

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

DEANNA SUSAN BREKKE T/D/B/A	:	
BLACK FOREST BISTRO, and	:	
DEREK GOSCINIAK	:	
Plaintiffs,	:	Civ. No.:
	:	
v.	:	
	:	
THE HONORABLE JARED POLIS,	:	
GOVERNOR,	:	
in his official capacity as Governor of the	:	
State of Colorado,	:	
JILL HUNSAKER RYAN , in her official	:	
capacity as Executive Director, Colorado	:	
Department of Health and Environment	:	
and COLORADO DEPARTMENT OF	:	
PUBLIC HEALTH AND ENVIRONMENT	:	
Defendants.	:	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Prelude

Although Plaintiffs and their counsel feel strongly that Governor Polis is acting in good faith in his efforts to help protect Colorado citizens, the United States Supreme Court has recently made clear “Government is not free to disregard the First Amendment in times of crisis. ... Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles. ...” (*Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. (2020), (Gorsuch, J. concurring with the *per curiam* opinion)).

1) On January 21, 2020, the first confirmed case of COVID-19 in the United States was diagnosed.¹

¹ Press Release, Ctrs. for Disease Control & Prevention, First Travel related Case of 2019 Novel Coronavirus Detected in United States, CDC Newsroom (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

2) On March 5, the first presumptive cases of COVID-19 were identified in Colorado.²

3) On March 10, Defendant Polis, the Colorado Governor, declared a state of disaster emergency in the State pursuant to the Colorado Disaster Emergency Act (“CDEA”), Colo. Rev. Stat. §§ 24-33.5-701 to 717.

4) Since that time, Governor Polis and Defendant Ryan, the Executive Director of Defendant CDPHE, have issued numerous Executive Orders and Public Health Orders with the purpose of slowing the spread of COVID-19 in Colorado.³

5) Among other things, these orders have temporarily closed certain businesses, then permitted them to reopen with precautions in place; restricted gathering sizes at numerous facilities, including churches and other houses of worship; required businesses to implement measures like cleaning and disinfecting high-touch surfaces and ensuring proper ventilation; first required, then encouraged individuals to stay at home or outdoors as much as possible, except to perform necessary activities; required individuals to wear face masks in public indoor spaces, with certain exceptions; and required individuals to maintain a six-foot distance from non-household members in certain public spaces.

6) At issue herein is the Second Amended Public Health Order 20-36, COVID-19 Dial, dated November 20, 2020 (“Operative Order” or “Order”) and the Third

² Press Release, Colo. Governor, Updated Information on COVID-19, Colo. Off. State Web Portal (Mar. 5, 2020).

³ See CDPHE, All Public Health & Executive Orders, Colo. COVID-19 Updates, <https://covid19.colorado.gov/prepare-protect-yourself/preventthe-spread/public-health-executive-orders> (last visited Oct. 14, 2020).

Amended Public Health Order 20-36, COVID-19 Dial, dated December 7, 2020 (“Amended Order”).

7) Both orders violate Plaintiffs’ constitutional rights of free assembly and the right to facilitate such assembly, its right to equal protection under the law, and its right to procedural due process. As such, this suit arises under the United States Constitution. And because the State is infringing the fundamental right of assembly, strict scrutiny of the Defendants’ actions is required.

8) The State is classifying businesses in twenty-two categories and is applying COVID-19 restrictions on them based on their category (which is defined by the activity of the business). The categories are arbitrary and appear to have been fashioned without even a rational basis, let alone the tailoring required for infringing a fundamental right like assembly.

9) As an example, both animal grooming services and libraries are defined as “critical services” under the “Critical Businesses List,” which is the same list that houses of worship – clearly protected under the First Amendment – are now listed under.

10) While it is likely people could survive without getting their pet’s nails clipped by a groomer or without choosing a new selection of books to borrow from the library, these “Critical Businesses” have been allowed by the Amended Order to “continue to operate without capacity limitations” indoors even when a county reaches the Red Level on the COVID-19 Dial. Restaurants – not deemed “critical” by the orders even

though they literally feed people and provide protected assembly space – are subject to a 0% indoor capacity.

