



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

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By CM/ECF

March 11, 2020

Molly Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103-1526

RE: *State of Washington, et al., v. U.S. Dept. of Homeland Security, et al.*
Cause No. 19-35914

Dear Ms. Dwyer:

Pursuant to FRAP 28(j), the State of Washington submits the following supplemental authorities to advise the Court of fast-paced developments relevant to this appeal.

On February 29, Washington Governor Jay Inslee declared a State of Emergency related to the deadly coronavirus outbreak. (Ex. A).¹ On March 6, eighteen State Attorneys General wrote to the Department of Homeland Security (DHS) to request that the agency immediately halt implementation of the Public Charge Rule to prevent any further worsening of this health emergency. (Ex. B).² On March 11,

¹ https://www.governor.wa.gov/sites/default/files/20-05%20Coronavirus%20%28final%29.pdf?utm_medium=email&utm_source=govdelivery

² https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/AG%20Ltr%20Re%20DHS%20Public%20Charge%20Rule%20and%20COVID-19.pdf

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the World Health Organization formally declared COVID-19 a global pandemic. (Ex. C).³

The emergence of COVID-19 has coincided with DHS's implementation of the Public Charge Rule. During the notice-and-comment period, DHS received specific warnings the Rule could lead to potentially devastating effects if there were an outbreak of a novel, highly communicable disease. *See* Answering Br. (Dkt. 40) at 20-24; SER 334 (Comment by National Association of County & City Health Officials). DHS did not respond to these concerns; instead, it addressed only vaccine access, which does nothing to mitigate the immediate, harmful effects of such an outbreak. *See* 84 Fed. Reg. at 41,384-85. DHS did, however, admit the Rule could result in "increased prevalence of communicable diseases" and increased use of emergency rooms as a primary method of health care—all of which only exacerbate the crisis. *See* 83 Fed. Reg. at 51,270.

COVID-19 is a lethal, highly communicable disease that has already taken 29 lives in Washington, with researchers estimating the total number of cases there will double approximately every six days. Nationally, the disease is also spreading, and the number of confirmed cases is growing exponentially. In response, public health officials are taking dramatic, emergency steps to limit the spread of the disease and mitigate its harmful effects. At the same time, DHS's new policy undermines these efforts by deterring certain immigrants from seeking medical care.

The attached supplemental authority demonstrates the District Court did not err in finding the Rule is likely arbitrary and capricious and the balance of equities favors a stay and injunction.

Sincerely,

s/ Nathan K. Bays
NATHAN K. BAYS

NKB:gs

cc: Counsel of record (via CM/ECF)

³ <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

Exhibit A

JAY INSLEE
Governor



STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

PROCLAMATION BY THE GOVERNOR

20-05

WHEREAS, On January 21, 2020, the Washington State Department of Health confirmed the first case of the novel coronavirus (COVID-19) in the United States in Snohomish County, Washington, and local health departments and the Washington State Department of Health have since that time worked to identify, contact, and test others in Washington State potentially exposed to COVID-19 in coordination with the United States Centers for Disease Control and Prevention (CDC); and

WHEREAS, COVID-19, a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person; and

WHEREAS, The CDC identifies the potential public health threat posed by COVID-19 both globally and in the United States as “high”, and has advised that person-to-person spread of COVID-19 will continue to occur globally, including within the United States; and

WHEREAS, On January 31, 2020, the United States Department of Health and Human Services Secretary Alex Azar declared a public health emergency for COVID-19, beginning on January 27, 2020; and

WHEREAS, The CDC currently indicates there are 85,688 confirmed cases of COVID-19 worldwide with 66 of those cases in the United States, and the Washington State Department of Health has now confirmed localized person-to-person spread of COVID-19 in Washington State, significantly increasing the risk of exposure and infection to Washington State’s general public and creating an extreme public health risk that may spread quickly; and

WHEREAS, The Washington State Department of Health has instituted a Public Health Incident Management Team to manage the public health aspects of the incident; and

WHEREAS, The Washington State Military Department, State Emergency Operations Center, is coordinating resources across state government to support the Department of Health and local officials in alleviating the impacts to people, property, and infrastructure, and is assessing the magnitude and long-term effects of the incident with the Washington State Department of Health; and

WHEREAS, The worldwide outbreak of COVID-19 and the effects of its extreme risk of person-to-person transmission throughout the United States and Washington State significantly impacts the life and health of our people, as well as the economy of Washington State, and is a public disaster that affects life, health, property or the public peace.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency exists in all counties in the state of Washington, and direct the plans and procedures of the Washington State Comprehensive Emergency Management Plan be implemented. State agencies and departments are directed to utilize state resources and to do everything reasonably possible to assist affected political subdivisions in an effort to respond to and recover from the outbreak.

