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*Attorney for Defendant*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI  
\*\*\*MAGISTRATE DIVISION\*\*\*

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STATE OF IDAHO,	)	Case No. CR28-20-5861
	)	
Plaintiff,	)	<b>MEMORANDUM IN SUPPORT OF</b>
	)	<b>MOTION TO DISMISS</b>
vs.	)	
	)	
CHRISTA M. THOMPSON,	)	
	)	
Defendant.	)	

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**BACKGROUND**

Defendant Christa M. Thompson is a married mother-of-six living in Rathdrum, Idaho. Upon the death of her father-in-law, her husband became the personal representative and beneficiary of his estate. The estate included a vast amount of personal property, but very little in the way of liquid assets. Faced with unsustainable storage fees and the challenges of dealing with the personal property while her husband works as an over-the-road truck driver, Mrs. Thompson decided the most expeditious way to liquidate the estate and preserve its value would be to sell the items from her home (this sale has been characterized as a “yard sale”).

Despite numerous attempts to coordinate the sale with the local Rathdrum police and comply with their extralegal conditions for the sale, Mrs. Thompson was cited with a violation of

Idaho Code § 56-1003(7)(c), alleging that selling items from her father-in-law's estate from her home contravened the "Order to Self-Isolate for the State of Idaho" (hereinafter also referred to as the "Order") issued by Director Dave Jeppesen of the Idaho Department of Health & Welfare on March 25, 2020. Mrs. Thompson now motions this honorable Court to dismiss the charge, inasmuch as she actually did not violate either Idaho Code 56-1003 or the Order or, in the alternative, the Order itself is unconstitutionally vague and/or Mrs. Thompson's actions were excusable under the common law defense of necessity.

### **LEGAL ARGUMENT**

**I. Mrs. Thompson did not violate the plain language of Idaho Code § 56-1003(7)(c) and its relevant definitions.**

Mrs. Thompson has been charged with a violation of Idaho Code § 56-1003(7)(c), which states that, "Any person who violates an order of isolation or quarantine shall be guilty of a misdemeanor." On the citation, the officer wrote "violation of isolation order." Idaho Code § 56-1001 provides the definitions relevant to Title 56, Chapter 10, under which Mrs. Thompson has been charged. "Isolation" is defined as "the separation of infected persons, or of persons suspected to be infected, from other persons to such places, under such conditions, and for such time as will prevent the transmission of the infectious agent."

The State has failed to put forth any facts to suggest that Mrs. Thompson is or has been infected with COVID-19 or any other infectious agent, or which would constitute a reasonable basis to suspect the same. Even if one were to assume the issuance of an order could, *ex nihilo*, generate a reasonable suspicion of a biological fact (e.g.: being "infected") among the entire population of the state, the Order requires people to stay home unless they fall under the exemptions contained in the Order (those exemptions which apply here are outlined in subsequent sections below). Home, then, is the "place" and "condition" which constitutes

“isolation.” The conduct of which Mrs. Thompson stands accused, holding a yard sale, definitionally occurred at her home. Thus, as a logical matter, she simply could not have violated an “order of isolation.”

If the State wishes to argue the citing officer got it wrong, and that Mrs. Thompson actually violated an “order of quarantine,” a similar problem arises. I.C. § 56-1001(8) defines “quarantine” as “the restriction placed on the entrance to and exit from the place or premises where an infectious agent or hazardous material exists.” Again, undersigned counsel is unaware of any facts which would suggest an “infectious agent” or “hazardous material” “exists” at Mrs. Thompson’s residence. Even assuming, *arguendo*, that the issuance of the Order suddenly confirmed the “existence” of such agents or material at every premises in the state (except, of course, Walmart, Home Depot, Albertsons, etc.), Mrs. Thompson is accused of holding a yard sale at her home, not “entering” or “exiting” her home. Again, as a logical matter, she could not have violated an “order of quarantine” by remaining at her home and holding a yard sale there. It is curious, indeed, why the Rathdrum police failed to cite any individual entering and exiting her premises to patronize the yard sale, if such a charge could be valid.