11) The level of COVID-19 infections in a county is being determined by a color-coded chart reminiscent of the Homeland Security Advisory System of more than a decade ago.

12) Plaintiff falls into two categories, Restaurants-Indoor and Restaurants-Outdoor. No matter the color on the chart, the indoor dining will range from 50% capacity to full shutdown and outdoor dining will range from mandatory distancing between tables to full shutdown. If Plaintiffs did not serve food, they would be shuttered until a county is bestowed a green color. If, instead, Plaintiffs chose to offer dog washes and grooming, it could still serve customers in person, indoors, even in Level Red. This is not narrow tailoring.

13) The chart colors are determined by three factors. The first being occurrences in the past two weeks, the second being total test administered positivity rate, and the third being hospitalizations. It is distressing to report that two of these factors are not being applied in any sort of rational basis.

14) The first factor, occurrences in the past two weeks, has somewhat of a firm basis because it is a measure of how many people have been infected divided by population for the past two weeks. Issues with testing reliability and access are problematic here, but it is likely that we can reliably measure the number of COVID-19 cases in a county. Dividing it up by county is itself arbitrary and not narrowly tailored to

avoid infringement on the fundamental right of assembly when dealing with a virus that respects no political boundaries and spans multiple counties across the state.

15) For example, this boundary problem results in a discriminatory effect based not only on business size, but also on location. An urban restaurant cannot do a tent like a rural one, nor can a business in a regulated association or community. Those entities can not take advantage of the tent exception. The State is concerned about public gatherings and limiting their size by restricting indoor dining, unless that indoor dining is transformed into outdoor dining under a tent, in which case it is now subject to a more lenient restriction. The State has not considered any of these effects and has not narrowly tailored their Rules to preserve assembly rights based on individualized circumstances.

16) Factor two, however, is more slippery. This one is measured by percentage of positive COVID-19 tests in a county. In addition to the boundary problem, this factor has the following issues: (1) over what period of time does the rate have to be over a limit to trigger this factor and (2) how many tests are being administered per capita, because there is a selection bias given that those without symptoms are unlikely to be tested which can radically alter the denominator of that ratio. Again, not narrowly tailored to avoid infringement on the fundamental right of assembly.

17) The third factor is the most problematic. If you look at the State's guidance as of filing, it says "Increasing, stable, or declining?" for all colors except green and purple. That is not a metric by any means, except that when the hospitals get to 90% capacity then we are all on a purple shutdown.

18) Furthermore, it appears that the State is using relief funds to pressure counties to move themselves into Red, even if they could otherwise stay in Orange and allow their businesses more ability to operate. On Monday, December 7, 2020, Kari Ladrow, Moffat County Public Health Director stated: “The state called me this morning...they are asking counties to voluntarily move into Red to receive relief funds from Senate Bill 1 that was recently passed. If we stay in Orange, we won’t be eligible for those funds.”⁴

19) Despite the efforts of the State to regulate behavior and end the crisis, as the pandemic rages harder than ever. This fact shows that the State’s response is simply not working because it allows “critical” businesses and infrastructure to engage in activities that spread the virus rapidly, and, because many people of the State are simply unwilling to abide by personal gathering rules in their homes because those rules are not being enforced. As the hospitals fill, and the restaurants close; the Big Box stores boom. That is not narrowly tailored to preserve the free assembly rights of the Plaintiffs.

20) The statistics of the State Reports speak for themselves. El Paso County has reported 197 outbreaks to the State for the week of December 2, 2020, yet just six involve establishments like the Plaintiffs. The list is full of Big Box stores, schools, law enforcement facilities, and the other “critical” endeavors where the State tolerates poor to non-compliance.

⁴ Reported in the Craig Daily Press and available at:
<https://www.craigdailypress.com/news/board-of-public-health-discusses-potential-move-to-level-red-likely-local-mask-order-in-public-meeting/>.

