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10 December 2020

Governor Gary R. Herbert
350 North State Street, Suite 200
PO Box 142220
Salt Lake City, Utah 84114-2220

Lt. Governor Spencer J. Cox
350 North State Street, Suite 220
PO Box 142325
Salt Lake City, Utah 84114-2325

Re: State Public Health Order 2020-26

Dear Governor Herbert and Governor-Elect Cox:

I represent a coalition of restaurants, bars, gyms, and other concerned small businesses who have been unconstitutionally singled-out and harmed by the restrictions you have placed or allowed to be placed upon them as a result of the COVID-19 flu. As several Courts in other states have determined, the restrictions have been put in place without proper supporting data or legal justification based upon a health concern in which 99%+ of those infected survive. We ask that you immediately cease such restrictions and follow the models of Florida and South Dakota which have allowed businesses and its citizens to exercise proper precautions but to remain open without burdens which are destroying otherwise successful enterprises. Specifically, I write to express concern regarding the Utah Department of Health's most recent Order (*State Public Health Order 2020-26*). In addition to the arbitrary curfew restrictions, the rigid spacing and masking rules, as well as others, I call your attention to paragraph 5.b.ii that decrees that legitimate bars and restaurants "shall not sell, offer to sell, or furnish liquor or beer after 10:00 p.m."

While I recognize the difficulty of Utah officials to govern during the COVID-19 pandemic, I believe Order 2020-26 (and its predecessors) arbitrarily singles out a particular group of businesses—restaurants and bars bearing the overwhelming brunt of the restrictions without data supporting such burdens. As such, I believe the Order, at a minimum, violates the First Amendment's right to assembly, and the Fourteenth Amendment's Due Process and Equal Protection clauses. In my view, the Order would

not withstand even “intermediate scrutiny” or “rational basis” tests under constitutional jurisprudence.

I am sure it is not lost on you that the businesses I represent are collapsing before our very eyes. Some are gone and will never return. Whether the notion is popular in Utah, alcohol sales reach their peak between 10:00 p.m. and 1:00 a.m., especially on Friday and Saturday nights. Prohibiting the businesses, I represent from conducting legitimate sales after 10:00 p.m. condemns them to failure. It would be akin to closing a pancake house from 6:00 a.m. to 11:00 a.m.

If one looks exclusively at Order 2020-26, which lasts for a period of about ten days, one might speculate a business could survive such a hiatus. True or not, the Order does not exist by itself. It follows a number of similar orders and may be followed by others. The unpredictability and uncertain ending add to the arbitrariness and constitutional concerns.

Additionally, the Order vaguely cites studies (many of which have been debunked or criticized by government and private analyses) about masks but alludes to no evidence suggesting a 10:00 p.m. curfew or alcohol ban is effective in the least. I am aware of no evidence or scientific data supporting the edict. It strains credulity, for example, to believe science supports the sale of alcohol at 9:30 p.m. but not 10:30 p.m. Or that well-placed plexi-glass is fine for crowded gas stations or Costco but inadequate for restaurants, bars, or gyms.

Given the difficult situation, my clients are not anxious to litigate, but we are prepared to do so. Courts around the country are ruling in favor of citizens against government overreach. For example, the Supreme Court recently determined religious communities were being unfairly limited.¹ The Court explained that there was “no evidence that the applicants have contributed to the spread of COVID-19 but there are many other less restrictive rules that could be adopted to minimize the risk . . .” *Id.* The context, of course, is different, but the principle is the same. No evidence exists linking plexi-glass instead of masks, ignoring curfews, or alcohol sold or consumed after 10:00 p.m. to the spread of COVID-19. Less restrictive rules certainly exist--as evidenced by the fact that Utah holds other types of businesses to lesser restrictions.

I do not doubt the good intentions of the Utah Department of Health. But, as the Western District of Pennsylvania federal court recently explained in regard to COVID-19 restrictions, “Good intentions toward a laudable end are not alone enough to uphold government action against a constitutional challenge.”² Good intentions are taking away jobs, shifts, wages, and tips from Utahans with otherwise good jobs. Undoubtedly the tax base--and therefore public services--are similarly suffering.

¹ *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, 592 U.S. ____ (2020).

² *County of Butler et al v. Thomas W. Wolf et al*, 2:20-cv-677.

It appears the Utah Department of Health is simply not weighing the benefits of the onerous restriction against its crippling costs. In a slightly different context, a California court recently explained that such a failure is fatal to COVID-19 restrictions: “By failing to weigh the benefits of an outdoor dining restriction against its costs, the county acted arbitrarily, and its decision lacks a rational relationship to a legitimate end.”³ Pursuing a desired occupation is certainly a legitimate end; arbitrarily picking a time that discriminates against hundreds of businesses and thousands of employees is not. As the Supreme Court further noted, “Even in a pandemic, the Constitution cannot be put away and forgotten.”⁴

I ask that you direct the Utah Department of Health to lift the restrictions that unconstitutionally targets or impacts bars, restaurants, and gyms and allow them the same freedom enjoyed by other businesses. Please lift these restrictions immediately and not wait until the renewal date next week—this state, of all states, should be leading with Florida and South Dakota in resisting the one-way slide down the slippery slope of lost constitutional protections and rights. I also ask that you schedule a time for me to meet with you and discuss the matter further if you are refusing to lift the restrictions. I will make myself available any time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brett Tolman', with a long horizontal line extending to the right.

Brett Tolman
Founder, The Tolman Group
Former United States Attorney for the District of Utah

³ *California Superior Court written decision yet to be published.*

⁴ *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, 592 U.S. ____ (2020).