

U.S. House of Representatives

Committee on the Judiciary

Washington, DC 20515–6216
One Hundred Sixteenth Congress

May 11, 2020

The Honorable William Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Barr:

We write concerning efforts by the Department to use its litigating authority—or the threat of that authority—in a manner that would undermine public health and safety restrictions put forth by state governments to combat COVID-19 and to request a staff briefing on these matters. As Members of the House Judiciary Committee, who also represent some of the communities hardest hit by the deadly epidemic, it is vitally important that we understand both the public health impact and legal underpinnings regarding these matters.

We are raising these concerns and requesting this briefing because you have repeatedly and publicly expressed your displeasure about state emergency pandemic measures. As early as April, you described some of the stay-at-home orders as “draconian.”¹ In a recent interview you stated, “You know, the idea that you have to stay in your house is disturbingly close to house arrest ... we’re looking carefully at a number of these rules that are being put into place. And if we think one goes too far, we initially try to jawbone the governors into rolling them back or adjusting them.”² You went on to suggest that these measures were no longer necessary and that states should look to more targeted approaches.³ These comments were followed by your issuance of a memorandum to the Assistant Attorney General for Civil Rights and all U.S. Attorneys directing them to “be on the lookout for state and local directives that could be violating the constitutional rights and civil liberties of individual citizens.”⁴ Since then, the Department has filed statements of interest in Mississippi and Virginia lawsuits, involving places

¹ Matt Zapotosky, Josh Dawsey, Jose A. Del Real, & William Wan, *Trump administration pushing to reopen much of the U.S. next month*, WASH. POST, April 9, 2020.

² Attorney General Barr on the Crisis, Interview with Hugh Hewitt, April 21, 2020, <https://www.hughhewitt.com/attorney-general-william-barr-on-the-crisis/>.

³ *Id.* (“The question is you can’t just keep on feeding the patient chemotherapy and say well, we’re killing the cancer, because we were getting to the point where we’re killing the patient,” Barr said. “And now is the time that we have to start looking ahead and adjusting to more targeted therapies.”).

⁴ U.S. Dept. of Justice, Memorandum for the Assistant Attorney General for Civil Rights and All United States Attorneys, from the Office of Attorney General, April 27, 2020, <https://www.justice.gov/opa/page/file/1271456/download>.

of worship planning to hold religious services that exceed the number of individuals allowed under the state’s social distancing rules.⁵

We need to understand whether and the extent to which the Department is taking public health considerations into account when developing its legal posture. According to data published by the Centers for Disease Control & Prevention, social distancing and other measures put in place by the states appear to be working.⁶ And public health officials have also made clear that “lifting restrictions too quickly could lead to a deadly resurgence [and] the way down can be as dangerous as the way up if not managed properly.”⁷ In fact, the Institute for Health Metrics and Evaluation at the University of Washington recently revised its projections to approximately 135,000 deaths in the United States—citing a variety of reasons including new outbreaks in the Midwest and relaxed social distancing.⁸ We also need to understand if the Department is considering the political interests of the President as it examines the stay-at-home orders of specific states. According to Johns Hopkins University’s Coronavirus Resource Center, multiple counties in New York, Michigan, California, and Virginia fall under the “Top 50 Confirmed Cases by County” as well as “Top 20 Counties by Number of Deaths.”⁹ These states have implemented strong social distancing measures, but are now facing public opposition from the President.¹⁰ To be sure, the Justice Department has an important role in protecting the civil rights and civil liberties of all Americans, but we have concerns with the appearance of the nation’s leading law enforcement agency attempting to determine which state and local public health measures are needed at which times during a pandemic.

With regards to the Department’s legal authority to override state public health restrictions, we are concerned the Department’s position supporting efforts to suspend stay-at-home directives

⁵ Josh Gerstein, *Feds, Northam spar over Virginia stay-at-home order’s impact on churches*, POLITICO, May 3, 2020.

⁶ Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report: Timing of Community Mitigation and Changes in Reported COVID-19 and Community Mobility — Four U.S. Metropolitan Areas, February 26–April 1, 2020*, (April 17, 2020, Vol. 69 No. 15), https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e2.htm?s_cid=mm6915e2_w.

⁷ *Coronavirus: 'Deadly resurgence' if curbs lifted too early, WHO warns*, BBC NEWS, April 10, 2020.

⁸ Arman Azad, *Key coronavirus model will revise projections to nearly 135,000 US deaths*, CNN, May 4, 2020 (“One of them is increased mobility before the relaxation, premature relaxation of social distancing, we’re adding more presumptive deaths as well, and we’re seeing a lot of outbreaks in the Midwest, for example.”)

