DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109	DATE FILED: May 22, 2020 9:05 PM
Plaintiffs: **COOKIES AND CREMA LLC, JESSE ARELLANO, and APRIL ARELLANO** v. Defendants: **THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, TRI-COUNTY HEALTH DEPARTMENT, JILL HUNSAKER RYAN in her official capacity as Executive Director of the Colorado Department of Public Health and Environment; and JARED POLIS in his official capacity as Governor of the State of Colorado.**	
ATTORNEYS FOR PLAINTIFFS: Law Offices of Randy B. Corporon, P.C. Randy B. Corporon, #2986 Dane E. Torbenson, #29860 Kevin J. Farrell, #27091 Brian E. Lewis, #41295 Joanna T. Floribus, #50414 2821 S. Parker Road, Suite 555 Aurora, CO 80014 Telephone: 303-749-0062	▲ **COURT USE ONLY** ▲ Case Number: 20CV30407 Division: _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF PURSUANT TO C.R.S. § 25-1-113 and 25-1-515

Plaintiffs, by and through their undersigned attorneys, The Law Offices of Randy B. Corporon, P.C. as and for their complaint against the Defendants, the State of Colorado, Tri-County Health Department, the Colorado Department of Public Health and Environment, Jill Hunsaker Ryan, and Colorado Governor Jared Polis, respectfully sets forth, complains and allege as follows:

INTRODUCTION

1. The matter before this Honorable Court is more than just a case of executive authority overreach and constitutional violations. It implicates core principles of our nation's founding and the rule of law. Since the first reported case of coronavirus (COVID-19) in the United States in January 2020, and after it began to receive significant national and local media attention, various governmental entities across the nation have been implementing various sweeping and economically devastating schemes in response to fluctuating, often inaccurate projections of COVID-19 related mass illness and death. Colorado's Governor, Jared Polis, initially shut down the state and ordered people to stay home and now, nearly 10 weeks later, continues arbitrarily categorizing essential and non-essential businesses to the extreme detriment of Plaintiffs.

2. The 68 days, so far, of Governor Polis' exercise of "emergency powers" has continued in spite of the fact that over 30% of all U.S. COVID-19 attributed deaths are confined to one state (New York), over 80% of deaths are confined to 12 primarily coastal states, and only 1% of deaths have occurred in Colorado. *See* Johns Hopkins University Coronavirus Resource Center (coronavirus.jhu.edu/map.html). In addition, according to the "Colorado Department of Public Health and Environment (CDPHE), "older people (over age 60), especially those over 80," and "people who have chronic conditions like heart, lung, or kidney disease, or diabetes" are at "higher risk." "Older people with chronic medical conditions are at the highest risk." *See* covid19.colorado.gov/higher-risk-severe-illness. These warnings are born out by currently relied upon statistics with 73% of COVID-19 attributed deaths in Colorado and 81% nationwide from February 1, 2020, to May 16, 2020, occurring in people 65 and over according to the Centers for

Disease Control and Prevention. *See* data.cdc.gov/NCHS/Provisional-COVID-19-Death-Counts-by-Sex-Age-and-S/9bhg-hcku.

3. Since *Marbury v. Madison* was decided in 1803, it has been the purview of the judicial branch to review abuse of executive authority and declare null and void those actions which violate the rights and liberties guaranteed in the Constitution. Plaintiffs are not asking the Court to weigh the scientific disputes over the extent of the danger COVID-19 presents because the Defendants have not provided any formal findings or opportunities for presenting contrary opinions. At issue is whether the rule of law and confidence in our constitutional republic will be maintained regardless of whether the Governor and unelected agency officials conclude COVID-19 poses, or continues to pose, an imminent public health threat.

4. C & C Breakfast & Korean Kitchen is a dine-in restaurant and coffee shop with two locations—one in Colorado Springs and one in Castle Rock. The owners of the restaurant, Jesse and April Arellano, not only invested a substantial amount of their own money while taking out significant loans in order to grow the business since 2013. They also invested their time and talent, restructured their family time and adapted their livelihoods in order to have the opportunity to make the business a success. Indeed, their story is not unlike those of millions since our nation's founding who attempted to earn a living, provide for their families and positively contribute to society through their endeavors by operating a small business. The story of the Arellanos and C & C Breakfast & Korean Kitchen is not necessarily unique, but it is now crucially important.

5. On May 10, 2020, C & C Breakfast & Korean Kitchen (C&C) opened its doors at the Castle Rock location for dine-in service, which attracted hundreds of members of the community to the restaurant to enjoy a meal with their families and engage in social and political

discourse. Normally, this would not be considered an unusual or shocking activity. The difference is that, since March 17, 2020, their restaurant ceased all on-premises dining in an effort to comply with state executive orders that sought to forcibly close all dine-in service restaurants that were deemed, arbitrarily and irrationally by government, to be "non-critical." Despite making a good faith effort to comply with these executive agency orders, the result was economic catastrophe for the Arellanos and their small business. In an effort to save themselves, their employees and their once profitable business from financial ruin, the restaurant opened for dine-in service on Mother's Day - May 10, 2020.

