

122. Unfortunately, the Plaintiffs and the people of Utah have witnessed firsthand how discarding rights, laws, and legislative processes in times of exigency can quickly reveal the too-long ignored creep of despotic government.

#### **Administrative Abuse of Trust and Public Health Order 2020-11**

123. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

124. Gov. Herbert and other state agencies and officers have acted secretively and without transparency or accountability. This secretive behavior can be seen in such actions as Gov. Herbert's directive to Richard G. Saunders ("Saunders"), the Interim Executive Director of the Utah Department of Health, who together have conspired to unlawfully issue State Public Health Order 2020-11 (UPHO-2020-11). Saunders claimed to have authority to issue this order under U.C.A. §§ 26-1-30(3), (5), and (6), 26-1-10, and 26-6-3.<sup>24</sup>

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<sup>24</sup> Utah Department of Health, *State Public Health Order – UPHO 2020-11*, <https://coronavirus-download.utah.gov/Governor/State-Public-Health-Order-UPHO-2020-11-v.2.pdf>, August 14, 2020, accessed on September 1, 2020.

125. However, Saunders order is, by its own admission, issued pursuant to the March 6, 2020, Executive Order 2020-1 that expired on August 20, 2020 and is thus without efficacy and is null and void.

126. Under § 26-1-10, the executive director is only empowered to issue orders to enforce state laws (as lawfully enacted by the Legislature) and rules (as allowed by law) established by the department.

127. Under § 26-1-30(3), (5), and (6), the Utah Department of Health (“UDOH”) may:

- promote and protect the health and wellness of the people within the state;
- investigate and control the causes of epidemic, infectious, communicable, and other diseases affecting the public health;
- and provide for the detection, reporting, prevention, and control of communicable, infectious, acute, chronic, or any other disease or health hazard which the department considers to be dangerous, important, or likely to affect the public health but as they are limited by law and further constrained by § 26-6-3.

128. There is simply no state law nor rule that gives Saunders or the UDOH the right to create laws, suspend statutes, nullify statutes, and/or set aside constitutional rights. Additionally, neither Saunders nor the UDOH is empowered to set aside proper rule making procedures and/or to enact rules that are contrary to law. The UDOH does have emergency rule making authority in some limited instances but they DID NOT follow this procedure in accord with the law.

129. Through UPHO-2020-11, Gov. Herbert, Saunders and the UDOH have and do violate the statutory and constitutional rights of every person in Utah where, under threat of force and criminal prosecution, they have:

- Forced the people of Utah to wear what Saunders, et al says they must – when, where and how he dictates;



- Deprived the parents and children of Utah their Constitutional Education right;
- Forced the free people of Utah to stand and to move where Saunders, et al say they must – when, where and how he dictates;
- Unlawfully discriminated against the people of Utah based upon, but not limited to, age, income and ability;
- Deprived the parents of Utah of their fundamental right to raise and parent their children;
- Violated the privacy rights of all Utahns.

130. Additionally, Saunders, UDOH, and Gov. Herbert have violated the laws of rulemaking in Utah. Rulemaking is a specific authority that the Legislature grants to an agency whereby it can make administrative rules that have the full power of law. This process is governed by the Utah Administrative Rulemaking Act (Title 63G, Chapter 3). A rule is defined by § 63G-3-102 and means an agency's written statement that is explicitly or implicitly required by state statute or other applicable law that implements or interprets a state legal mandate. A “rule” does not mean orders; the governor's executive orders or proclamations; or an agency written statement that is in violation of any state law.

131. Pursuant to § 63G-3-202, rules are not enforceable unless they are made in accordance with the requirements of the Utah Administrative Rulemaking Act. Grants of rulemaking power from the Legislature to a state agency are made by statute in accord with § 63G-3-502. Rules are approved via an omnibus bill approved by both houses of the Legislature. In 2020, Administrative Rules were reauthorized by Senate Bill 62 which was enrolled on March 20, 2020.

132. Under the lawful rule making process contained in § 63G-3-301, all agencies must: publish new proposed rules in the rules bulletin; hold requisite public hearings; allow 30 days for public comment. Even under § 63G-3-304 – Emergency rulemaking procedure, agencies must comply with the rulemaking procedures of Section 63G-3-301 unless these procedures would cause an imminent peril to the public health, safety, or welfare; or place the agency in violation of federal or state law. Even if the agency has an emergency exception, the agency must still file the rule, including specific reasons and justifications for its findings, and then must publish the rule in the Utah Rules Bulletin. This does not appear to have been done for any rules or regulations related to the governor’s declared state of emergency since March 2020. Instead, the Bulletin simply posted the governor’s executive orders.

