

Chief Justice Gonzalez and Associate Justices,

I am writing this email to request reconsideration of the Supreme Court's order regarding vaccine mandates and to caution other judges in their decisions to impose such mandates in local courts.

At first, I was frustrated with this order based on prior knowledge of the law, but I decided to hope that all of us are seen by each other as acting in good faith and that we care about the proper response to COVID-19. None of us wants people to get sick or die because of our action or inaction. This has become an emotional issue for many on both sides of the debate so it is important that we avoid attaching negative motives as we walk through the legal analysis of the issues set forth below.

We also need to avoid breaking ourselves up into constituent groups such as vaccinated versus unvaccinated or pro vaccine versus anti-vaccine because it serves no purpose in the analysis of the legal issues at hand. We also do not need to get into a debate about the efficacy of vaccines to answer the legal questions posed.

This is merely an attempt to focus dispassionately on what the law is and not on what we want the law to be.

The issue is whether the Supreme Court, or any other government official or body, has the authority under Washington law to order unvaccinated staff to be vaccinated as a condition of continued employment.

Only the Legislature Can Compel Vaccinations under Washington Law

It is well accepted that state statutes can mandate vaccines. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). However, in *Jacobson*, the court held: *"The authority of the State to enact this statute is to be referred to what is commonly called the police power -- a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not, by their necessary operation, affect the people of other States. According to settled principles, the police power of a State must be held to embrace, at least,*

such reasonable regulations **established directly by legislative enactment** as will protect the public health and the public safety. It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. **A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.**"

Id. at pp. 24-25 (citations omitted and emphasis added).

The question is whether there is any authority "*established directly by legislative enactment*" permitting the Supreme Court, the Governor, or other government official to directly or indirectly adopt vaccine mandates.

We must keep in mind that the Court in *Jacobson* was addressing a Massachusetts statute that allowed local jurisdictions to mandate vaccines. No such statute exists in our state that gives the Governor or the Supreme Court the authority to mandate vaccinations. The only vaccination mandate passed by the legislature that is currently in effect is for school-aged children. See RCW 28A.210. There is no statute that mandates adult vaccinations or delegates the decision to require vaccinations to any other government official or government body.

The State Board of Health is actually a creature of our State Constitution found in Article 20, Section 1. The State Board of Health operates only under "*such powers as the legislature may direct.*" The legislature gave the Board of Health, and not any other state official, the authority to create regulations for "*the prevention and control of infectious...diseases.*" RCW 43.20.050(2)(f). In addition, the legislature provided for local boards of health to enforce regulations adopted by the state board of health and local boards of health. RCW 70.05.070. (See Attachment A for a more detailed discussion of the structure of health departments in our state).

In Washington, unlike Massachusetts, the legislature has reserved to itself

the decision on whether mandatory vaccines would be needed. This is evidenced by only providing for mandatory vaccines of school-aged children, not mandating vaccinations for adults, and by not delegating that specific power to either the state or local boards of health as Massachusetts did with local jurisdictions in *Jacobson*.

The State Board of Health is able to enact regulations that apply to immunizations for children because the legislature permitted that to occur by the adoption of RCW 28A.210. However, state and local boards of health cannot adopt a vaccine mandate for adults because there is no statutory authority enacted by the legislature that provides for such a mandate or delegation of that decision. See *Jacobson, Supra* at p.24.

In addition, the Governor's emergency powers do not give him the authority to create laws, only to waive or suspend them. See RCW 43.06.220(2). RCW 43.06.220 provides for limited actions that can be taken by the governor and those powers do not include managing vaccine policy (see Attachment B for a discussion on gubernatorial power in health emergencies). The Supreme Court definitely has no legislative or executive authority to pass vaccine mandates.

There is also no law or regulation that conditions public employment on any form of vaccine or other medical procedure. This means that the Governor, the justices, and/or any other state or local officials cannot mandate vaccinations as a condition of employment because no law passed by the legislature has given them the authority to do so.

