

# PROCLAMATION

## Re: Idaho's Stage 2 Stay Healthy Order.

THE BONNER COUNTY BOARD OF COUNTY COMMISSIONERS ("BOCC") HEREBY PROCLAIMS AS FOLLOWS:

### BACKGROUND

The novel coronavirus is a global pandemic affecting the lives, health, and livelihoods of people across the globe. Government bodies have taken significant and important steps to slow the spread of the virus and to ensure public health. However, executive overreach applied in an arbitrary and capricious manner threatens the system of government guaranteed to the people of the State of Idaho by the United States and Idaho constitutions.

The Idaho Governor's and IDHW's joint Stage 2 Stay Healthy Order (the "Order") is focused both on preventing overutilization of the healthcare system due to Covid-19 and on minimizing virus transmission. These two objectives i.e., overutilization-prevention and transmission-prevention are summarized in the Order as follows: "*it is essential to slow virus transmission as much as possible to protect the most vulnerable and to prevent the healthcare system from being overwhelmed*".

Earlier Idaho State Covid-19 orders were apparently lawful due to healthcare overutilization being a distinct possibility especially without adequate transmission-prevention measures in place. Because overutilization-prevention was accomplished in part by means of transmission-prevention earlier Idaho Covid-19 orders furthered a compelling government interest and did so in a narrowly tailored way i.e., in a way that minimized rights infringements. The current Order, however, infringes on fundamental rights by empowering and directing localities such as counties to rely on the Orders authority to "enact more stringent public health orders than those set out in this Order". The Order suffers from two distinct constitutional defects given that it burdens fundamental liberties. The first defect being that because there is no evidence of a threat of healthcare overutilization there is no reason for the State to continue imposing overutilization-prevention measures. For example, the State should not be imposing the Idaho Testing Task Force's ("ITTF") liberty infringing May 20, 2020 Covid-19 Testing Recommendations ("**Recommendations**") through directive to its localities based on overutilization-prevention rationale. See Attachment A. Second, the Order is unconstitutionally burdening Idahoan's liberties in an endless pursuit of eliminating every case of COVID-19 in Idaho. The following analysis elaborates on these two constitutional inadequacies.

### OVERUTILIZATON-PREVENTION

Paragraph 1 of the Order states "*it is essential to slow virus transmission as much as possible [...] to prevent the health care system from being overwhelmed.*" In furtherance of this part of the Order's purpose, the Order states "This Order helps preserve critical and limited healthcare capacity in the State of Idaho." However, the Order identifies no evidence (let alone substantial evidence) that Idaho has or will have a Covid-19 health care overutilization problem without implementing the Order's measures. For example, The Order states that one, just one, of Idaho's forty-four counties has a relatively high rate of infection by one metric. However, the Order fails to close the circuit with a statement that this translates to an impending overutilization problem in that affected County. The Order also fails to

identify infection-attributes of this high infection County that might not be shared by low infection counties. Instead the Order misleadingly implies that this high infection county's infection-attributes are shared throughout Idaho. There are currently forty-three (43) other counties most of which do not have either a high infection rate or a projected healthcare overutilization problem. In fact, the Order completely disregards the fact that most of Idaho has both a low-infection rate and no projected overutilization problems. Additionally, the Order's stated objective is facially unsupported by the Order's stated facts. The Order does not cite evidence such as trend-evidence from other similar states or CDC and WHO research, for example, which would indicate that Idaho healthcare utilization will likely exceed its existing or projected capacities without all or some of the measures set forth in the Order. This part of the Order violates the Constitutional principle of "Narrow Tailoring" or "Narrow Framing". Narrow Tailoring is the Constitutional requirement that a law be written to specifically fulfill only its intended purpose i.e., the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose. The part of the Order relating to overutilization-prevention infringes on the fundamental liberties of Idahoans, because even though there is no threat of overutilization the Governor has empowered and directed localities to enact stringent orders in furtherance of overutilization prevention.