133. The actions of Saunders and the UDOH are at best blind administrative obedience, but if done knowingly – a treachery against the faith and confidence bestowed upon an administrative body by the people, through their Legislature. To make matters worse, the governor and his consorts have also, unconscionably targeted Utah’s children.

**UTAH’S CONSTITUTIONAL RIGHT TO EDUCATION,  
MASKS CONSTITUTIONALITY, AND HARM**

134. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

135. Adding to the already long and problematic list of unlawful actions, the governor and the UDOH have also violated the Fourth part of the Utah Constitution’s Article III Ordinance clause on education. This provision alone renders null and void all actions spoken of herein that touch upon the Constitutional Right of Education that belongs to Utah’s Parents and Children.

136. The Constitutional Right of Education demands the “...establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control.”

137. **The Utah Constitution’s Preamble assures the people that this fundamental educational right, along with every other liberty and principle of free government, comes from God – not government.**

138. Article I, Section 27 further demands that this right not only remain in each individual child but that it also remains in each child’s rightful father and mother. No free government can justly take away this God-given right without incurring the wrath of a free people and the decree of Almighty God.<sup>25</sup>

139. “What therefore God hath joined together, let not man put asunder.”<sup>26</sup>

140. This right rests unalienable and inherent in every father and mother as acknowledged by the United States and Utah Constitution, including Article I, Section 2.

141. Should the servants of the people who are vested with the duty “...to secure and perpetuate the principles of free government,” fail to do so, then the same spirit that motivated the founders of this nation will likely move upon this people.

142. “And where the body of the people, or any single man, is deprived of their right, or is under the exercise of a power without right, and have no appeal on earth, then they have a liberty to appeal to heaven, whenever they judge the cause of sufficient moment. And therefore, though the people cannot be judge, so as to have, by the constitution of that society, any superior power, to determine and give effective sentence in the case; yet they have, by a law antecedent and

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<sup>25</sup> Utah Constitution, Preamble.

<sup>26</sup> Holy Bible, Mark 10:9.

paramount to all positive laws of men, reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, viz. to judge, whether they have just cause to make their appeal to heaven.”<sup>27</sup>

143. Additionally, pursuant to the Utah Constitution Article X, Section 3, after parents and the law-making powers of the Legislature, “[t]he general control and supervision of the public education system shall be vested in a State Board of Education.”

144. The governor and the UDOH, among any other functionary of the state, have no right to interfere with these clear constitutional boundaries.

145. U.C.A. § 53E-2-201, recognizes the fundamental rights of parents but also limits every lawful steward of the right of education.

“In the implementation of all policies, programs, and responsibilities adopted in accordance with this public education code, the Legislature, the state board, local school boards, and charter school governing boards **shall: respect, protect, and further the interests of parents** in their children's public education; and **promote and encourage full and active participation and involvement of parents at all public schools.**”

(Emphasis added).

146. U.C.A. § 53E-2-301 also recognizes “...that parents are a child's first teachers and are responsible for the education of their children.” The Utah Supreme Court has also recognized that the Open Education Clause:

“...requires that the public education system: “shall be open to all children of the state.” Utah Const. art. X, § 1. We hold that this provision is self-executing.

First, the clause is presumptively “mandatory and prohibitory” under article I, section 26. There is no wording in the Open Education Clause constituting a contrary declaration.

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<sup>27</sup> John Locke, *Second Treatise on Civil Government*, ¶168, 1689.

Second, the clause is judicially definable and enforceable absent enabling legislation. In fact, this court has already defined and applied the Open Education Clause. For example, in *Logan City School District v. Kowallis*, this court stated that[:]

“[t]he requirement that the schools must be open to all children of the state is a prohibition against any law or rule which would separate or divide the children of the state into classes or groups, and grant, allow, or provide one group or class educational privileges or advantages denied another. No child of school age, resident within the state, can be lawfully denied admission to the schools of the state because of race, color, location, religion, politics, or any other bar or barrier which may be set up which would deny to such child equality of educational opportunities or facilities with all other children of the state. This is a direction to the Legislature to provide a system of public schools to which all children of the state may be admitted. It is also a prohibition against the Legislature, or any other body, making any law or rule which would deny admission to, or exclude from, the public schools any child resident of the state, for any cause except the child's own conduct, behavior, or health. The schools are open to all children of the state when there are no restrictions on any child, children, or group of children which do not apply to all children in the state alike. 94 Utah 342, 347-48, 77 P.2d 348, 350-51 (1938).”

*Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 2000 UT 87, ¶¶ 13-16, 16 P.3d 533, 536.