**II. Mrs. Thompson’s yard sale was not a “business,” nor did it have a “facility in the State of Idaho.”**

Section 5 of the Order states, “All businesses with a facility in the State of Idaho, except Essential Businesses as defined below in Section 8, are required to cease all activities at facilities located within the state except Minimum Basic Operations, as defined in Section 8.g.”

Infrequent, occasional sales of tangible personal property (“yard sales”) have never been considered “businesses,” subject to the same licensing requirements and other regulations which apply to other commercial endeavors. For example, Idaho Code § 63-3622K specifically exempts occasional sales of tangible personal property from the requirement imposed on

businesses to collect sales tax. The Idaho Administrative Code states that, “Tangible personal property may be sold tax exempt at a home yard sale,” if the yard sale is of “short duration lasting no more than a few days,” the seller is not “in the business of regularly selling the same or similar property as that which is offered for sale at the yard sale,” the items offered for sale are not “items which are specifically purchased for the purpose of reselling them,” the items are “owned by seller,” and the sale is “conducted on the residential premises of the seller.” Idaho Admin. Code r. 35.01.02.097 (1993).

Here, Mrs. Thompson was conducting a yard sale which was of short duration, she is not in the business of regularly selling the same or similar property as that which she offered for sale at her yard sale, the items she sold were not purchased for the purpose of reselling them, the items were owned by her and her husband, and the sale was conducted at her home. Neither her nor the yard sale operation had any other “facility.” It is not clear why her yard sale activity would be considered a “business” which the Order required to cease operation at “facilities” located within the State of Idaho. This designation is especially curious in light of the fact that not a single citation has been issued to other sellers of personal property or holders of yard sales in the entire state while the Order remained in effect.

**III. Even if Mrs. Thompson’s yard sale is considered a “business” with a “facility,” it is an “essential business” under the Order.**

Section 8 of the Order states, in relevant part, that, “All individuals currently living within the State of Idaho are ordered to self-isolate at their place of residence...All persons may leave their residences only for Essential Activities, Essential Governmental Functions, or to operate Essential Businesses, all as defined in Section 8.” Section 5 goes on to say that, “All Essential Businesses are **strongly encouraged** to remain open” [emphasis added]. Finally,

subsection 8.f and its various subparts provide definitions of “Essential Businesses” under the Order; those most applicable to Mrs. Thompson’s activities will be dealt with in turn below:

A. Mrs. Thompson’s yard sale provided necessities of life for economically disadvantage and otherwise needy individuals.

Subpart 8.f.iv of the Order defines an essential business as one which provides, “food shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals.” At her yard sale, Mrs. Thompson sold, among other items, household and personal goods necessary to food preparation, hygiene, and other necessary life functions. As with any yard sale, Mrs. Thompson’s prices were lower than new retail, which obviously attracts economically disadvantaged and otherwise needy individuals who cannot afford to purchase new products. It should be noted here that “necessities of life” and “economically disadvantaged and otherwise needy” are impossibly vague terms, and utterly lacking in legal precision, but this point will be dealt with more fully below.

B. Mrs. Thompson’s yard sale supplied products needed for people to work from home.

Subpart 8.f.xv of the Order defines an essential business as one which supplies “products needed for people to work from home.” While this is a vague qualification, the spirit of the Order would seem to indicate this includes not only products actually needed to carry out one’s occupation from his residence, but which would enable one to do so safely and securely without leaving one’s home. This is, after all, an “Order to **Self-Isolate** for the State of Idaho.” To that end, Mrs. Thompson sold necessary household goods, as well as products which might be more traditionally associated with carrying out work tasks, like tools and electronic equipment.