As a result of this event, I also hereby order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak. Additionally, I direct the Washington State Department of Health, the Washington State Military Department Emergency Management Division, and other agencies to identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments.

Signed and sealed with the official seal of the state of Washington this 29th day of February, A.D., Two Thousand and Twenty at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

Exhibit B



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

PO Box 40100 • Olympia WA 98504-0100 • (360) 753-6200

March 6, 2020

Chad Wolf
Acting Secretary
U.S. Department of Homeland Security
2707 Martin Luther King Jr. Ave. SE
Washington, DC 20528

Kenneth T. Cuccinelli
Senior Official Performing the Duties of the Director
U.S. Citizenship and Immigration Services
20 Massachusetts Ave. NW
Washington, DC 20001

Dear Acting Secretary Wolf and Senior Official Cuccinelli:

We urge the Department of Homeland Security (DHS) to immediately stop implementation of the *Inadmissibility on Public Charge Grounds Rule* (“Public Charge Rule”), *see* 84 Fed. Reg. 41,292 (Aug. 14, 2019), in the wake of the COVID-19 coronavirus. During the notice-and-comment period for the Rule, DHS received warnings of the potentially devastating effects of the Rule if its implementation were to coincide with the outbreak of a highly communicable disease – a scenario exactly like the one confronting our communities with the COVID-19 public health emergency. Your agency failed to consider such legitimate concerns.

Communities across America are undertaking extensive efforts to limit the spread of COVID-19. Your agency’s Public Charge Rule undermines those efforts by deterring individuals from accessing critical health benefits to which they are legally entitled. Failure to immediately stay implementation of the Rule so that we can take the steps necessary to contain and mitigate the outbreak of the disease puts the public health and safety of our communities at increased risk.

The overwhelming evidence – including from the World Health Organization (WHO), Department of Health and Human Services (HHS), and the Centers for Disease Control (CDC) – shows COVID-19 is highly communicable and likely to spread in increasing numbers. On February 26, Dr. Nancy Messonnier, the Director of the CDC’s National Center for Immunization and Respiratory Diseases, explained “it’s not so much a question of if [community spread] will happen anymore but rather more a question of exactly when this will happen and how many people in this country will have severe illness.”¹ Analysis by Trevor Bedford, an investigator and expert in vaccines and infectious diseases at the Fred Hutchinson Cancer Research Center in Seattle, suggests that new coronavirus cases in Western Washington are

¹ *See* <https://www.cdc.gov/media/releases/2020/t0225-cdc-telebriefing-covid-19.html>

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likely doubling every six days.² Dr. Messonnier also warned the necessary public health responses may result in “disruption to everyday life [that] may be severe,” including interruptions to work and school closures.³ Despite these warnings, there is still hope the disease may be contained, provided governments at all levels take appropriate and comprehensive steps to limit its transmission. As the Director General of the WHO recently explained, “[w]ith early, aggressive measures, countries can stop transmission and save lives.”⁴

CDC’s data and public statements underscore the urgent importance of such measures. As of February 26 – just two days after DHS began implementation of the Public Charge Rule – CDC had already documented multiple cases of COVID-19 spreading person-to-person within the United States.⁵ CDC further acknowledges “person-to-person spread will [likely] continue to occur, including in the United States.”⁶ If an individual gets sick with suspected COVID-19 symptoms, CDC urges that they consult with their medical and healthcare professionals, including by “seek[ing] prompt medical attention if [their] illness is worsening.”⁷ CDC’s emphasis on coordination with healthcare professionals closely aligns with similar guidance from WHO, which warns that a successful response will require “all countries to educate their populations, to expand surveillance, to find, isolate, and care for every case, to trace every contact, and to take an all-of-government and all-of-society approach.”⁸ Inexplicably, DHS contravenes this guidance by implementing a public charge rule punishing certain lawful immigrants for seeking effective medical treatment that might mitigate COVID-19’s harmful scope and effect.

