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.	:	

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Comes now the Plaintiffs, even though they and their counsel feel strongly that Governor Polis is acting in good faith in his efforts to help protect Colorado citizens: (1) having filed suit against the above Defendants before this Court moving this Court seeking to RESTRAIN the above Defendants from enforcing Second Amended Public Health Order 20-36, COVID-19 Dial, dated November 20, 2020 ("Operative Order" or "Order") and the Third Amended Public Health Order 20-36, COVID-19 Dial, dated December 7, 2020 ("Amended Order").

Plaintiffs are bar owners, patrons, and vendors who have been similarly affected by Defendants' Orders.

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

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, then closed them again; 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

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[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] 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).

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

7) The orders violate Plaintiffs constitutional right of free assembly and the right to facilitate such assembly, its right to freedom of association and to facilitate association, its right to equal protection under the law, and its right to due process. As such, this suit arises under the United States Constitution, the Colorado Constitution, the CDEA, and the Colorado Administrative Procedure Act ("APA"), Colo. Rev. Stat. §§ 24-4-101 to 204.

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 a rational basis. 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. Furthermore, 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 – are subject to a 0% indoor capacity.

9) The level of COVD-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.

10) Plaintiffs fall 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.

11) 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.

12) The first factor, occurrences in the past two weeks, has the most 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 when dealing with a virus that respects no political boundaries and spans multiple counties across the state.

13) Factor two, however, is more slippery. This one is measured by percentage of positive COVID-19 tests in a county. In addition to the political 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.

14) 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.

15) 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] Upon information and belief, the State is also limiting the ability of restaurants to offer outdoor dining based on irrational monetary factors outside of some business owners' control instead of solely basing the option on ability to operate and factors integral to the pandemic.

[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/

16) 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 "essential" 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.

17) 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 "essential" endeavors where the State tolerates poor to non-compliance. That fiasco, in and of itself, has caused far more COVID-19 casualties than every restaurant in this State combined.

18) Here's a breakdown of reported outbreaks by percentage in El Paso County since March[5]:

Schools K-12: 22.05%
Other: 8.21%
Healthcare - Outpatient: 7.69%
Healthcare - Skilled Nursing: 7.18%
Healthcare - Assisted Living: 6.67%
Retailer: 5.13%
Office/Indoor Workspace: 4.62%
Child Care Center: 3.59%
Restaurant - Sit Down: 3.59%

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[5] https://krdo.com/news/top-stories/2020/12/07/restaurants-not-at-top-of-el-paso-county-outbreak-sources/

Construction Company/Contractor: 2.56%
Healthcare/Rehab Facility: 2.05%
Materials Supplier: 2.05%
Non-Food Manufacturer/Supplier: 2.05%
Religious Facility: 2.05%
Grocery Store: 1.54%
Healthcare Drug/Alcohol Abuse Treatment (inpatient): 1.54%
Hotel/Lodge/Resort: 1.54%
Correctional, Other: 1.03%
Healthcare - Acute Care Hospital: 1.03%
Healthcare - Memory Care: 1.03%
Law Enforcement Administration: 1.03%
Restaurant - Fast Food: 1.03%
School Administration: 1.03%
Caterer: .51%College/University: .51%
Food Manufacturing/Packaging: .51%
Healthcare - Combined Care: .51%
Healthcare - Hospice: .51%
Home Maintenance Service: .51%
Personal Services: .51%
Restaurant - Buffet .51%
Restaurant - Other .51%
Trade School: .51%
Youth Sports/Activities: .51%

19) 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.

20) As shown above, the overwhelming majority of cases reported through December 2, 2020, come from nursing homes, health and childcare facilities, grocery stores, State Prisons, schools, and the County's Big Box stores.

21) While Defendants prohibit Plaintiffs from allowing indoor patrons, they are permitting critical businesses and other non-critical businesses to do so largely uninhibited and those entities have become Super Spreaders.

