


# ACLU: Pandemic does not end protest rights

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Coloradans who recently protested the state's stay-home orders issued in response to the COVID-19 emergency appear to be on firm legal footing, even though medical experts are concerned such gatherings could further spread the virus.

"I think the right to protest is a fundamental constitutional right," said Mark Silverstein, legal director for the Denver chapter of the American Civil Liberties Union.

"I think it would be very difficult for a prosecutor to say this protest violated a stay-at-home order and we think the stay-at-home order overrides your constitutional right to protest."

Governor Jared Polis issued successive executive orders starting in March, in response to the pandemic that was declared over COVID-19, a viral illness that had, as of the most recently available information, killed nine in Montrose County and 506 in the state. The virus has also sickened 10,868 state residents, Polis said Wednesday, reiterating the need to limit social interactions to the greatest possible extent, even as the stay-home order is being relaxed.

There is no cure or vaccine for the novel coronavirus-2019 and the orders were issued in hopes of preventing outbreaks that could overwhelm health care resources. Unlike influenza, which strikes people year-round, and for which vaccines exist, COVID-19 struck thousands of people nationwide in a short period, straining health care systems. Montrose, which implemented several public health orders, has so far avoided experiencing a surge on hospital resources.

Polis' stay-home order closed businesses that were not defined as "essential" and asked residents to limit outings to essential duties, such as buying food, seeking medical care, or outdoor exercise. The order also precluded gathering in groups of more than 10 and encouraged keeping at least 6 feet from others when in public (social distancing).

That order is set to expire Sunday and the state will transition to a "safer at home" order, in which among other provisions, some businesses can reopen, with precautions to help prevent the spread of COVID-19. The prohibition on large gatherings remains, including in schools, which Polis on Wednesday said will remain closed for the rest of the academic year.

Although national media has reported widespread report for stay-home and similar orders, on April 18, protests of Colorado's took place around the state, including in Montrose and Grand Junction.

"I think people have the right to do that," Montrose County Republican Party Chairman Ray Langston said. "People are getting a little bit tired of being cooped up. Some of the shutdown of businesses makes absolutely no sense. Some pose a minimal risk and therefore, there is no reason to keep them shut down, other than that some of our elected officials are doing things with a broad brush. I think it's wrong."

It's not a matter of politics, Montrose County Democratic Party Chairman Kevin Kuns said.

"The First Amendment ... I would fight and die for that, because I think there is a reason it is the First Amendment," he said. However, he has also experienced people harassing him and others when they have exercised their right to march in support of such rights as women's suffrage; he therefore sees hypocrisy, he said.

Kuns also said it troubled him to see people at the Montrose rally this past weekend hugging and interacting closely during a time of pandemic, calling that a "stab in the back" to health care workers, first responders and grocery store employees.

Gatherings in the state this past weekend drew more than 10 people to a single location and therefore violated provisions of the stay-home order, but Silverstein said it is unlikely anyone could be successfully prosecuted for that. In order to overcome constitutional rights of peaceable assembly and free speech, the government would have to prove both a compelling interest, as well as establish that its orders are the most narrow way to advance that compelling interest, he said.

"I think the protesters, especially if they are observing social distancing while doing it, are going to be all right. ... I put my money on the protesters here," Silverstein said.

He said that to his knowledge, no one was cited over the Colorado protests.

The same legal rationale holds true for religious services, Silverstein said: the government's compelling interest to limit such gatherings would have to be the least restrictive means of doing so. "If I went to court, it would be the issue of whether the exceptions are sufficiently narrowly tailored or not. I noticed Gov. Polis had the sense to include an exemption for religious services in his stay-at-home order," he said.

Houses of worship in Montrose have shifted their services to online, remote options. No issues have been reported.

"Coloradans have a First Amendment right to protest and to free speech and the governor hopes that they are using social distancing and staying safe," a Polis spokesperson said in a written response to the Montrose Daily Press.

"No one wants to reopen Colorado businesses and lift these restrictions more than the governor, but in order to do that, Coloradans have to stay home as much as possible during this critical period, wear masks and wash their hands regularly to slow the spread of this deadly virus."

Local health officials expressed concern over large gatherings, while acknowledging constitutional rights.

"I worry about gatherings. The county public health department wants people to be able to gather and carry on with their activities that they feel are reasonable and safe, as soon as possible. But we are also the ones responsible if there is a surge here that overwhelms (resources)," said Dr. Joe Adragna, Montrose County's contracted pandemic emergency specialist, and the medical adviser for Montrose County Public Health.

Adragna is separately the first vice-chairman of the Montrose County Republican Party, but was not speaking in that capacity.

Slowing the spread of COVID-19 is vital to preventing a surge, he said, and a movement going counter to that should be considered in terms of risk.

"The right to assemble and protest is a fundamental right of Americans. Nobody in Montrose County government wants to take away anybody's freedoms. We just have to do it (assemble) with some level of conscientiousness," Adragna said.

That includes assembling in ways that maintain social distancing, assembling while wearing a mask, and in ways that respect first responders, but also in ways that let officials know they are accountable, so they must be careful with restrictions, he said.

"Overall, I was happy I didn't see a fight erupt and that people were able to make their opinions known without causing harm. I hope we don't see an increase of cases," Adragna said.

Because people can carry the virus before they show symptoms, Adragna said public health officials will be watching for any spike in cases in the coming weeks.

An increase in cases will give elected officials like Polis more reasons to implement restrictions, he added.

Montrose should work to show it's done its part to end the pandemic as quickly as possible, Adragna said.

"If that means we'll have to wear a mask for the next month, I'm going to do that, so I don't have to wear a mask for the next year. ... Let's just do our part and get over it," he said.

Langston said individuals need to make smart decisions and that the economy needs to be taken into account.

"If people exercise good judgment and use precautions, then people should be allowed to once again start going out in public, and we need to reopen our economy. We're printing money so fast we're burning up the printing press," he said. "Our Constitution didn't get suspended because of this."

Langston said he is concerned about the spread of any disease and he has a lung condition that puts him in the high-risk category for COVID-19.

"Obviously, I do not need this virus. I am concerned about that. On the other hand, if people use their judgment and take precautions, they should be allowed to go out," he said.

"There will always be people who do not use good judgment. That's one of the risks of living in a free society."

Kuns said the virus stands to claim in three months more American lives than were lost in the Vietnam War. "That's not the flu. I appreciate that we're all making sacrifices and that it is hard on people. But in the end, if we're not all in this together, it's going to get worse," he said, adding that he fears a second round of the disease if the state reopens too quickly.

"I feel for everybody. But I'm not so sure showing up on the steps of a courthouse in a city, armed with weapons, is the answer to how we all come together to fix this thing. There's got to be a better way. That's the bottom line."

Polis in his lengthy remarks Wednesday spoke of testing and other issues, and drove home the need for continued precautions.

People should continue to wear non-medical masks when they are in public places and should not travel far from home for recreation, he said, also reminding people that seniors and those with preexisting conditions remain at extreme risk. Colorado's success in combating the virus will come down to personal responsibility and maintaining precautions, the governor said.

"It's not an opportunity to go out and get the virus ... It's a pandemic, not a vacation. We'll get through this, but to get through this, we'll need to forego some of these things through May," Polis said.

*Note: The online version of this story includes a statement from the governor's office that arrived too late to be included in the print edition.*