

PHASE 2

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For instance, Bennett pointed out that the larger a building, the more people it can accommodate while social distancing is maintained.

The state's current "one-size-fits-all" approach, as Bennett describes it, fails to acknowledge those differences. The limit on gatherings under phase one is 25 people.

The county's proposal also asks the governor to consider differences in the risk of virus transmission between indoor and outdoor events — a key

issue as summer approaches and organizers of local festivals such as Miners Jubilee ponder whether to go ahead with their events.

The proposal reads: "If an attendee cap is going to be considered, please consider making that cap higher for outdoor events."

Restaurants and bars were allowed to resume on-site dining during phase one, which Baker County started May 15.

The county's proposal for phase two suggests allowing restaurants and bars to install "high dividers, 5 or 6 feet

tall, between booths to create a barrier similar to plexiglass protectors at a cash register. This can allow more booths to safely be available."

The county is also asking the governor to allow restaurants and bars to remain open until midnight — the current limit is 10 p.m.

The proposal also calls for truck stop restaurants to "resume flexible service hours, up to 24-hour service."

Under the heading "recreation and entertainment," the county's proposal calls for allowing theaters, bowling alleys and "similar venues" to

reopen "where social distancing between parties can be maintained."

The county also asks the governor to allow "guided raft trips, jet boat trips and similar activities to resume even when social distancing cannot be maintained. If necessary, and in consultation with the industry, limit trips to parties who are together."

The county also proposes to open skate parks, and all campgrounds.

Baker County's Hewitt and Holcomb parks on Brownlee Reservoir near Richland are open, as are Idaho Power

Company campgrounds in Hells Canyon. Some Oregon state park campgrounds opened Friday, and others are slated to open June 9.

Forest Service and BLM campgrounds remain closed.

Bennett said he's confident Baker County will qualify for phase two. The state's criteria include that a county has not had a "significant increase in the percentage of positive cases out of total tests in your county over the past 7 days."

As of Friday, Baker County has had one confirmed case of COVID-19. It was reported in early May.

"We're in good shape," Bennett said.

The county submitted its application for phase two approval to the state on Friday.

State officials have not announced specific changes in restrictions during phase two. The state asked counties to offer suggestions, which prompted Baker County to craft its proposal.

The proposal also urges the governor to consider creating a "phase 2A" that would further ease restrictions in counties, possibly including reopening swimming pools and playgrounds.

LAWSUIT

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That preliminary injunction, which the state Supreme Court temporarily stayed later on the same day Shurtleff 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 that most Oregon counties, including Baker County, are in phase one 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 June 2 to submit briefs defending Shurtleff'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 Shurtleff'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 (ORS) 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 Shurtleff 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 Shurtleff "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 which 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 — as she did March 8 — she "may implement any action authorized" by chapter 433.

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

"Contrary to the trial court's conclusion, the two statutes do not conflict; they give the Governor complementary powers in distinct if overlapping circumstances," he wrote in the brief. "The text, context, and legislative history of chapter 433 show that the legislature did not intend to limit the Governor's existing chapter 401 emergency powers."

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 emergencies under that law.

But the Legislature didn't do so — chapter 401, which the governor invoked in her initial emergency

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.

"The legislature included a time limit on chapter 433 declarations because it understood that if a more prolonged response were required, the Governor could declare an emergency under chapter 401 and exercise the greater powers authorized under that statute," Gutman wrote in his brief.

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 Shurtleff 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.

Gutman argues in the brief that both the balance of harms and the public interest "overwhelmingly weigh against an injunction disrupting the state's ongoing effort to contain the COVID-19 pandemic."

"The threat to the public health caused by suddenly lifting the executive orders overwhelms any harm that plaintiffs and intervenors will suffer from following those orders for now," Gutman writes.

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.

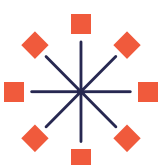
In his brief, Gutman contends that the governor's executive orders do not violate the plaintiffs' rights because the orders "treat faith-based gatherings the same as non-faith-based gatherings that implicate the same public-health concerns. They are neutral laws of general applicability that do not target 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, and all those gatherings need to observe reasonable social distancing measures to slow the pandemic."



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