22) Restaurants, pre-COVID-19, already must abide by stringent health codes to ensure their patron's safety through sanitization. [6] Plaintiffs stand able to present a mitigation plan that confirms it can operate in strict accordance with CDC Guidelines. Plaintiffs can open safely and were ~~as~~ able to do so 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.

23) The order and its implementation infringes the Plaintiffs' Freedom of Assembly right, their right to equal protection, and their right to due process before having a liberty or property interest infringed.

STANDARD FOR RELIEF

1. Plaintiffs must satisfy the four elements of the familiar preliminary injunction test.

i. (1) a substantial likelihood of success on the merits,

[6] 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.

ii. (2) irreparable injury in the absence of the injunction[7],
iii. (3) its threatened injury outweighs the harm to the opposing party under the injunction, and
iv. (4) the injunction is not adverse to the public interest.

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008).[8]

2. Once the Plaintiffs satisfies these factors this court may use its equitable powers to enter a preliminary injunction to prevent the injury complained of by the moving party. *Id.*

[7] As to Irreparable harm, there can be no question that the challenged restrictions cause irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U. S. 347, 373 (1976) (plurality opinion).

[8] Plaintiff incorporates herein its Complaint (Doc. 1) as though set forth in complete detail below.

ARGUMENT

Substantial Likelihood of Success on the Merits

3. "Congress shall make no law . . . abridging the . . . the right of the people peaceably to assemble . . . " U.S. Const. Amed. I.

4. While the Constitution speaks clearly as to the right of assembly, the Court has framed it in associational terms as the "freedom to associate" since the Civil Rights Era. *See e.g. NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958); *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960). The vocabulary shift does not change the standard however, "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. at 461.

5. That being said, while the Court changed the vocabulary, they did not transform the right of assembly (where people gather in a specific place) into just a right of association (where people who are like minded can gather). Assembly is a protected act without reference to speech or association, and unlike the rights of speech or association, implicitly requires a site to assemble. Gathering together with others in the privacy of one's home – which has also been severely curtailed by the State in both orders – has never been sufficient in the United States for the freedom of assembly. Other forums have historically been necessary for this right to be freely exercised.

6. The right of assembly, while seemingly often ignored (Colorado's Bill of Rights does not mention it and at least 25 Federal court opinions cite the "freedom of association clause" instead), is crucial to American democracy. An analysis of historical practice shows that freedom of assembly is a fundamental right "deeply rooted in this Nation's history and tradition." *See*

Washington v. Glucksberg, 521 U.S. 702, 721 (1997). And the deep roots of this right originate in American taverns[9]

7. The tavern and the discourse among the assembly at the tavern, was the ideological and organizational heart of the American Revolution. It was these assemblies, whether big or small, organized or impromptu, that ignited the American experiment as much as military victories or vigorous pamphleteering. The egalitarian nature of the tavern creates a local informal institution where people can assembly and participate in the free exchange of ideas with strangers and companions alike that was crucial to the development of civil society in the infant Republic. Outside of the church, community organizing in early America happened at the local taverns. The right to assemble at a tavern is a fundamental right.

8. In *Thomas v. Collins*, 323 U.S. 516, 530 (1945), the Supreme Court called the rights secured by the First Amendment – including the right to assembly – "the indispensable democratic freedoms" and analyzed the "the preferred place," "priority," and "sanctity" given to these liberties. While Federal courts generally provide a refuge for the freedom of religion and of free speech in political discourse, the freedom to assemble is sometimes overlooked. Yet *Thomas* concluded, of First Amendment rights: "All these, though not identical, are inseparable. … This conjunction of liberties is not peculiar to religious activity and institutions alone. … Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was

[9] This motion heavily relies upon history and analysis contained in Baylen J. Linnekin, "Tavern Talk and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns" 39 Hast. Const. L. Quarterly 3, 593 (Spring 2012). That article, and its citations, are the source for the historical discussion contained here and a copy of this article is attached for the court's reference.

insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." *Id*. at 530-531.