#### TRANSMISSION-PREVENTION

The Order also pursues the objective of slowing virus transmission as a stand-alone objective as distinct from overutilization-prevention. The Order states, "it is essential to slow virus transmission as much as possible". The Order implements this transmission slowing directive (Directive) through devolution of power to localities and through directing localities to slow transmission as much as possible through making their own local orders. The Order devolves authority to localities where it states "to decrease the spread of COVID-19, the cities, counties, and public health districts of the State of Idaho may enact more stringent public health orders than those set out in this Order". The Order directs localities to slow transmission as much as possible where it states, "it is essential to slow virus transmission as much as possible". Combining these two propositions i.e., a devolution-proposition and a directive-proposition the Order both empowers and directs localities to minimize transmission. This Order is ironic because on the one hand it purports to be freeing or opening Idaho from State imposed orders, while on the other hand it relocates the same liberty infringing orders to be issued, systematically or willy-nilly, at the local level. The Order confusedly claims to be re-opening Idaho while at the same time directing its localities to re-close Idaho. The Order removes burdensome restrictions on the front-end (State-level) only to covertly reintroduce a whole new regime of liberty infringing impositions on the back-end (local-level) through the use of locally based contact-tracing grants implementing the ITTF's **Recommendations**. Furthermore, the Directive functions as a one-way ratchet in that it directs localities to intensify but not reduce liberty infringing commands. This Directive applied to localities is so wildly under-tailored that it empowers localities to engage in highly aggressive liberty invading activities. For example, it is clear from the ITTF's **Recommendations** (see Attachment A) that the State through its localities is mobilizing to implement a systematic and aggressive contact-tracing program to compel testing on all or most Idahoan's followed by new rounds of liberty restrictions. Localities are impliedly directed to use these results to separate families by force (as in Washington state) if necessary, to minimize transmission. The Directive directs localities to implement whatever it takes to minimize transmission and puts no ceiling on what localities should or could do to minimize transmission. Any robust minimization regime, like the one proposed by the Order and the one proposed by the ITTF's **Recommendations** (to be undertaken systematically by localities taking Federal pass-through money) includes forced testing; forced isolation/quarantine; forced business closures;

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forced vaccinations; and any other measures that are deemed useful to minimize transmission. This Order directs localities to invade their citizens bodily integrity, amongst other liberty invasions, by imposing a system of forced testing and forced vaccinations, even without substantial evidence that a forced testing and forced vaccination regime is necessary to accomplish constitutionally compelling government objectives. There are no limits imposed on what local governments can and should do under this Order and therefore this Order suffers from fatally inadequate means-ends tailoring. (Note: The ITTF's most current liberty infringing **Recommendations** deployed through localities through local-grants can be found here: <https://rebound.idaho.gov/wp-content/uploads/testing-recommendations.pdf>. ) (see also Exhibit A).

### **AMBIGUITY PROBLEMS**

Finally, to the extent the Order is not facially unconstitutional it is fatally ambiguous. The Order is fatally ambiguous as to its purpose because it lacks specifically defined objectives other than the objective of entirely eliminating COVID-19 from Idaho. If the aim of the Order is to flatten the curve to prevent healthcare overutilization alone, it does not make this sufficiently clear. If the aim of the Order is to shrink the overall size of the curve to a specific level i.e., reduce the total area under the curve to a determinate level, it does not make this clear. The Order fails to expressly set determinate curve-size reduction targets, nor does it advise localities if they are authorized under the Order to set their own curve-size reduction targets. Thus, for example, it is unclear whether localities are directed to pursue contact tracing followed by potential coerced isolation and vaccination only to meet locally defined curve-size reduction targets. Thus, the Order empowers and directs localities to impair liberties continuously and endlessly for all reasons remotely connected to complete and total overutilization-prevention and/or transmission-prevention.

### **SOCIAL PROOFING**

Why has the State imposed such draconian measures on Idahoans for such untenable and unsupportable objectives? One explanation is that State actors may be relying on Social Proof and Information Cascades. Social Proof is a form of herd behavior wherein people copy the actions of others in ambiguous social situations by looking to others for clues concerning the correct behavior instead of forming one's own reasoned opinions. Social Proof can cause people to converge too quickly upon distinct solutions, so that decisions of larger groups of individuals may be grounded in very little information (see information cascades). The liberty infringing ITTF **Recommendations** (see Attachment A) appear to be based largely on Social Proofing influences instead of good public policy.


### **CONCLUSION**

The Order's overutilization-prevention and transmission-prevention objectives are unconstitutional and replicate methods used in command-and-control societies such as China. Consequently, the BOCC will not be following the Directive set forth in this Order.

PROCLAIMED as stated above.

DATED this 28<sup>th</sup> day of May, 2020.

COMMISSIONERS:

  
Chairman, Dan McDonald

  
Steven Bradshaw

- Opposed -  
Jeff Connolly