C. Mrs. Thompson’s yard sale supplied other essential businesses with the support or supplies necessary to operate.

Subpart 8.f.xvi of the Order defines as essential business as one which supplies, “other Essential Businesses or Essential Government Functions with the support or supplies necessary to operate.” Mrs. Thompson’s yard sale included many power and hand tools, lawn care equipment, and the like used by those in the building trades and landscaping. Indeed, contractors came to the yard sale and told Mrs. Thompson they appreciated being able to buy tools and other needed equipment even though they could not make it to the big box hardware stores during reduced COVID-19 hours. “Plumbers, electricians, exterminators, landscapers, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses” are defined as Essential Businesses under the Order. Thus, Mrs. Thompson’s yard sale, to the extent it can be described as a “business,” was an “Essential Business” supplying other “Essential Businesses.”

**IV. Even if Mrs. Thompson’s yard sale is considered a “business with a facility in the State of Idaho,” and not an “essential business,” it was only engaged in “minimum basic operations to maintain the value of the business’s inventory and ensure security.**

Section 5 of the Order requires “all businesses with a facility in the State of Idaho, except Essential Businesses...to cease all activities at facilities located within the state except Minimum Basic Operations, as defined in Section 8.g.” Section 8.g defines “Minimum Basic Operations” to include, “The minimum necessary activities to maintain the value of the business’s inventory, ensure security, process payroll and employee benefits, or for related functions.”

Here, Mrs. Thompson had a substantial amount of personal property in her yard for which she could not afford to pay storage company fees, and had no alternate location to secure it. This property was exposed to the elements and to the risk of theft. Selling the “inventory,” such as it was, as quickly as possible was her only means of “maintaining its value” and “ensure security.”

**V. Even if Mrs. Thompson violated the Order, the Order is unconstitutionally vague.**

The void-for-vagueness doctrine arises from the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and mandates that statutes defining criminal conduct be worded with sufficient clarity that ordinary people can understand what conduct is prohibited and that the statute be worded in a manner which does not allow arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The Idaho Supreme Court has held that due process requires that all “be informed as to what the State commands or forbids” and that “men of common intelligence” not be forced to guess at the meaning of the criminal law. *State v. Cobb*, 132 Idaho 195, 969 P.2d 244 (1998). A statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes. *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9<sup>th</sup> Cir. 1984). A statute may also be unconstitutionally vague if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute. *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 1858-59, 75 L.Ed.2d 903, 908-09 (1983).

Idaho Code § 56-1003(7) empowers the director of the Idaho Department of Health and Welfare to “impose and enforce orders of isolation and quarantine to protect the public from the spread of infectious or communicable diseases or from contamination from chemical or biological agents, whether naturally occurring or propagated by criminal or terrorist act.” I.C. § 56-1003(7)(c) makes the violation of such orders a misdemeanor. The statute itself, while a sweeping delegation of legislative authority to the executive branch, does not appear to be unconstitutionally vague; the problem lies within the text of the Order of March 25, 2020.

Simply put, the Order fails to put the average citizen on notice of the conduct which is proscribed and subject to criminal penalties.

Section 8.f of the Order, purporting to define “Essential Businesses,” has a number of inadequate definitions and terms which do not reasonably inform citizens of which conduct is permissible and which is prohibited, nor do they adequately guide those charged with enforcing the law. For instance, subpart 8.f.iv defines “Businesses that provide food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals” as “Essential Businesses.” What are “necessities of life?” What does “economically disadvantaged or otherwise needy” mean? Clearly, the meanings of these phrases are entirely subjective.

Similarly, subpart 8.f.ix includes, as “Essential Businesses,” “Plumbers, electricians, exterminators, landscapers, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses.” How can ordinary citizens of average intelligence know objectively what “other service providers” are included here? Which services are necessary to provide what levels of “safety,” and “sanitation?” What is an “essential operation” of a residence as opposed to, perhaps, a “non-essential” or “superfluous” use of one’s home?

Subsection 8.g, regarding “Minimum Basic Operations,” is likewise vague and ambiguous. Businesses not otherwise deemed “Essential” are permitted to carry out only “Minimum Basic Operations” under the Order. “Minimum Basic Operations” are defined as “(i) The minimum necessary activities to maintain the value of the business’s inventory, ensure security, process payroll and employee benefits, or for related functions,” and “(ii) The minimum



necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.”

