

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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March 23, 2020

The Honorable Cliff R. Pirtle
Senator – Chaves, Eddy & Otero-32
5507 Y.O. Road
Roswell, New Mexico 88203
Email: Cliff.pirtle@nmlegis.gov

Re: Opinion Request – Governor’s Authority during a Public Health or Other Emergency

Dear Senator Pirtle:

You have requested an Attorney General opinion regarding a governor’s authority to close or otherwise regulate the activities of private businesses, including private clubs, engaged in the sale of food and alcoholic beverages for consumption on the premises during a public health or other emergency.¹ Based on our examination of the relevant constitutional, statutory and case law authorities, as well as the information available to us at this time, we conclude that the Governor has broad authority to declare a public health emergency by executive order. In turn, the executive order properly triggers the authority of the Secretary of Health to order the closure of public places, including privately owned businesses generally open to the public, and forbid large gatherings.

As a preliminary matter, there are several rules of statutory construction that guide our analysis. First, in construing a statute, our goal is to give primary effect to the legislative intent, which intent is evidenced primarily through the statute’s language. *See Souter v. Ancae Heating and Air Conditioning*, 2002-NMSC-0078, 132 N.M. 608, 611. Second, under the plain meaning rule, we give statutory language its ordinary meaning unless the Legislature indicates a different meaning is necessary. *See Cooper v. Chevron*, 2002-NMSC-020, 132 N.M. 382, 388. Finally, we read statutes regarding the same subject matter

¹ While you have asked that we address a governor’s authority to regulate private business activity in a public health *or other* emergency, we decline to address other emergencies, as the executive’s declaration and response in those instances will necessarily depend on the specific circumstances and nature of the emergency.

together as harmoniously as possible in a way that facilitates their operation and achievement of their goals. *See Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, 136 N.M. 630, 634-5.

We begin our analysis by reviewing the relevant statutes that authorize the governor to declare a state of public health emergency and the executive's response to said emergency. The New Mexico Constitution vests the governor with the supreme power of the state and directs the governor to take care that the laws be faithfully executed. N.M. Const., art. V, § 4. Notwithstanding, as head of the executive branch, the governor's powers are limited to those granted by the constitution or statute. *See* N.M. Const, art. III, § 1; *State v. Fifth Judicial Dist. Court*, 1932-NMSC-023, 36 N.M. 151. *See also State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 362, 524 P.2d 975, 978 (1974) (stating that “[t]he power of veto, like all powers constitutionally conferred upon a government officer or agency, is not absolute and may not be exercised without any restraint or limitation whatsoever”) (emphasis in original). Thus, while the governor may issue orders to executive agencies in an effort to better execute existing law, the governor's executive order will be invalid if it is outside the governor's constitutional or statutory authority.

The Public Health Emergency Response Act² provides a grant of authority to the governor to declare a state of public health emergency “upon the occurrence of a public health emergency.” *See* § 12-10A-5(A).³ It requires the governor to consult with the secretary of health prior to making such a declaration. *Id.* And, upon making the declaration, the Act allows the governor to confer upon the secretaries of health, public safety, and homeland security and emergency management the authority to coordinate a response to the public health emergency. The Act also mandates that the governor's declaration of a state of public health emergency be by an executive order that specifies:

- (1) the nature of the emergency;
- (2) the areas of the state affected by the emergency;
- (3) its causation;
- (4) its expected duration, if less than thirty days;
- (5) the public health officials needed to assist in coordinating a response to the emergency; and
- (6) any other provisions necessary to implement the order.

See § 12-10A-5(B).

² NMSA 1978, Sections 12-10A-1 to -19 (2003, as amended through 2015),

³ The Act defines “public health emergency” as “the occurrence or imminent threat of exposure to an extremely dangerous condition or a highly infectious or toxic agent, including a threatening communicable disease, that poses an imminent threat of substantial harm to the population of New Mexico or any portion thereof.” § 12-10A-2 (G). It further defines a “threatening communicable disease” as “a disease that causes death or great bodily harm that passes from one person to another and for which there are no means by which the public can reasonably avoid the risk of contracting the disease. “Threatening communicable disease” does not include acquired immune deficiency syndrome or other infections caused by the human immunodeficiency virus.” § 12-10A-2 (L).

With an executive order in place, then, the Public Health Act⁴ authorizes the Department of Health to, among other things:

- (C) investigate, control and abate the causes of disease, especially epidemics, sources of mortality and other conditions of public health;
- (D) establish, maintain and enforce isolation and quarantine;
- (E) close any public place and forbid gatherings of people when necessary for the protection of the public health; and
- (F) respond to public health emergencies and assist communities in recovery.

See § 24-1-3 (emphasis added). The Public Health Act does not define public place, but based on New Mexico statutory definitions and common usage, we find that a “public place” is a place generally open or accessible to the public and may include both publicly owned and privately owned spaces. *See e.g.* <https://definitions.uslegal.com/p/public-place/> (public place is generally an indoor or outdoor area, whether privately or publicly owned, to which the public have access by right or by invitation, expressed or implied, whether by payment of money or not, but not a place when used exclusively by one or more individuals for a private gathering or other personal purpose). As such, private businesses, including private clubs would be subject to an executive order that closes any public place and forbids gatherings of people when necessary for the protection of the public health.