Most all public employees have a property interest in their positions and they cannot be terminated without due process of law. In *Board of Regents v Roth*, 408 US at 564 (1972), the Court held:

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

408 US at p. 577. The *Roth* court held that a property interest "can... be

created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." Id. The concepts in *Roth* were confirmed in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

"Loudermill hearings" are commonplace in jurisdictions across our state. In addition, many public employees are protected by collective bargaining agreements.

Terminating a public employee for not performing an act that the public employer has no authority to compel would be a problematic violation of due process and it would fly in the face of fundamental fairness. The monetary liability for wrongful termination would be staggering and there may even be an argument for attorney's fees under 42 USC1983.

The reasoning above also calls into question public colleges, counties, cities, school districts, hospital districts, and other local government entities' attempts to require proof of vaccination for continued employment when there is no statutory or regulatory authority to do so.

In conclusion, the Supreme Court, the Governor, and all other government bodies need to reconsider vaccine mandates that are not permitted by law.

Thank you.

Judge Dave Larson

Attachment A

Existing Statutory and Regulatory Mechanism for Public Health

Health departments have been part of our lives in Washington State for quite some time, but the current statutory structure is most pertinent to this discussion. An understanding of the statutory structure is important when analyzing the extent to which gubernatorial authority under RCW 38.08, RCW 38.52, and RCW 43.06 can be asserted in alleged health emergencies.

The best summary of the laws currently in effect¹ regarding to role of the different public health stakeholders is found on Washington State Department of Health (DOH) webpage²:

“Washington's Public Health System

Along with the state Department of Health, Washington's public health system includes 35 local health departments and local health districts (serving 39 counties), the Board of Health, tribal governments and other partners.

Washington State Department of Health

The Department of Health was formed in 1989 to promote and protect public health, monitor health care costs, maintain standards for quality health care delivery and plan activities related to the health of Washington citizens. The [Secretary of Health](#) is appointed by the governor. The statutory authority for the Department of Health is in the [Revised Code of Washington 43.70.020](#).

Washington State Board of Health

The 10-member [Board of Health](#) provides a citizen forum for the development of public health policy. It recommends strategies and promotes health goals to the Legislature and regulates a number of health activities including drinking water, immunizations and food handling. The Board is housed with the Department of Health although it is an independent entity.

Local Health Departments/Districts

Washington has 31 county health departments, three multi-county health districts and two city-county health departments. We refer to them as local health jurisdictions. They are local government agencies, not satellite offices of the state Department of Health or the State Board of Health. Local health jurisdictions carry out a wide variety of programs to promote health, help prevent disease and build healthy communities.

¹ See, RCW 43.70 (Department of Health); RCW 43.20 (State Board of Health); RCW 70.05 (Local Health Departments); RCW 70.08 (Combined City-County Health Departments); RCW 70.46 (Health Districts)

² <https://www.doh.wa.gov/AboutUs/PublicHealthSystem>

We provide [links to local health jurisdiction websites](#) on our local health jurisdiction map page.

Tribal governments

Washington State and the American Indian tribes located in Washington State work together, government-to-government, to address the public health issues that affect all of us. The involvement of Indian Tribes in the development of public health policy promotes locally relevant and culturally appropriate approaches to issues of mutual interest or concern.

Public Health Partners

The Department of Health works with many health partners including hospitals and clinics, the [University of Washington School of Public Health and Community Medicine](#); and state and local community-based organizations, associations and coalitions. It also has close working relationships with federal agencies including the [Centers for Disease Control and Prevention](#), the [Department of Health and Human Services](#), the [Department of Agriculture](#) and the [National Institutes of Health](#).

