

State solicitor: Legislature never intended to limit governor's emergency powers

By Jayson Jacoby
EO Media Group

SALEM — Oregon's solicitor general contends the Legislature did not intend to limit the duration of an emergency that the governor declared.

Solicitor General Benjamin Gutman asks state Supreme Court in a brief to order Baker County Circuit Court Judge Matt Shirtcliff to vacate his May 18 decision granting a preliminary injunction to a group of plaintiffs, led by Elkhorn Baptist Church in Baker City, who sued Gov. Kate Brown on May 6, claiming she exceeded her legal authority in issuing executive orders during the coronavirus pandemic.

That preliminary injunction, which the state Supreme Court temporarily stayed later on the same day Shirtcliff granted it, would "upend the Governor's phased, data-driven process of reopening the state, threatening to squander the sacrifices that Oregonians have already made to keep one another safe," Gutman wrote in his 42-page brief.

"This is not a close case," he wrote. "No reasonable jurist could conclude that a preliminary injunction is warranted in these circumstances."

Gutman noted most Oregon counties, including Baker County, are in Phase 1 of the state's reopening plan, which relaxed some of the restrictions included in the governor's executive orders.

Gutman submitted the brief on Thursday, as requested by the Supreme Court.

Attorneys for the plaintiffs and a group of intervenors, including Bill Harvey, Baker County Commission chairman, have until Tuesday to submit briefs defending Shirtcliff's

decision.

At issue is the preliminary injunction the judge granted.

It temporarily prohibited the state from enforcing restrictions in Brown's executive orders, including limits on the number of people in public gatherings, one of the main objections the plaintiffs, which include 10 churches, have cited.

But the Oregon Supreme Court later on May 18 issued a stay that temporarily stopped the preliminary injunction from taking effect.

That remains the case, and the governor's executive orders continue to be in effect.

Even if the Supreme Court rules in the governor's favor and vacates Shirtcliff's preliminary injunction, the lawsuit itself would continue, possibly leading to a trial in Baker County Circuit Court.

The legal debate over the preliminary injunction centers on two state laws — Oregon Revised Statute chapters 401 and 433.

Chapter 401, the law the governor cited in her initial emergency declaration on March 8, does not have any time limits on the emergency. The declaration can remain in effect until either the governor, or the Legislature, decides to terminate it.

The Legislature has not convened since the pandemic started.

Chapter 433 deals specifically with public health emergencies, and Brown has invoked the law in several of the executive orders she issued following the initial emergency declaration.

Chapter 433 limits the duration of a public health emergency to 28 days.

The plaintiffs contend — and Shirtcliff agreed in his decision granting the preliminary injunction — that

by invoking chapter 433, Brown's executive orders are subject to the 28-day limit.

But Gutman, in his brief to the state Supreme Court, argues that Shirtcliff "erred in concluding that those statutes — ORS chapters 401 and 433 — conflict with one another, and that the expiration provisions of chapter 433 effectively limit the duration of a state of emergency declared under chapter 401."

Gutman cites a clause in chapter 433 that states that nothing in that chapter "limits the authority of the Governor to declare a state of emergency" under chapter 401.

Chapter 433 also states that if the governor declares a state of emergency under chapter 401, she "may implement any action authorized" by chapter 433.

The two statutes are not in conflict, Gutman argues, but are instead complementary.

Gutman argues that if the Legislature had intended, when it passed chapter 433, to limit the governor's authority specifically during public health emergencies, then lawmakers likely would have also amended chapter 401 so that diseases would no longer qualify as disasters under that law.

But the Legislature didn't do so — chapter 401, which the governor invoked in her initial disaster declaration, lists "disease" as one reason for such a declaration.

Gutman also notes that "chapter 433 repeatedly cross-references chapter 401, underscoring that the statutes were meant to harmonize rather than conflict."

Gutman goes on to cite statements by legislators in 2003 when they were considering chapter 433. The record shows, Gutman argues, that lawmakers did

not intend chapter 433 to limit the governor's powers under chapter 401.

Gutman includes in his brief a quote from the state's public health officer who stated that an argument could be made that chapter 401, which dates to 1949, gives the governor the authority to take all the actions listed in chapter 433, and more.

Gutman also argues that the 28-day time limit in chapter 433 applies only to the governor's proclamation of a public health emergency, but not on the actions, such as restricting businesses and the movement of residents, that the governor is authorized to take under that law.

Gutman contends that Shirtcliff should not have granted the preliminary injunction because the plaintiffs' request for that action doesn't satisfy the legal requirements, including a "balance of harms" and whether the injunction is in the public interest.

Although the issue of the preliminary injunction doesn't directly involve the plaintiffs' freedom of religion under the Oregon Constitution, the lawsuit does mention both the state and federal constitutional guarantees of religious freedom.

Gutman contends that the governor's executive orders do not violate the plaintiffs' rights because the orders "treat faith-based gatherings the same as non-faith-based gatherings that implicate the same public-health concerns. They are neutral laws of general applicability that do not target religion for unfavorable treatment. Faith-based gatherings, just as much as non-faith-based gatherings, pose a high risk of spreading the virus that causes COVID-19."

Twitter suspends account of Oregon group claiming changes to party affiliations

By Hillary Borud

The Oregonian/OregonLive via AP StoryShare

SALEM — Twitter and Facebook are taking steps to stop the spread of misinformation about Oregon's elections system, after Republican Secretary of State Bev Clarno's administration alerted the social media companies to what she said were falsehoods being shared on their platforms.

Oregon election officials, from county clerks to the secretary of state, hear complaints from voters during every primary election, because some people who receive nonpartisan ballots believed they registered as Democrats or Republicans.

This year, those frustrations were amplified when a Facebook group called "My party was changed Oregon" and the Oregon Republican Party launched an effort to gather firsthand accounts from voters who say their party affiliation was changed without their consent. They shared some of those accounts with the reelection campaign of President Donald Trump, who has attacked vote-by-mail in recent weeks and on Tuesday received his first Twitter fact-check warning in response to his remarks on voting.

Starting in April, some voters who said they are lifelong Democrats contacted The Oregonian/OregonLive to say they were upset to receive nonpartisan ballots. Most of them turned out to be infrequent voters who had been registered as nonpartisan voters for years and had not voted in recent primaries, public records showed.

Then May 18, the website Gateway Pundit, which Facebook says is "known

for publishing falsehoods and spreading hoaxes," published an unverified claim that Oregon officials changed hundreds of Republicans' ballots to nonpartisan.

After Clarno's administration contacted the social media companies, Facebook tagged the post as "partly false" and began referring people to fact checks on it by the websites PolitiFact, run by the journalism nonprofit Poynter Institute, and Lead Stories, which is a project of the nonpartisan Rand Corporation think tank. Twitter suspended the account on Friday.

In the wake of last week's primary, "Elections officials highlighted social media activity that was occurring on their platform that was false," wrote Andrea Chiapella, legislative and communications director for the secretary of state, in an email. "They looked into it and their third-party fact checkers deemed it partly false."

That has not deterred people involved with the Oregon group. Nicole Chaisson, founder of the Facebook group "My party was changed Oregon," announced online Tuesday she was preparing to launch paid Facebook ads to solicit more such stories.

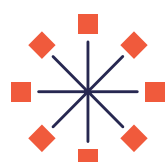
Chaisson said she stopped the process and deleted the ads while they were still going through Facebook's review process because she wants to rework the ads to make them clearer.

Chaisson, who lives outside The Dalles, said she started the Facebook group in May after a friend who wanted to vote in the 2nd Congressional District primary found out she could not do so because she was registered as a nonaffiliated voter.

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