147. While some may jump at the provision concerning health contained in *Spackman*, it must be remembered that the CDC data shows that this argument, founded upon unconstitutional and unlawful acts, can have no weight.<sup>28</sup>

**148. As to the school age children of Utah (ages 0-24), the CDC registers no deaths to the International Classification of Disease Code for an identified COVID-19 case; U071.<sup>29</sup>**

149. Utah also reports no mortality rate in the 0-24 age group.<sup>30</sup>

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<sup>28</sup> *Id.*, at <https://data.cdc.gov/d/hk9y-quqm/visualization>

<sup>29</sup> *Id.*, at <https://data.cdc.gov/d/hk9y-quqm/visualization>, see also World Health Organization, *Emergency Use ICD Codes for COVID-19 Disease Outbreak*, [https://www.who.int/classifications/icd/covid19/en/#:~:text=The%20COVID%2D19%20disease%20outbreak,%2D10%20code%20of%20U07](https://www.who.int/classifications/icd/covid19/en/#:~:text=The%20COVID%2D19%20disease%20outbreak,%2D10%20code%20of%20U07,), September 1, 2020.

<sup>30</sup> Utah Department of Health, *Hospitalizations & Mortality*, <https://coronavirus.utah.gov/case-counts/>, accessed on September 1, 2020.

150. Despite these facts and fundamental truths, the governor and the actors mentioned heretofore have deprived the Plaintiffs, their children, and the people of Utah of their rights and constitutionally guaranteed freedoms.

### **THERE CAN BE NO BENEVOLENT DICTATORS**

151. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

152. Finally, the governor, et al have expressed their intent to make their state of emergency dictates enforceable under threat of violence, i.e. to have the “full force and effect of law.” U.C.A. § 53-2a-209(1).

153. However, history teaches us that the unlawful actions discussed herein cannot be sanctioned by force.

154. It should trouble the courts that U.C.A. § 53-2a-204(1)(b) authorizes the governor to employ measures and give direction to state and local officers and agencies that are reasonable and necessary for the purpose of securing compliance with orders made pursuant to the Disaster Response and Recovery Act.

155. During states of emergency, the governor is commander in chief of the military forces of the state in accordance with Utah Constitution Article VII, Section 4, and Title 39, Chapter 1, State Militia. *See* § 53-2a-206 – Commander in chief of military forces.

156. Whenever the militia is called into active service, the governor may, by proclamation, declare the troops and that are authorized by § 39-1-8 to take entire charge in accord with his judgment, and pursuant to Article VII, the Governor has power to call out the militia to execute the laws, to suppress insurrection, or to repel invasion.

157. These types of martial provisions cannot possibly be given sanction and/or be put within the reach of an executive who can carry out the types of actions complained of herein. Over the last 170 days, the governor and other have created and executed laws, and have assumed the power to indefinitely perpetuate a state of emergency.

158. While this may seem absurd to some, certain aspects of American history should always serve as stark and haunting reminders against pride.

“In February 19, 1942, President Roosevelt signed Executive Order 9066, which resulted in the forcible internment of 120,000 people of Japanese ancestry. More than two-thirds of those interned under the Executive Order were citizens of the United States, and none had ever shown any disloyalty. The War Relocation Authority was created to administer the assembly centers, relocation centers, and internment camps, and relocation of Japanese-Americans began in April 1942. Internment camps were scattered all over the interior West, in isolated desert areas of Arizona, California, Utah, Idaho, Colorado, and Wyoming, where Japanese-Americans were forced to carry on their lives under harsh conditions. Executive Order 9066 was rescinded by President Roosevelt in 1944, and the last of the camps was closed in March, 1946.”<sup>31</sup>

159. The seeds of despotism, no matter how exigent or benign, cannot find purchase against the bulwarks of Article 1, § 26 and Article V, § 1. The constitutionally mandated retention of power in the people, and governmental separation of powers stand,

“...to prevent the evils that would arise if all were concentrated and held by the same hand. Such a **concentration of power** would give to the class of officers possessing it absolute power, and that **would amount to a despotism.**”

*In re Handley's Estate*, 15 Utah 212, 49 P. 829, 830 (1897) (emphasis added).

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<sup>31</sup> J. Willard Marriott Library, The University of Utah, *Japanese-American Internment Camps During WWII*, <https://www.lib.utah.edu/collections/photo-exhibits/japanese-american-internment.php>, accessed September 1, 2020.

**FIRST CLAIM FOR RELIEF  
DECLARATORY JUDGMENT**

160. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

161. As previously stated, the Utah Constitution does not diminish in times of trouble, instead it stands as the vigilant bastion between Utah's government and the eternal and unalienable rights of her people. Its promise of liberty is steady and uninterrupted.