9. But we are now faced with a public health order that tells taverns that they must comply with capacity limitations or shutdowns based on a color-coded system that does not provide for any tailoring of the application of those public health orders to the individual tavern based on their actual impact on the public health emergency.

10. Instead of respecting the role taverns play in facilitating the right of assembly by creating tailored and workable compliance programs to serve the public interest in combating the pandemic, the State issued blanket restrictions that apply no matter the individualized circumstances of the tavern or the unique needs of its patrons. The right of assembly implicitly requires a place to assemble, and because assembling at a tavern is an activity replete with a "history and tradition" that shows it is a fundamental right, the State must narrowly tailor their rules for taverns to preserve the right to assemble. Plaintiffs demonstrate a substantial likelihood of success on the merits because the public health orders are by no means narrowly tailored to serve the public interest or fundamental First Amendment rights.

11. Defendants justify their actions because of an Emergency declared nearly a year ago. Since then, our understanding of this pandemic has increased and the nature of the emergency is no longer impacted by considerable uncertainty regarding transmission and infection results.

12. As was outlined by the court in *Denver Bible Church v. Polis, et al,* (D.Co. No. 20-2362, ____J)

> "The First Amendment to the Constitution, which has been incorporated against the states by the Fourteenth Amendment, guarantees, among other things, the free exercise of assembly U.S. Const. amend I; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). A state can violate this promise in a number of ways. The wrinkle in this case, of course, is that it does not arise in "normal" times, but in the midst of a global pandemic. Emergencies like this one raise an age-old question. When confronting an emergency, to what extent can the government curtail civil rights? And what is the proper scope of judicial review of actions taken by state or federal governments in response to the emergency? Justice Jackson was surely correct that the Bill of Rights is not a suicide pact—the Constitution doesn't kneecap a state's pandemic response. *See Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). But the existence of a crisis does not mean that the inalienable rights recognized in the Constitution become unenforceable. Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality opinion) ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.")."

13. Because of the pandemic there is no question that the State here has a compelling interest in protecting its citizens from the SARS-CoV-2 virus. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("The police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."). For another thing, a state's actions during a public-health emergency, like Colorado's here, are often taken against a backdrop "fraught with medical and scientific uncertainties." *Marshall v. United States*, 414 U.S. 417, 427 (1974). It isn't the job of the judiciary to second-guess the "wisdom, need, or appropriateness" of the measures taken by a state to protect the health of its people during a pandemic. *Edwards v. California*, 314 U.S. 160, 173 (1941); see also *Jacobson*, 197 U.S. at 28, 30-35 ("It is no part of the function of a court . . . to determine [what is] likely to be the most effective for the protection of the public against disease.").

14. The court cannot accept the position, however, that the Constitution and the rights it protects are somehow less important, or that the judicial branch should be less vigilant in enforcing them, simply because the government is responding to a national emergency. The judiciary's role may, in fact, be all the more important in such circumstances. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" (*quoting Korematsu v. United State*s, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting))).

15. *Jacobson*, while an important and instructive case, isn't a "blank check for the exercise of governmental power." *Robinson v. Att'y Gen*., 957 F.3d 1171, 1181 (11th Cir. 2020); *see also Calvary Chapel,* 140 S. Ct at 2605 (Alito, J., dissenting) ("[A] public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists."). Indeed, *Jacobson* itself says that "no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation" to safeguard public health and safety may "contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." 197 U.S. at 25. "A local enactment or regulation, even if based on the acknowledged police powers of a state, *must always yield in case of conflict* . . . with any right [the Constitution] gives or secures." *Id.* (emphasis added).

16. In other words, while an emergency might provide justification to curtail certain civil rights, that justification must fit within the framework courts use to evaluate constitutional claims in non-emergent times.[10]

17. Therefore, *Jacobson* means that most state and local public health orders that don't implicate fundamental rights will be analyzed under what is now known as the rational basis test. And they will generally be upheld. *See Lawrence v. Colorado*, 455 F. Supp. 3d 1063, 1070-71, 1076-78 (D. Colo. 2020); *but see Butler*, 2020 WL 5510690, at *2 (declaring Pennsylvania's lockdown orders unconstitutional).

