



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 9, 2020

Ms. Joni Reynolds
Director
Gunnison County Department
of Health and Human Services
220 N. Spruce Street
Gunnison, Colorado 81230

VIA Email: jreynolds@gunnisoncounty.org

Dear Director Reynolds:

I write concerning the Gunnison County Department of Health and Human Service's ("DHHS") Fifth Amended Standing Health Order dated April 3, 2020 (the "Order").¹ The Order purports to "prohibit all non-residents, *including non-resident homeowners*, from remaining in Gunnison County" for the duration of the Order, and directs all non-resident homeowners to "return to their out-of-Gunnison County place(s) of residence immediately." Order at 2 (Apr. 3, 2020) (emphasis added). While the Order contains other laudable measures aimed at protecting public health, its patent discrimination against non-resident homeowners—including Texans who own homes in Gunnison County—runs afoul of the United States Constitution.

The Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1; *see id.* amend. XIV, § 1 (providing that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"). The Privileges and Immunities Clause guarantees that a citizen of one state will be "treated as a welcome visitor rather than an unfriendly alien when temporarily present in another State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). The Clause "inhibits discriminating legislation against [nonresidents] by other States"; it gives nonresidents "the right of free ingress into other States, and egress from them"; and it insures to nonresidents "in other States the same freedom possessed by the citizens

¹ Gunnison Cty. Dep't of Health & Human Servs., Fifth Amended Standing Public Health Order Prohibiting or Imposing Additional Restrictions on Certain Events, Gatherings, Business Operations and Other Activities, Prohibiting Non-residents (Including Non-resident Homeowners) and Imposing Limited Quarantine on Certain Out-of-County Travelers to Limit and Contain the Spread of the COVID-19 Virus (Apr. 3 2020), https://covid19.gunnisoncounty.org/wp-content/uploads/2020/04/5th-Amended-Public-Health-Order_Signed_Recorded_4032020.pdf

of those States in the acquisition and enjoyment of property and in the pursuit of happiness.” *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869)). Indeed, the “right to ‘take, hold and dispose of property, either real or personal,’ has long been seen as one of the privileges of citizenship.” *McBurney v. Young*, 569 U.S. 221, 229 (2013); *see also* U.S. Const. amend. V (requiring that private property shall not be taken for public use without payment of just compensation).

The Order violates the Constitution by banishing nonresident homeowners from Gunnison County for the duration of the Order, depriving them of important rights. It discriminates against nonresident homeowners by entirely prohibiting their ingress to the county and enjoyment of their real and personal property in the county. Resident homeowners, on the other hand, are under no such prohibition.

The Order attempts to justify this disparate treatment by asserting that nonresident homeowners from lower elevations may be at “greater risk of complications” from COVID-19, and that nonresidents burden health care, food supplies, and other essential services. But there is no indication that nonresident homeowners, as a whole, are more susceptible to COVID-19 based on age or other health criteria, or that those nonresidents will pose any greater strain on local resources than residents. *See Hicklin*, 437 U.S. at 525 (finding that discrimination against non-citizens is impermissible when “there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States”). The Order also allow nonresidents to seek an exemption from its restrictions. But there are no criteria for judging such exemptions, or any indication whether exemptions will be freely allowed. In short, there is no way to judge whether the Order’s restriction on nonresident homeowners bears any relationship to the interest of public health. *See Supreme Ct. of Va. v. Friedman*, 487 U.S. 59, 65 (1988) (finding that when a “challenged restriction deprives nonresidents of a protected privilege,” it must be “closely related to the advancement of a substantial state interest”).

This is not to say that nonresident homeowners should not abide by other restrictions, such as limits on social gathering and essential services, applicable to *all* residents of Gunnison County. As Americans, we all must work together to protect ourselves, and each other, from the threat posed by COVID-19. But as we face this challenge on behalf of our constituents, we as public servants must be careful to do so within the boundaries drawn by our Constitution.

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Thank you for your immediate attention to this matter. We would appreciate confirmation that you will modify your Order to protect the rights of non-resident homeowners.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. J. Hacker", with a long, sweeping horizontal stroke at the end.

David J. Hacker
Special Counsel to the Texas Attorney General