162. The strictest of scrutiny should be applied here where fundamental constitutional rights are being infringed. There is no compelling governmental interest that merits the several violations of the explicit constitutional protections demanded by the constitutions of Utah and the United States. This standard is especially applicable where the laws and policies undertaken by Gov. Herbert, et al, and those carried out by the system of public education pursuant to UDOH-2020-11 were not narrowly tailored to achieve any lawful goal or interest. Additionally, these government actions so broadly abrogated the most fundamental rights in such an expansive and prolonged manner that there should be no question that the actions of the parties were not narrowly tailored. It is poignant that even the rights of the school age children of Utah, and by extension their parents, under UPHO 2020-11 were sacrificed for a mortality rate that was quite literally 0%.

163. Regardless of the arguments associated with addressing concerns related to Covid-19, Utah, the Governor, and the other Defendants have no compelling interest in circumventing the express restrictions on the Governor's power. The Utah legislature has now met in four special sessions since the general session. In other words, there is no 'state of emergency' that does not allow the Utah legislature to act in a timely manner. The Utah Legislature, the body with the



constitutional authority to address certain Covid-19 related concerns, has elected not to continue the state of emergency. Accordingly, there is no compelling governmental interest in circumventing these other restrictions, as the legislature has had full opportunity to address any compelling governmental interests that need to be addressed.

164. Article VII, Section 5 mandates that the governor, and by extension all executive powers of Utah, shall see that the laws are faithfully executed. Instead, Gov. Herbert, et al have:

- Issued unlawful executive orders, rules, and regulations declaring, perpetuating, and enforcing an unconstitutional state of emergency that is contrary to U.C.A. 53-2a-2(3).
- Violated the express provisions of the DRRA and Article I, § 26, because without express permission to continue a state of emergency beyond 30 days, the provisions of the constitution are mandatory and prohibitory and the extension of the state of emergency was impermissible.
- Unlawfully exercised powers prohibited to them that properly belong to the Legislature pursuant to Article V, § 1.
- Violated the powers conferred upon the executive branch, which powers are forbidden to be exercised, by article 5, § 1, by any person in the exercise of powers belonging to a different department of the government.” *Ellison v. Barnes*, 23 Utah 183, 63 P. 899, 900 (1901) (emphasis added).

165. These actions have harmed, and are presently harming Plaintiffs, and will irreparably harm Plaintiffs in the future by their interference with Plaintiffs’ rights to public servants, officers, and functionaries of the state who abide by their duties under the law; but instead are depriving Plaintiffs’ of their state and federal constitutional rights.

166. The court should grant Plaintiffs’ declaratory relief, finding that each and every action of Gov. Herbert, et al, as demonstrated herein, constitutes an impermissible and unlawful violation of Utah’s statutes; and also as violations of Plaintiffs’, and their children’s, statutory and constitutional rights.

167. The court should enjoin Gov. Herbert, et al, including Utah's system of public schools, from any present and future violations of their statutory and constitutional duties. If necessary, recuse the parties from all discretionary actions and decisions related to the respective state of emergency. Additionally, if these parties will not comply, the Court should compel Gov. Herbert, et al, including Utah's system of public schools, through a writ of mandamus, to strictly obey and carry out the law.

**SECOND CLAIM FOR RELIEF  
PRELIMINARY & PERMANENT INJUNCTION**

168. Plaintiffs incorporate by reference here, all prior and subsequent averments found elsewhere herein.

169. As a result of the actions thus far described, Utah has experienced an unprecedented and unlawful suspension of their most sacred and fundamental rights. Under the unlawful Executive Orders such as 2020-57 and its illegitimate counterparts, such as UDOH 2020-11, Gov. Herbert, et al, in coordination with some municipalities and counties of Utah, have:<sup>32</sup>

- a. Closed churches.
- b. Denied Utahns the right to worship freely.
- c. Deprived the people of their access to justice.
- d. Muzzled mouths and speech.
- e. Denied freedom of conscience.
- f. Denied the people of their right to labor and to be rewarded for their labor.
- g. Imprisoned the people against their will through unlawful quarantine.

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<sup>32</sup> Phased Guidelines for the General Public and Businesses to Maximize Public Health and Economic Reactivation Version 4.10, Coronavirus.Utah.Gov, August 12, 2020.