18. Even where heightened scrutiny does apply, *Jacobso*n stands for the undeniable proposition that fighting a pandemic is a compelling state interest. Plaintiffs cannot seriously contest this.

19. *Jacobson's* emphasis, in conjunction with cases like *Marshall* and *Edwards*, on the need for judicial deference to policymakers' analysis of evolving scientific and medical knowledge helps explain why, as "emergency" restrictions extend beyond the short-term into

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[10] *See, e.g., Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614-15 (6th Cir. 2020) (enjoining ban on drive-in church services); *Robinso*n, 957 F.3d at 1181 (denying motion to stay district court's preliminary injunction of abortion restrictions); Butler, 2020 WL 5510690, at *8, *31 (applying traditional canons of constitutional review and declaring Pennsylvania's lockdown orders unconstitutional); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, No. 3:20-CV-00033- GFVT, 2020 WL 2305307, at *4 (E.D. Ky. May 8, 2020) (enjoining prohibition on in-person religious services); *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at *7 (D. Kan. Apr. 18, 2020) (enjoining ten-person limit on church services); *see also Bayley's Campground Inc. v. Mills,* No. 2:20-CV-00176-LEW, 2020 WL 2791797, at *10 (D. Me. May 29, 2020) (analyzing right-to-travel claim challenging Maine's fourteen-day quarantine under strict scrutiny).

weeks and now months, courts should become more stringent in their review of the "tailoring" prong of current constitutional doctrine.

20. Where fundamental rights are implicated, like the right of assembly, this requires assessing whether the government's action is the least restrictive means available of achieving the governmental interest.

21. *Thomas* highlights the need for Federal courts to use a strict standard of scrutiny where First Amendment rights, in particular, have been injured: "[A]ny attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. … Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble…" *Thomas* at 530.

22. In the earliest days of a pandemic or other true emergency, what may be the least restrictive or invasive means of furthering a state's compelling interest in public health will be particularly uncertain, and thus judicial intervention should be rare.

23. But as time passes, scientific uncertainty decreases and officials' ability to tailor their restrictions more carefully will increase. *See Calvary Chapel,* 140 S. Ct at 2605 (Alito, J., dissenting) ("As more medical and scientific evidence becomes available, and as States have time

to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights."); Michael W. McConnell & Max Raskin, Opinion, If Liquor Stores Are Essential, Why Isn't Church?, N.Y. Times (Apr. 21, 2020), https://www.nytimes.com/2020/04/21/opinion/first-amendment-church coronavirus.html ("In the early weeks of the crisis, it made sense to enforce sweeping closure rules against all public gatherings— no exceptions.")[11]

24. What may have been permissible at one point given exigencies and realistic alternatives in the face of those exigencies may not remain permissible in the long term. *Cf. Wiley & Vladeck, supra,* at 182 ("The suspension principle is inextricably linked with the idea that a crisis is of finite—and brief—duration. To that end, the principle is ill-suited for long-term and open-ended emergencies like the one in which we currently find ourselves.").

25. What was acceptable on March 10, 2020, therefore, has changed.

26. What the Constitution currently requires is that the State create rules that help combat COVID-19 while ensuring that taverns and restaurants can operate and the right of assembly for Plaintiffs and all Coloradans of all beliefs, persuasions, and reasons to assemble is protected. It defies Constitutional sense that the State can allow "critical" Big Box stores, animal groomers, jails, and schools, to operate as they see fit while "non-critical" taverns are subject to crippling regulations when most of the former are more likely daily super spreader events. The

[11] *See, e.g.,* Media Statement, Ctrs. for Disease Control & Prevention, CDC Updates "How COVID is Spread" Webpage, CDC Newsroom (Oct. 5, 2020), https://www.cdc.gov/media/releases/2020/s1005-how-spr ead-covd.html.

rules promulgated do not fit the governmental interest in combating the pandemic at this point and only serve to suppress the right of assembly in taverns and restaurants.[12]

27. This is not equal protection. Because if it were, taverns (an institution with deep ties to our civil society) would not be limping along with debilitating restrictions that are not tailored to their individual situations while Big Box Stores (an institution that lacks any purpose other than the provision of material goods) pack patrons in for holiday shopping.