21) We are in the middle of a raging pandemic that is being fueled by governmental and cultural failures at every level. Instead of focusing efforts on the actual behavior which fuels the pandemic, the State created a whole scheme to regulate behavior that impermissibly restricts free association and peaceful assembly, forces restaurants out-of-business and fails to stop the spread:

22) The overwhelming majority of cases reported through December 2, 2020, come from nursing homes, health and childcare facilities, grocery stores, the State Prisons, elementary schools, and the County's Big Box retail stores.

23) While Defendants prohibit Plaintiffs from allowing indoor patrons, they are permitting other businesses to do so largely uninhibited.

24) Restaurants, pre-COVID-19, already must abide by stringent health codes to ensure their patron's safety through sanitization.⁵ Plaintiffs stand able to present a mitigation plan that confirms it can operate in strict accordance with CDC Guidelines. Plaintiffs can open safely and are able to do so; but the State has chosen to paint with a broad brush that discriminates, without being subject to the scrutiny of cross examination or any other check or due process balance, against one business over another, in what we presume are good faith efforts at pandemic control.

25) The order and its implementation violate the equal protection, substantive due process, and procedural due process rights of the Plaintiffs, but there is another dimension to this dispute. While the court is likely to analyze the equal protection claim

⁵ Pursuant to statute and/or regulation, Restaurants are required to have Safe Serve Certification which covers, among other things, the proper handling and storage of food as well as sanitization standards and methods.

through the rational basis lens because restaurants are not traditionally considered a protected class, the facts show this order burdens the right of free assembly and the right of a proprietor of a traditional forum for free assembly, like a pub, to host people assembled.

26) It is this constitutional dimension that mandates application of heightened scrutiny to the application of the order to bars and restaurants. They are traditional forums for protected speech and burdening that traditional forum with limits above and beyond similarly situated places like Walmart, or the mall, without due process allowing for an adversarial testing of those limits, restricts the First Amendment rights of proprietors to use their businesses as a forum for protected assembly. The Constitution was not written solely for use in homes, at animal groomers, or among unmanaged crowds at Big Box stores.

Identification of the Parties

- 27) Defendant Polis is the Governor of the State of Colorado (“Polis”).
- 28) Defendant Jill Hunsaker Ryan (“Ryan”) is Executive Director of Defendant Colorado Department of Health and Environment (the “CDPHE”). The CDPHE is a state agency for which Ryan is the head, pursuant to C.R.S. §25-1-102(1).
- 29) Plaintiff, Deanna Susan Brekke t/d/b/a Black Forest Bistro (“BFB”), owns 3 affected businesses in El Paso County and is an award-winning food entrepreneur⁶. Ms.

⁶ Ms. Brekke is a Food Network Champion - Food Truck Fan Fight; holds the title for Best Food Truck in Colorado Springs 2017, 2018, 2019; is a IPA Cook Off Champion; Best in Business 2019; and Celebrity Chef - Daily Blast Live. Respectfully, as is relevant herein, she is properly certified as an expert in food safety, restaurant sanitization.

Brekke took over the physical facility (a closed, failed establishment) where BFB operates in late 2019, early 2020 and instantly set upon gutting the place, investing tens of thousands of dollars in needed renovations. Just as she was set to Open, COVID-19 (and the Governor's shutdown Orders) hit.

30) Plaintiff Derek Gosciniak is a Veteran with Post Traumatic Stress Disorder that runs a Mobile Veterinarian Service and who, in his free time, counsels other similarly affected Veterans, helping them integrate back into civilian life. With the closure of bars and restaurants, Mr. Gosciniak has lost his forum of choice for meeting with and helping to re-socialize Veterans who have suffered severe trauma serving our Nation, protecting our Constitutional way of life.

31) Plaintiff Larry K. Neuhalfer, Sr. t/d/b/a Bodycast is a local musician who, for 18 years, has been playing in local establishments.

COUNT I
VIOLATION OF FIRST AMENDMENT - 42 U.S.C. § 1983

32) All previous paragraphs are incorporated herein.

33) The restrictions contained in the orders prohibits bars from operating unless they serve food.