DHS’s implementation of the Public Charge Rule during this public health crisis is irresponsible and reckless. As noted by Plaintiff States in ongoing litigation challenging the Rule,⁹ DHS openly concedes the Rule could lead to “increased prevalence of communicable diseases,”¹⁰ disenrollment from public programs,¹¹ and increased use of emergency rooms as a primary method of health care.¹² Washington State has already had eleven deaths attributable to COVID-19. The State is doing everything in its power to limit the spread of the disease and prevent

² See <https://bedford.io/blog/ncov-cryptic-transmission/>

³ See <https://www.cdc.gov/media/releases/2020/t0225-cdc-telebriefing-covid-19.html>

⁴ <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--2-march-2020>

⁵ <https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html>

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/summary.html>

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/about/steps-when-sick.html>.

⁸ <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--28-february-2020>

⁹ See *Washington v. DHS*, Case No. 4:19-cv-05210-RMP, Dkt. No. 158 (E.D. Wa., Sept. 27, 2019); *California v. DHS*, Case No. 4:19-cv-04975-PJH, Dkt. No. 17 (N.D. Cal., Aug. 26, 2019); *New York, et al. v. U.S. Dep’t of Homeland Sec.*, Case No. 1:19-cv-07777-GBD, Dkt. No. 35 (S.D.N.Y. Sept. 9, 2019) (explaining that the Final Rule jeopardizes Plaintiffs’ ability to reduce the spread of communicable diseases, will cause individuals to disenroll from public programs, and will increase use of emergency departments).

¹⁰ 83 Fed. Reg. at 51,270.

¹¹ 84 Fed. Reg. at 41,463.

¹² 83 Fed. Reg. at 51,270.

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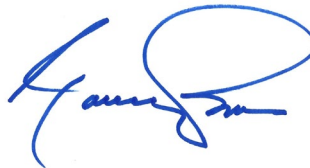
additional fatalities. States, cities, and counties are undertaking similarly dramatic efforts to limit the spread of the disease and mitigate its harmful effects. With this threat looming, however, DHS's policy of deterring immigrants from using the medical benefits to which they are legally entitled directly undermines and frustrates our public health professionals' efforts, putting our communities and residents at unnecessary risk.

You have authority to swiftly correct your agency's failure to consider the Public Charge Rule's risks to public health and safety. We urge that you immediately stay implementation of the Public Charge Rule pending successful containment of COVID-19 to assist our public health professionals and protect our communities.

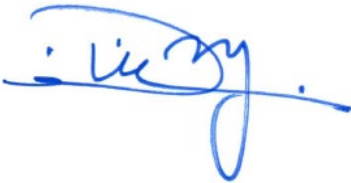
Sincerely,



Bob Ferguson
Washington State Attorney General



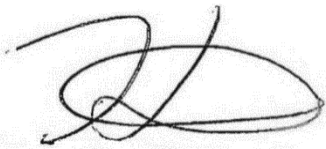
Xavier Becerra
California Attorney General



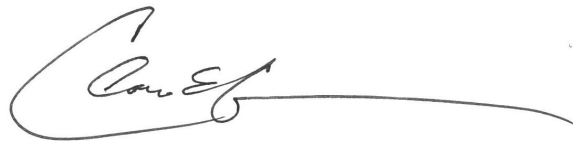
William Tong
Connecticut Attorney General



Kathleen Jennings
Delaware Attorney General



Karl A. Racine
District of Columbia Attorney General



Clare E. Connors
Hawaii Attorney General



Tom Miller
Iowa Attorney General



Maura Healey
Massachusetts Attorney General

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Dana Nessel
Michigan Attorney General