Regional Healthcare Coalitions

The coalitions are made up of hospitals, clinics, home care providers, local government, emergency medical services and trauma care councils, tribes and others that work together to help plan a coordinated regional healthcare response for emergencies. The coalitions' work includes helping healthcare systems to create, exercise and update their response plans, and participating in emergency response training. [View Coalitions contacts page.](#)"

The Board of Health creates regulations that local health departments/districts must follow. RCW 43.20.050(5). This rule-making authority extends to rules regarding "isolation and quarantine" and for "the prevention and control of infectious and noninfectious diseases" RCW 43.20.050(2)(e) and (2)(f). Board of Health regulations are found in WAC 246. The response to communicable diseases is regulated in WAC 246-100.

Local health officers in health departments/districts are charged with several duties including enforcing local and state health laws/regulations as well as controlling and preventing dangerous diseases. RCW 70.05.070.

The Secretary of the Department of Health has "...the same authority as local health officers, except that ***the secretary shall not exercise such authority unless the local health officer fails or is unable to do so, or when in an emergency the safety of the public health demands it, or by agreement with the local health officer or local board of health***" RCW 43.70.130(7).

As an example of control by local health officials, not state health officials, is found in WAC 246-100-036(1), which provides:

“The local health officer shall establish, in consultation with local health care providers, health facilities, emergency management personnel, law enforcement agencies, and any other entity he or she deems necessary, plans, policies, and procedures for instituting emergency measures necessary to prevent the spread of communicable disease or contamination.”

The key phrases are, “*local health officer shall establish*” and “*in consultation with*” others. This means that others act at the direction of the local health officer, not the other way around.

For example, the Governor’s 2020 stay at home order was the equivalent of an isolation order. Isolation and quarantine orders are implemented by local health officers, not state health officials. WAC 246-100-036. The very specific procedures for isolation and quarantine are found in WAC 246-100-040. The local health official, not the state, makes the determination for individual or group isolation or detention.³ There are very specific rights delineated, including the right to seek judicial review⁴ and the right to counsel⁵, including indigent defense if someone cannot afford counsel to fight the order to isolate or quarantine.

The local health official can also close public or private facilities, but they must comply with the “*Control of Communicable Diseases Manual*, 20th edition, published by the American Public Health Association” when doing so. See WAC 246-100-036(3). A copy of that publication would be useful for the analysis here.

In addition, local health officials, not state health officials, address school closures for communicable diseases. WAC 246-110-020. Parenthetically, school districts have communicable disease policies and, in addition, school closure policies are adopted pursuant to public notice and comment. See RCW 28A.335.020. Generally, emergency closure decisions are also made by school districts, not the Office of the Superintendent of Public Instruction. See RCW 28A.335.030.

So one might ask how this relates to broader issues, like pandemics. The answer is that the legislature took the time in 2006 to reinforce this local command and control system for public health response when it passed a bill entitled “*Pandemic Influenza – Preparedness*” now known as RCW 70.26.⁶

³ WAC 246-100-4-4(1) provides, “At his or her sole discretion, a local health officer may issue an emergency detention order causing a person or group of persons to be immediately detained for purposes of isolation or quarantine...”

⁴ WAC 246-100-055

⁵ WAC 246-100-060

⁶ <http://lawfilesext.leg.wa.gov/biennium/2005-06/Pdf/Bills/Session%20Laws/Senate/6366-S.SL.pdf?cite=2006%20c%2063%20%A7%201>

This collection of laws defines the powers and duties of county health departments and the State Department of Health in a pandemic. The centerpiece of the legislation was the requirement for each county, not the state, create “*pandemic flu preparedness and response plans.*” King County’s 2013 *Pandemic Influenza Response Plan* does assume some powers of the governor, but the bulk of the document supports local command and control in conjunction with others. In addition, King County’s 2014 *Isolation and Quarantine Response Plan* has no provision for gubernatorial intervention.

This health district by health district duty to respond is consistent with the 2006 pandemic response law, which states that, “*An effective response to pandemic influenza in Washington **must focus at the local level** and will depend on preestablished partnerships and collaborative planning...*” RCW 70.26.010(5).