While no New Mexico courts have had the opportunity to interpret Section 24-1-3, taken as a whole, the statutory scheme outlined above appears to fall within the State’s traditional police powers to regulate certain activity for the protection of public health against the spread of infectious disease. “The United States Supreme Court has declared that the ‘structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’” *Florida v. United States HHS*, 648 F.3d 1235, 1305 (11th Cir. 2011) (alterations in original) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006)). Moreover, “[n]umerous Supreme Court decisions have identified the regulation of health matters as a core facet of a state’s police powers.” *Florida*, 648 F.3d at 1305 (citing various Supreme Court cases discussing the latitude of States to regulate matters of health); *see also Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) (“It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state’s police power.”).

And, in a recent case challenging New York’s mandatory vaccination law for children attending public, private or parochial schools, the federal district court for the Eastern District of New York revisited the history of a State’s traditional police powers before concluding that children with disabilities were not exempt from vaccination, as the mandatory vaccination law did not interfere or modify their rights under the Individuals with Disabilities Education Act. *See V.D. et al. v. State of New York*, 403 F. Supp. 3d 76 (E.D.N.Y. 2019).

⁴ NMSA 1978, Section 24-1-1 to -40 (1973, as amended through 2019).

The district court recalled that “[s]tates have historically enjoyed considerable discretion to regulate in areas affecting the health and safety of their citizens. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). As such, the Supreme Court has long upheld the rights of states to enact compulsory vaccination laws. *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27, 25 S. Ct. 358, 49 L. Ed. 643 (1905).” “[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27. In service of this goal, a state may impose certain requirements on its constituents without offending the Constitution. *See id.* at 26 (“[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”); *see also Prince v. Massachusetts*, [321 U.S. 158](#), 166-67, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (“The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.” (citing *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (N.Y. 1903))).” *V.D. v. New York*, at 86.

Turning our attention to recent events, on March 11, 2020 Governor Michelle Lujan Grisham declared a state of emergency in New Mexico under Executive Order 2020-004 (“EO 2020-004”), in accordance with the Public Health Emergency Response Act and the All Hazard Emergency Management Act.⁵ *See* Executive Order 2020-004, §§ 1 and 2. Executive Order 2020-004 describes the origin and nature of the novel coronavirus disease (“COVID-19”) public health emergency, the areas of the state affected by the emergency, its causation - going back to several cases of pneumonia with an unknown cause first reported to the World Health Organization on December 31, 2019 – as well as other information required by § 12-10A-5(B). Its stated intent is to minimize the spread and adverse impacts of COVID-19 in New Mexico. *Id.*

A careful reading of the Executive Order reveals that it directs the Department of Health and the Department of Homeland Security and Emergency Management to “collaborate to provide an effective and coordinated response to this public health emergency” and “consult with [the governor’s] office regarding all matters germane to this Order.” Executive Order 2020-004, § 3. It further directs “[a]ll cabinets, departments, and agencies to comply with the directives of this Order and any instruction given by the Department of Health,” and provides specific instructions for the Secretary of the General Services, the Superintendent of Insurance, the Secretary of Department of Workforce Solutions, the Adjutant General of the New Mexico National Guard, and the Department of Finance and Administration. Executive Order 2020-004, §§ 4 through 9.

Following the issuance of Executive Order 2020-004 and consistent with Section 24-1-3, the Secretary of Health has issued several Public Health Orders (“PHO”). Relevant to your question, Secretary Kunkel issued an Amended PHO Limiting Mass Gatherings and Implementing Other Restrictions due to COVID-19, dated March 16, 2020, citing the further spread of COVID-19 in New Mexico and the threat it poses to the health, safety, wellbeing of the residents of the state.

⁵ NMSA 1978, §§ 12-10-1 to -10 (1959, as amended through 2007).

The March 16, 2020 PHO expressly (1) prohibits all mass gatherings of 100 or more persons; (2) orders all restaurants, bars, breweries and other food service establishments to operate at no more than fifty percent of maximum capacity and no greater than 50 percent of seating capacity, and directed that individual tables seat no more than six persons and be separated by at least six feet; and; (3) with the exception of casinos located on Tribal lands, orders all casinos and horse racing facilities and attendant restaurant and bar operations to close during the pendency of the PHO.

Then, on March 19, 2020, Secretary Kunkel issued another PHO, further limiting mass gatherings and imposing further restrictions, “organized around one principle: to temporarily limit person-to-person contact, particularly in large groups. This is the best way to minimize spread of COVID-19 and prevent a spike in illnesses, particularly serious illnesses in vulnerable populations.” See <https://cv.nmhealth.org/2020/03/19/new-public-health-order-in-effect/>. The limitations imposed by the March 19, 2020 are more granular and includes mandatory closures, as the number of presumptive tests positive for COVID-19 continues to rise. It includes a strengthened prohibition against mass gatherings, the additional limitation of restaurants, bars, breweries, eateries and other food service establishments to providing only take-out and home delivery service, the closure of indoor shopping malls, recreational facilities, health clubs, resort spas and other public places.

Against the backdrop of the continued spread of COVID-19 and the threat it poses to the health, safety and wellbeing of all New Mexico citizens, the PHOs issued by Secretary of Health to date, limiting the activities of certain private businesses that offer services and are open to the public appear to be a reasonable exercise of the police powers vested in the Secretary and Department of Health by the Public Act.

Please be advised that this opinion is a public record, not subject to the attorney client privilege. As such, we may provide copies to the public. If this office may be of further assistance, or if you have any questions regarding this opinion, please do not hesitate to contact our office.

Sincerely,

Sally Malavé

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Director, Open Government Division