The meanings of these “definitions” are not just subject to reasonable differences of opinion, but are virtually guaranteed to vary person-to-person. The “minimum necessary activities” required to “maintain the value of a business’s inventory” will vary not just between industries, but in the subjective opinions of various business owners. “Related functions” is a wide-open phrase with no clear definition. “Facilitat[ing] employees of the business being able to continue to work remotely from their residences” cannot be claimed to provide a clear guide to legal versus illegal conduct.

Because of the poverty of clarity in these definitions, arbitrary, selective, and discriminatory enforcement was bound to result and, indeed, has. Mrs. Thompson is the only person in the entire state who has been cited for selling items of personal property from her home. Presumably, state and local police agencies have access to the internet as an investigative tool; why, then, have there been no other citations issued to the multitude of individuals who sold cars, boats, trailers and yes, even held yard sales, during the time the Order was in effect, and which could be readily identified with just a cursory glance at Craigslist or Facebook? To ask the question is to answer it.

**VI. Even if Mrs. Thompson violated the language of the Order, and the Order is held to be constitutionally valid, her actions were excusable under the common law defense of necessity.**

Idaho Code § 73-116 provides that, “The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.” The Idaho Supreme Court has recognized the common law defense of necessity, stating as its underlying

premise that, “a person who is compelled to commit an illegal act in order to avoid a greater harm should not be punished for that act.” *State v. Hastings*, 118 Idaho 854, 855, P.2d 563, 564 (1990). The elements of the common law defense of necessity are (1) a specific threat of immediate harm, (2) the circumstances which necessitate the illegal act must not have been brought about by the defendant, (3) the same objective could not have been accomplished by a less offensive alternative available to the actor, and (4) the harm caused was not disproportionate to the harm avoided. *Id.*, citing E. Arnolds and N. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 *J.Crim.Law & Criminology* 289, 294 (1974); C. Kenny, *Outlines of Criminal Law*, 68-70 (1907).

Here, Christa Thompson faced an impossible choice: liquidate her late father-in-law’s estate as quickly as possible, or watch her husband’s inheritance be destroyed by rain and thieves. She chose to preserve the value of her family’s property, which any reasonable working person would have done. Mrs. Thompson did not choose the timing of her father-in-law’s passing, nor did she bring about her family’s inability to pay thousands of dollars per month in storage fees to stow the property until some unknown future date. With her husband on the road trying to earn an income, she had no other means of protecting and maintaining the value of the assets while raising six children. The harm which would have resulted from her inaction was immediate and tangible: the destruction of valuable property, potential code violation fines for having garbage on her property and being unable to remove it and, even in the best case, dump fees. It is unclear what, if any, actual “harm” to any person resulted from Mrs. Thompson’s sale of items from her father-in-law’s estate.

If the Court determines that Mrs. Thompson violated the Order, and that the Order is constitutionally valid, the charge against her should be dismissed as it was committed due to necessity.

### CONCLUSION

Mrs. Christa Thompson did not violate the plain language of the Idaho Code § 56-1003(7)(c), nor did she violate the plain terms of the “Order to Self-Isolate for the State of Idaho” issued by Director Jeppesen of IDHW on March 25, 2020. However, if the Court does find that Mrs. Thompson violated the Order, the Order should be voided as unconstitutionally vague. Finally, even if Mrs. Thompson violated the Order, and the Court finds the Order to be constitutionally sound, her actions were excusable under the common law defense of necessity.

For the foregoing reasons, Defendant Christa M. Thompson respectfully requests the dismissal of the charge against her.

DATED this 4<sup>th</sup> day of August, 2020.

DINDINGER & KOHLER, PLLC

/s/ Edward W. Dindinger  
Edward William Dindinger, Esq.  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of August, 2020, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS was served upon:

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