DOH formed Emergency Preparedness and Response Regions to plan for and address, not ironically, emergencies.⁷ The map below depicts this regional approach to health emergencies in which a “...*lead agency and coordinator help local health jurisdictions to create local emergency preparedness plans and to collaborate on a regional plan that will tie the local plans together.*”⁸

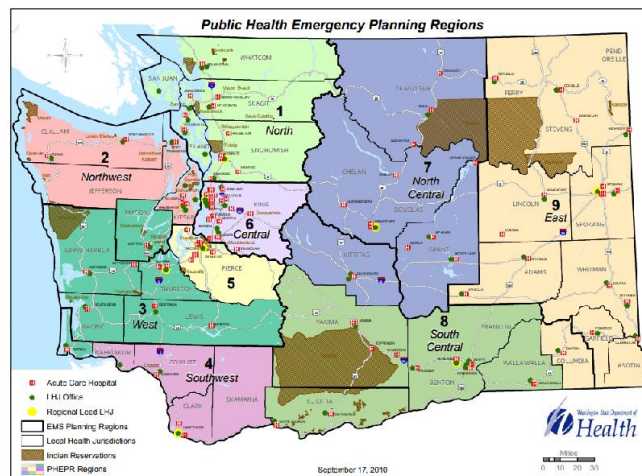


Figure 1: <https://www.doh.wa.gov/Portals/1/Documents/1200/phsd-PHEPR.pdf>

⁷<https://www.doh.wa.gov/AboutUs/ProgramsandServices/EmergencyPreparednessandResponse/EmergencyPreparednessRegions>

⁸<https://www.doh.wa.gov/AboutUs/ProgramsandServices/EmergencyPreparednessandResponse/EmergencyPreparednessRegions>

Attachment B

Powers of the Governor in Public Health Emergencies

The Governor has some emergency powers under RCW 43.06.010 and RCW 43.06.220, but there is an absence of language that ties those powers to pandemics or health emergencies.

There are powers to address “infestation of plant pests⁹” and invasive aquatic species¹⁰, but not viruses or pandemics. The closest one comes is RCW 43.06.010(12) which provides that the governor’s power can only extend to the “area affected¹¹” by a “public disorder, disaster, energy emergency, or riot...which affects life, health, property, or the public peace,” but that section was originally adopted to “*control or suppress riots or unlawful strikes...*” and not to address health emergencies. See 1965 c 8 § 43.06.010. Prior: 1890 p 627 § 1; RRS § 10982.^{12 13}

RCW 43.06.010 has been amended five times after the Department of Health was created in 1989. Energy emergencies were added in 1976. 1975-'76 2nd ex.s. c 108 § 25. Plant infestations were added in 1982. 1982 c 153 § 1. Aquatic species were added in 2014. 2014 c 202 § 305. The legislature never included health emergencies or allow for gubernatorial intervention in contagious diseases, epidemics, or pandemics.

One would need to use common sense and rules of statutory construction to reconcile the clear intent for local control of health emergencies¹⁴ with the specific absence of the governor’s power to address health emergencies in RCW 43.06 to answer the question of the validity of gubernatorial intervention here. The legislature could have easily provided for gubernatorial intervention when it adopted RCW 70.26, but it did not.

A health emergency is not a public disorder, energy emergency, or a riot, so the only remaining question is whether it is considered a “disaster” under RCW 43.06.010(12). RCW 43.06 does not define disaster, but RCW 38.52.010(9)(a) provides:

⁹ RCW 43.06.010(13)

¹⁰ RCW 43.06.010(14)

¹¹ In addition, “...powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation”