- h. Denied children their right of education and open schools.
- i. Denied parents their fundamental familial rights including their right to manage their child's education.
- j. Denied family gatherings, reunions, and attendance at funerals.
- k. Denied the people their right to assemble in their community celebrations.
- l. Denied peaceable assembly.
- m. Denied Utahns their most fundamental voting rights and associations.
- n. Denied the neediest among us of their right of family, comfort, and association in accord with their life choices surrounding physical, mental and emotional health.
- o. Closed schools.
- p. Closed businesses.
- q. Forced people to forego business opportunities.
- r. Violated rights of privacy.
- s. Forced medical checks.
- t. Deprived people of their right to move and travel freely.
- u. Denied Utahns their most fundamental rights of human contact and touch.
- v. Denied Utahns their right to sociality with friends, family and neighbors.
- w. Deprived Utahns of their community rituals and festivals.
- x. Limited family gatherings.
- y. Effectively imprisoned the elderly and/or consigned them to loneliness.
- z. Denied family members and loved ones their right to be present during life's most trying times.

- aa. Exerted political pressure on religious leaders.
- bb. Targeted and tracked people without their consent.
- cc. Entered illicit associations with private, and other entities motivated by graft and gain.

170. These are the rights and restrictions upon which the government now treads.

171. These ongoing irreparable harms demand immediate action. The court should not permit any continued violations of the law, nor any further denial of Plaintiffs' rights, or the rights of their children, under statutory law and under the United States and Utah Constitutions.

172. The court should immediately and permanently enjoin Defendants, including Utah's system of public schools, from: the enforcement of each provision of all the relevant orders, rules and regulations discussed herein; committing any further violations of their statutory and constitutional duties. If necessary, the court should recuse the parties, including any officers and agents, from all discretionary actions and decisions related to the state of emergency and the orders, rules, and regulations. If the respective parties will not comply, the Court should compel Defendants, including Utah's system of public schools, through a writ of mandamus, to strictly obey and carry out the law.

**THIRD CLAIM FOR RELIEF (ALTERNATIVE RELIEF)**  
**WRIT OF MANDAMUS / EXTRAORDINARY RELIEF**

173. Plaintiffs/Petitioners incorporate by reference here, all prior and subsequent averments found elsewhere herein.

174. In the alternative to the declaratory and injunctive relief sought above, the court, via writ of mandamus, should accomplish the same restrictions and injunctions by compelling Gov. Herbert, et al, including Utah's system of public schools, to strictly perform the statutory duties

assigned by law as specifically identified herein, and further compelling these parties to immediately cease and desist their unlawful actions; and their refusal, or deliberate failure to carry out their required duties under the law.

175. Without the judgment and injunction from this Court, there is no other plain, speedy, and adequate remedy available to the Plaintiffs except by extraordinary relief. The Legislature has already declined to extend the state of emergency and the governor has ignored them. The governor will surely not cease of his own accord and as the executive power of the state of Utah, if he will not enforce and uphold the laws there is no other peaceful means by which a people can obtain relief except through their arbiters of law and justice.

### **REQUEST FOR RELIEF**

176. Plaintiffs ask the court to exercise its co-equal powers under the Utah Constitution to put a stop to the unconstitutional actions described herein.

177. “The framers of the Utah Constitution necessarily intended that this Court should be both the ultimate and final arbiter of the meaning of the provisions in the Utah Declaration of Rights and the primary protector of individual liberties.” *State v. Anderson*, 910 P.2d 1229, 1240 (Utah 1996).

**WHEREFORE**, Plaintiffs request judgment against Defendants/Respondents as follows:

1. That Declaratory Judgment be entered against Defendants as requested.
2. Declare that all Executive Orders related to Covid-19 or the March 6, 2020 order and issued prior to August 20, 2020 are null and void, and no longer in effect.
3. Declare that all Executive Orders related to Covid-19 or the March 6, 2020 order and issued after August 20, 2020 are null and void, and no longer in effect.

4. Declare that all actions, rules (including UPHO 2020-11), regulations, and actions issued or undertaken in conjunction with all Executive Orders contemplated herein are null and void, and no longer in effect.
5. Enjoin the Defendants, including Utah's system of public schools, from taking any official action in relation to Executive Orders issued prior to August 20, 2020.
6. Enjoin the Defendants, including Utah's system of public schools, from taking any official action in relation to Executive Orders issued after August 20, 2020.
7. Enjoin the Defendants, including Utah's system of public schools, from taking any official action in relation to all rules (including UPHO 2020-11), regulations, and actions issued or undertaken in conjunction with all Executive Orders contemplated herein.
8. For a preliminary and permanent injunction, immediately enjoining Defendants as requested above.
9. For such other relief as this Court deems appropriate.

DATED: September 3, 2020

/s/ J. Morgan Philpot  
Attorney for Plaintiffs