34) The restrictions contained in the Operative Order also prohibits indoor dining and the sale of alcohol only, but yet, without distinction, allows for dining in outdoor Tents, with heaters.

35) The First Amendment provides protection for the freedom of assembly.

36) Plaintiffs have suffered particular harm from the violation of their right to freedom of assembly that cannot be replaced or replicated elsewhere.

37) The Court can, and should, take Judicial Notice of the role that Restaurants and Taverns have played in the development of this Nation and, in fact, our Constitution itself.

38) During the late colonial and early revolutionary periods, taverns became increasingly popular throughout America as a place to gather, have a pint of stout, share a newspaper, peruse the latest broadside or pamphlet, and engage in friendly—or not so friendly—banter concerning the latest news and gossip.

39) Newspapers were delivered by post to taverns, and the literate patrons eagerly read them aloud to their illiterate neighbors.

40) On July 4, 1776, when the Continental Congress officially adopted the Declaration of Independence and ordered its publication and distribution, it was posted on tavern and meetinghouse doors and was reprinted again and again.

41) And, as is relevant herein, during the Constitutional Convention, *all* of the founding fathers gathered at the City Tavern in Philadelphia – once described by John Adams as “the most genteel tavern in America” -- to discuss liberty, independence, and resistance to tyranny.⁷

⁷ For a complete discussion of the role Taverns played in the development of our Constitution and the Amendments thereto, see ‘Tavern Talk’ and the Origins of the Assembly Clause: Tracing the First Amendment’s Assembly Clause Back to Its Roots in Colonial Taverns.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735069.

42) Defendants' Order prohibiting indoor dining and the sale of alcohol without food violates the freedom of association clause because bars, taverns, and pubs are traditional forums well-rooted in our history for the free expression and exchange of ideas associated with assembly. The order closes a traditional forum for protected assembly by fiat, without any tailoring to protect these forums, without any consideration of mitigation measures already in place, and/or without offering any avenue of redress.

43) Holding out your pub for political gatherings, public meetings, impromptu meetups, or simply a patron needing social interaction to help with the severe mental issues now associated with COVID-19 restrictions, is a right protected by the First Amendment, and is a right directly and completely prohibited and/or curtailed by the Order.

"The proper situs of the Assembly Clause, research reveals, is in its birthplace: colonial America's taverns. ... colonial taverns served not just as establishments for drinking alcohol but as vital centers where colonists of reputations great and small gathered to read printed tracts, speak with one another on important issues of the day, debate the news, organize boycotts, draft treatises and demands, plot the expulsion of their British overlords, and establish a new nation."

44) That the harm being perpetrated is on-going and will continue or may continue in the future unless enjoined and constitutes significant and various violations of constitutional rights guaranteed by the Constitution of the United States and Colorado.

COUNT II
VIOLATION OF EQUAL PROTECTION - 42 U.S.C. § 1983

45) All previous paragraphs are incorporated herein.

46) The Equal Protection Clause requires governments to act in a rational and non-arbitrary fashion when treating any group of persons differently.

47) The State allows certain institutions and retail super spreaders to remain open without enforced capacity restrictions because they are “critical.” Critical is arbitrary and at a minimum, those promulgating who fits within this category, and their experts upon whom they rely, should be subject to cross examination before constitutional rights are taken away from any group falling outside this arbitrary category.

48) The State has also, in its Amended Order, decided to remove all capacity restrictions on weddings and funerals, “religious or secular,” even though these events have been noted as super spreaders around the nation. Due to the State’s clarification that its lifting of capacity restrictions on these life events is not based on the freedom of religion, it can only be based on either purely arbitrary government decision-making or on an acknowledgement of the rights of freedom of association and assembly. The State may not selectively recognize these rights and deny equality to those who wish to assemble and associate at events and places that are of equal importance to them, but secular.