¹² “(12) *He may control or suppress riots or unlawful strikes, or any unlawful assembly of ten or more persons, when by such riot, unlawful strike, or unlawful assembly any persons are attempting to commit a felony, or inciting others to commit such crime, or any person or persons are in imminent danger of losing either life or property. Before taking any such action, the governor shall first notify and request the local authorities to suppress such riot, unlawful strike, or unlawful assembly, and if they fail, refuse, neglect, or are unable to do so, he shall issue his proclamation commanding such persons to disperse and refrain from taking part in or encouraging or inciting such riot, unlawful strike, or unlawful assembly, and if thereafter such imminent danger still continues, the governor shall proceed to suppress it by calling into action all the force necessary to accomplish that purpose.*”

¹³ The section was amended in 1969. 1969 ex.s. c 186 § 8 to read, “*He may, after finding that a public disorder, disaster, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in the area affected, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation;*”

¹⁴ Specifically, local response to pandemics in RCW 70.26.

"Emergency or disaster" as used in all sections of this chapter except RCW 38.52.430 means an event or set of circumstances which: (i) Demands immediate action to preserve public health, protect life, protect public property, or to provide relief to any stricken community overtaken by such occurrences; or (ii) reaches such a dimension or degree of destructiveness as to warrant the governor proclaiming a state of emergency pursuant to RCW 43.06.010."

One must construe RCW 38.52.010(9)(a) in the context of all other existing laws and regulations. Arguably, the COVID-19 issue presented a "set of circumstances" that affected "public health," but the question remains whether "immediate action" was, or is still, required by the governor when there is and was an existing legally adopted methodology for responding to pandemics that does not include gubernatorial intervention. See RCW 70.26, WAC 246-100, and WAC 246-110.

The next question is whether RCW 38.52 gives EMD, and therefore the governor, the right to exert direct command and control authority over local health departments/districts. The definitions found in RCW 38.52.010 do not seem to fit local health districts/departments because they are not a "*county, city or town*"¹⁵ and do not "*provide firefighting, police, ambulance, medical, or other emergency services.*"¹⁶ This does not mean that EMD plays no role, it just means that EMD does not play a supervisory role that can supplant the statutory and regulatory authority of local health officers. Therefore, the governor cannot exercise such control either.

One might argue that the governor has authority, through the Secretary of DOH, to bypass local health officers under RCW 43.70.130(7), but there has been no evidence presented that local health officials have failed or have been unable to perform their duties. In addition, to construe a pandemic as the type of emergency that would require the Secretary of DOH to assume local control would not make sense in light of the stated legislative intent in RCW 70.26.010(5) to provide for local control and response in pandemics which are, by definition, emergencies.¹⁷

Further evidence suggests that the governor's powers do not extend to pandemics is that under RCW 43.06.220(2)(g) (iii) the governor cannot suspend laws if the "*the waiver or suspension would conflict with the rights, under the First Amendment, of freedom of speech or of the people to peaceably assemble.*" If the governor cannot waive laws to infringe on those rights the governor certainly cannot impose restrictions on those rights

¹⁵ RCW38.52.010 (20) "*Political subdivision*" means any county, city or town.

¹⁶ RCW38.52.010(21) "*Public agency*" means the state, and a city, county, municipal corporation, district, town, or public authority located, in whole or in part, within this state which provides or may provide firefighting, police, ambulance, medical, or other emergency services."

¹⁷ "*An effective response to pandemic influenza in Washington must focus at the local level and will depend on preestablished partnerships and collaborative planning...*"

either. On the other hand, health officers do have the authority to prevent people from congregating in ways that spread disease. WAC 246-100-030(3).

In sum to construe a “disaster” under RCW 38.52.010(9)(a) in a manner that would give the governor the power to order the closure of businesses, schools, churches, require people to isolate in their homes, and mandate vaccinations would essentially nullify all of the above-referenced health laws and regulations. Any such interpretation would fly in the face of basic rules of statutory construction.

Even if we can get past the apparent intent of RCW 70.26 to provide for local control of pandemics, the question remains whether the governor’s orders are reasonable and not arbitrary or oppressive. That question will not be addressed here except as noted above.