28. Equal protection is particularly violated by the Amended Order, as the State has arbitrarily chosen to lift all capacity restrictions on weddings and funerals, specifically noting that it did not lift them due to their common relation to the right to freedom of religion. Instead, the State noted in its Amendment Order that capacity restrictions are lifted, whether the wedding or funeral is religious or secular. This is a partial recognition of Coloradans' right to assemble, but the State has lifted itself up as the final arbiter of which assemblies are protected and which are not. In its Amended Order, the State has also seen fit to expand and allow indoor capacity for institutions it deems educational, particularly naming museums, aquariums, and zoos, while declining to find any educational value in the conversations and assemblies that take places in taverns or restaurants. The State has failed to equally protect the assembly and association rights of Plaintiffs and has made itself an unconstitutional decider.

29. This is not due process. Because if it were, taverns and restaurants would have the ability to fashion a workable safety plan and submit it to the State where the individualized circumstances of owners and patrons can be considered. The State simply does not look at taverns

[12] The statistics show that while family owned establishments are, by the Defendants own statistics, YTD, trending at 3.5 % rate, the Big Box Retailers, operating with minimal, if any mitigation measures are, in fact, fueling the recent surge. See https://www.kktv.com/2020/11/27/outbreaks-confirmed-at-2-colorado-springs-costcos/

and restaurants as possessing any Constitutional attributes and has not taken any steps to equally preserve the right of assembly in those places during the pandemic.

30. This is not Constitutional. Freedom of assembly implicitly requires a place to assemble. Taverns and restaurants, in our deeply rooted history and tradition, are ~~as~~ close to churches in the hierarchy of places to assemble. ─This is true because the right of assembly is its own separate and equally fundamental right, not identical to the freedom of religion, and yet, "inseparable." *See Thomas* at 530. And regulating taverns and restaurants with broad untailored capacity limits and shutdown orders deeply impacts the freedom of assembly. Given that the color-coded system is not narrowly tailored at all despite its destruction of fundamental First Amendment freedoms, the Plaintiffs demonstrate substantial likelihood of success on the merits.

The Balance of Harms Fall in the Plaintiffs Favor

31. The injury to freedom of assembly outweighs the harm to the State under the injunction. As the above numbers show, neither Defendants nor the public, who are free to go out if and only if they choose to do so but can stay out of everything from box stores to restaurants if they so choose, will suffer harm if Plaintiffs are allowed to operate with narrowly tailored pandemic regulations. There has likewise been no showing by the State that restaurants or taverns, contribute more in any material way, to deaths or ICU bed loss, than big box stores and other activities. In fact, the evidence appears to be quite the contrary. Plaintiffs already are subjected to strict sanitization training and measures and have spent the past nine months adapting their business models to a dizzying array of Orders, guidelines, and mandates – keeping the outbreaks associated with their establishments below 3.5%, well below many of the States' preferred "Critical Businesses."

The Injunction Does Not Harm Public Interest

32. The injunction is not harmful to the public interest. In this matter, an injunction serves the public interest because it allows for people to engage in assembly in ~~a~~ places that are deeply rooted in our history and tradition as a forum for assembly. It also entirely leaves the choice to assemble or not with the People, which is precisely where it ought to rest. The evidence that the course of the pandemic is altered at all by restricting restaurants is slight, and there is no rational basis for choosing to shut them down, where assembly routinely happens, and leave open big box stores, where no assembly happens.

REQUEST FOR RELIEF

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 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 Operative Order 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;

(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.

and,

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

DATED: December 10, 2020.

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