49) Furthermore, the State has also acted to prefer some American institutions over others. The Amended order gives a particular indoor exception to “educational institutions like museums and aquariums” which may now “operate at 25% of the posted occupancy limit” indoors. The State has chosen to elevate the right to assemble and associate for assumed educational purposes outside of school while denying the same right of assembly and association for Veterans. It seems, according to the State’s orders, Veterans would be protected if they chose to exercise their right to associate and assemble

with fellow veterans at the Denver Art Museum, but not at an establishment in their hometown. The State may not arbitrarily choose some forums for the exercise of constitutional rights while rejecting others equally qualified. There is no rational argument the state may make that would elevate a museum in Denver as a better forum for the right to assemble than a restaurant in Calhan.

50) The state has decided that non-critical businesses are subject to capacity restrictions. But even those capacity restrictions are based on presumptions about business operations and virus spread that are not tailored to businesses, the communities they serve, or the actual statistics and data from the State itself. These classifications are inherently arbitrary and capricious and not narrowly tailored to protect free assembly rights.

51) Defendants' actions are therefore a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution that strip Plaintiffs of their fundamental rights.

52) Defendants' decision to ban indoor dining impedes Plaintiffs fundamental right to use their private property for free assembly without the government imposing irrational restrictions on the use of the property.

53) Defendants' actions have caused Plaintiffs to be deprived of the use and control of their private property while other businesses, including Bona Fide Super Spreaders that also sell alcohol and take-out food, pursuant to the State's own data, are authorized to operate. Plaintiffs are suffering irreparable damages right now because of this arbitrary and overbroad application of State mandates.

**COUNT III
DUE PROCESS - 42 U.S.C. § 1983**

54) All previous paragraphs are incorporated herein.

55) The Fourteenth Amendment to the United States Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law.

56) None of the following due process protections have been afforded Plaintiffs, or any Restaurant/Bar owner, as required by the United States Constitution:

- No workable waiver system;
- No neutral arbitrator; and
- No opportunity to be heard;

57) The Orders provided by Defendants, do not provide any due process, either procedurally or substantively.

58) Defendants failure to provide a workable process where the Plaintiffs can implement Federal CDC guidance, without any explanation, fails to accord procedural due process there is absolutely no way for the Plaintiffs to obtain relief from the capacity and closure orders, no matter how safely they can run their operation, until the State's arbitrary metrics are met. Metrics which are entirely outside Plaintiffs' control. They could be operating in 100% compliance with CDC guidance and the State would still not hear them out because their county has been classified using metrics that are not tailored to individual business situations and, as detailed *supra*, because the State is using monetary reward to push counties to classify as Level Red to receive relief money – even when this means harsher closures for their restaurants and businesses.

59) Defendants deny substantive due process to the Plaintiff by infringing their protected assembly right through the Public Health orders without any sort of tailoring to process that rights.

60) Plaintiffs are denied both sides of the due process coin with the State's orders and this court must intervene to force the State to protect their fundamental right of assembly.

WHEREFORE, Plaintiffs demand judgment in their favor, against Defendants jointly and severally, and seek relief as follows:

(1) a Declaratory Judgment that issuance and enforcement of the Second Amended Public Health Order 20-36, COVID-19 Dial, dated November 20, 2020, and the Third Amendment Public Health Order 20-36, COVID-19 Dial, dated December 7, 2020, is unconstitutional for the reasons stated herein, and that the actions of the Defendants are unlawful and unconstitutional;

(2) a permanent injunction to prohibit Defendants from enforcing the Orders in the manner and fashion engaged by Defendants;

(3) a declaration that the rights of the Plaintiffs have been violated by the various actions of the Defendants and the said Defendants are enjoined from engaging in such violations and declaring them to be null and void ab initio, and in addition thereto with respect to the First Amendment rights of assembly as provided in the Constitution of the United States of America;

(4) award of costs and expenses, including reasonable attorneys' fees under 42 U.S.C. § 1983 and 1988; and,

(5) In the alternative, an order enjoining any further closures of businesses and restrictions on the right to assemble where people choose to assemble, without a hearing whereby the people promulgating and/or supporting such order, are subject to cross examination and the Plaintiffs and those similarly situated are allowed some semblance of due process.

(6) such other relief as this Court deems appropriate.

DATED: December 10, 2020.

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