⁹ The majority of Americans “do not want to relax social distancing guidelines or lift shelter-at-home orders until more is done to combat the effects of Covid-19.” Katelyn Burns, *Polls: Americans don’t want to end social distancing policies despite financial devastation*, VOX, April 29, 2020. Recent polling indicates that “Americans clearly oppose the reopening of restaurants, retail stores and other businesses, even as governors begin to lift restrictions that have kept the economy locked down in an effort to combat the coronavirus pandemic.” Dan Balz & Emily Guskin, *Americans widely oppose reopening most businesses, despite easing of restrictions in some states, Post-U. Md. poll finds*, WASH. POST, May 5, 2020.

¹⁰ See e.g., Kevin Liptak, *Trump tweets support for Michigan protesters, some of whom were armed, as 2020 stress mounts*, CNN, May 1, 2020; @realDonaldTrump, TWITTER (April 17, 2020, 11:25 AM), <https://twitter.com/realDonaldTrump/status/1251169987110330372>; @realDonaldTrump, TWITTER (April 17, 2020, 11:17 AM), <https://twitter.com/realDonaldTrump/status/1251169217531056130>; Dareh Gregorian, *'Fire Gruesome Newsom!': Stay-at-home protests in California and across the country*, NBC NEWS, May 1, 2020.

treads on questionable constitutional grounds. Under relevant legal precedent, content-neutral restrictions on the right to assemble, for example, are justifiable so long as they are narrowly tailored to serve a significant governmental interest.¹¹ In the Department’s eagerness to litigate against these measures, we are concerned you may have misunderstood or mischaracterized relevant law, including the orders at issue in the Virginia litigation.¹²

The Department’s actions are particularly troubling considering the lack of a coordinated national response to the pandemic by the Administration—which includes the failure to address the shortage of medical equipment, rapid testing, or personal protective equipment;¹³ or to provide comprehensive guidance for reopening¹⁴ that would help the country mitigate the threat of a second wave. Rather, the President and his allies have stated that state and local governments are, in many respects, on their own as they seek to address this crisis.¹⁵ In light of our myriad questions and concerns—which go directly to the safety of our constituents and the Department’s role in our system of federalism—we request a briefing with the Assistant Attorney General for the Civil Rights Division, Eric Dreiband; the U.S. Attorney for the Eastern District of Michigan, Matthew Schneider; and other relevant Department officials.

We look forward to hearing from your office so that we may schedule this important briefing at your earliest convenience.

¹¹ *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹² For example, the Department accuses Virginia of discriminating against houses of worship by exempting “all non-retail businesses,” but not churches, from its restriction against gatherings of more than ten people. But according to Virginia, the challenged orders do not in fact provide those exemptions. *See* Def.’s Notice of Intent to File Response at 3, *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-204 (E.D. Va. May 3, 2020).

¹³ *See e.g.*, Dennis Wagner, *Overwhelmed hospitals, equipment shortages: Coronavirus pandemic plays out as state planners expected*, USA Today, April 13, 2020; Joel Rose, *A “War” for Medical Supplies: States say FEMA winning by poaching orders*, NPR, April 15, 2020; *Trump: U.S. states, not federal government, must improve testing*, REUTERS, April 17, 2020; Rachel Sandler, *White House Coronavirus Testing Strategy Puts Onus On States, Says Federal Government Is A ‘Last Resort’*, FORBES, April 28, 2020.

¹⁴ Jason Dearen & Mike Stobbe, *US Shelves Detailed Guide to Reopening Country*, ASSOCIATED PRESS, May 7, 2020.

¹⁵ *See e.g.*, Quint Forgey, *‘We’re not a shipping clerk’: Trump tells governors to step up efforts to get medical supplies*, POLITICO, March 19, 2020 (“Governors are supposed to be doing a lot of this work, and they are doing a lot of this work,” Trump said. “The Federal government is not supposed to be out there buying vast amounts of items and then shipping. You know, we’re not a shipping clerk.”); Ben Gittleson, *After Kushner says ‘it’s our stockpile,’ HHS website changed to echo his comments on federal crisis role*, ABC NEWS, April 3, 2020 (“The notion of the federal stockpile was it’s supposed to be our stockpile, it’s not supposed to be states’ stockpiles that they then use.”).

Sincerely,



Jerrold Nadler
Chairman



Steve Cohen
Chairman
Subcommittee on the Constitution,
Civil Rights, and Civil Liberties



Mary Gay Scanlon
Vice Chair



Jamie Raskin
Vice Chair
Subcommittee on the Constitution,
Civil Rights, and Civil Liberties

cc: The Honorable Jim Jordan, Ranking Member, House Committee on the Judiciary
The Honorable Mike Johnson, Ranking Member, Subcommittee on the Constitution,
Civil Rights, and Civil Liberties