Keith Ellison
Minnesota Attorney General



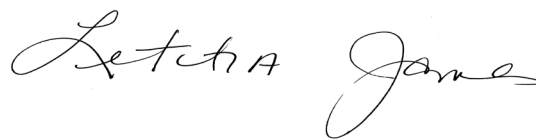
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Gurbir S. Grewal
New Jersey Attorney General



Letitia James
New York Attorney General



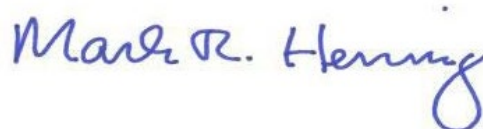
Ellen F. Rosenblum
Oregon Attorney General



Josh Shapiro
Pennsylvania Attorney General



Thomas J. Donovan, Jr.
Vermont Attorney General



Mark R. Herring
Virginia Attorney General

CC: Vice President Mike Pence
Secretary Alex Azar, U.S. Department of Health and Human Services

Exhibit C



WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020

11 March 2020

Good afternoon.

In the past two weeks, the number of cases of COVID-19 outside China has increased 13-fold, and the number of affected countries has tripled.

There are now more than 118,000 cases in 114 countries, and 4,291 people have lost their lives.

Thousands more are fighting for their lives in hospitals.

In the days and weeks ahead, we expect to see the number of cases, the number of deaths, and the number of affected countries climb even higher.

WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction.

We have therefore made the assessment that COVID-19 can be characterized as a pandemic.

Pandemic is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.

Describing the situation as a pandemic does not change WHO's assessment of the threat posed by this virus. It doesn't change what WHO is doing, and it doesn't change what countries should do.

We have never before seen a pandemic sparked by a coronavirus. This is the first pandemic caused by a coronavirus.

And we have never before seen a pandemic that can be controlled, at the same time.

WHO has been in full response mode since we were notified of the first cases.

And we have called every day for countries to take urgent and aggressive action.

We have rung the alarm bell loud and clear.

===

As I said on Monday, just looking at the number of cases and the number of countries affected does not tell the full story.

Of the 118,000 cases reported globally in 114 countries, more than 90 percent of cases are in just four countries, and two of those – China and the Republic of Korea - have significantly declining epidemics.

81 countries have not reported any cases, and 57 countries have reported 10 cases or less.

We cannot say this loudly enough, or clearly enough, or often enough: all countries can still change the course of this pandemic.

If countries detect, test, treat, isolate, trace, and mobilize their people in the response, those with a handful of cases can prevent those cases becoming clusters, and those clusters becoming community transmission.

Even those countries with community transmission or large clusters can turn the tide on this virus.

Several countries have demonstrated that this virus can be suppressed and controlled.

The challenge for many countries who are now dealing with large clusters or community transmission is not whether they **can** do the same – it's whether they **will**.

Some countries are struggling with a lack of capacity.

Some countries are struggling with a lack of resources.

Some countries are struggling with a lack of resolve.

We are grateful for the measures being taken in Iran, Italy and the Republic of Korea to slow the virus and control their epidemics.

We know that these measures are taking a heavy toll on societies and economies, just as they did in China.

All countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights.

WHO's mandate is public health. But we're working with many partners across all sectors to mitigate the social and economic consequences of this pandemic.

This is not just a public health crisis, it is a crisis that will touch every sector – so every sector and every individual must be involved in the fight.

I have said from the beginning that countries must take a whole-of-government, whole-of-society approach, built around a comprehensive strategy to prevent infections, save lives and minimize impact.

Let me summarize it in four key areas.

First, prepare and be ready.

Second, detect, protect and treat.

Third, reduce transmission.

Fourth, innovate and learn.

I remind all countries that we are calling on you to activate and scale up your emergency response mechanisms;

Communicate with your people about the risks and how they can protect themselves – this is everybody's business;

Find, isolate, test and treat every case and trace every contact;

Ready your hospitals;

Protect and train your health workers.

And let's all look out for each other, because we need each other.

===

There's been so much attention on one word.

Let me give you some other words that matter much more, and that are much more actionable.

Prevention.

Preparedness.

Public health.

Political leadership.

And most of all, people.

We're in this together, to do the right things with calm and protect the citizens of the world. It's doable.

I thank you.

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