6. Their action of simply opening their restaurant to customers as so many other businesses were allowed to do, and which did attract many community members and political supporters, received a substantial amount of mainstream and social media attention. In response to this "reopening," Governor Polis held a press conference the following day and castigated the Arellanos and their customers for their ideology and unscientific views. The governor indicated such media attention given to disobedient citizens caused "fear" among the public and as a result, he ordered the Health Department to suspend the C&C License to Operate a Retail Food Establishment. Both the business license suspension order and the Tri-County Health Department order closing the premises to all business were issued on May 11, 2020, the same day as the Governor's press conference. The restaurant has been closed since May 11, 2020. In a subsequent press conference, on May 20, 2020, Governor Polis expressed additional disdain for some of his constituents saying there "are always Coloradans who are going to be ignorant and selfish" in response to Coloradans swimming in Boulder Creek on a warm, sunny day.

7. The coordinated, heavy-handed actions of the Governor of the State of Colorado, and the Director of CDPHE included designating the patrons of C&C as "imminent health

hazards." This action was done with the knowledge or foreseeable consequence that it would deprive the Arellanos of their livelihood and ability to operate their business after they simply allowed customers onto their premises to serve food and beverages.

8. The background and history of the executive and public health orders that the government claims as its authority to close Plaintiffs' restaurant and summarily suspend their Retail Food Establishment license is unlawful, unprecedented and highly suspect. Under normal circumstances, the CDPHE would be required to impose rules only after a public hearing in which scientific evidence is formally reviewed and considered. C.R.S. 24-4-103(4). That process was suspended because the Governor declared a statewide "disaster" after the CDPHE initially identified thirty-three positive "presumptive" cases of COVID in the state.

9. Unfortunately, following the declaration of "disaster," Defendants have now arbitrarily and irrationally selected small businesses like Plaintiffs' to continue to bear the burden of what can only be deemed a speculative concern over "flattening the curve," potentially straining medical resources, and constantly waiting for more information. Certainly, the Plaintiffs opening their restaurant to customers, when so many other businesses are permitted to open their doors to customers, does not constitute an "imminent health threat." As a result, given the Governor's unprecedented and unlawful exercise of executive authority, Plaintiffs constitutional protections as set forth in this Complaint have been vitiated and sacrificed which compel Plaintiffs to respectfully request that this court declare the Defendants' actions against Plaintiff ultra vires, unconstitutional and, therefore, void and of no effect.

JURISDICTION AND VENUE

10. The Court has subject matter jurisdiction over the claims asserted in this action pursuant to C.R.S. § 25-1-113; and C.R.S. § 25-1-515 which authorizes this filing based upon an

allegation the actions herein complained of are actions contrary to constitutional rights or privileges; are in excess of the statutory authority or jurisdiction of the county or district board or public health director; affected by any error of law; made or promulgated upon unlawful procedure; are "unsupported by substantial evidence in view of the entire record as submitted;" or are claimed to be arbitrary or capricious. Venue is proper because the situs of the property and actions that gave rise to this action by executive agencies is Douglas County, Colorado. Plaintiffs cannot seeking damages in this Complaint, but reserve the right to pursue damages in a future Court action.

STATEMENT OF FACTS

11. Jesse and April Arellano established and serve as co-owners of Cookies and Crema, LLC, doing business as the C & C Breakfast & Korean Kitchen (Plaintiffs). Plaintiffs operate two locations. The first location was opened on July 26, 2013, at 4284 Trail Boss Dr., Ste 100, Castle Rock, CO 80104. A second location was opened at 162 Tracker Drive, Ste 100, Colorado Springs, CO 80921 on August 17, 2019.

12. Each C&C location serves a variety of food and beverages including American breakfast entrees, Korean lunch, Korean dinner specials, in addition to a specialized coffee and espresso bar. Because of the nature of the business, which is focused as much for community gatherings and private conversations as it is for food service, Plaintiff's restaurants are primarily designed to serve patrons on the premises as a "dine-in" style restaurant.

13. Governor Jared Polis (Governor) issued Executive Order D 2020 003 on March 11, 2020 ***(EXHIBIT A),*** declaring a disaster emergency in Colorado due to the presence of COVID-19. Effective March 17, 2020, Jill Hunsaker Ryan (Director) issued Public Health Order 20-22 (PHO-20-22) ***(EXHIBIT B)*** mandating the closure all bars, restaurants, theaters, gymnasiums and casinos in Colorado. Similarly, on March 26, 2020, the Governor issued Executive Order D 2020-017 ***(EXHBIT C)*** ordering all businesses in the State of Colorado to

close due to the presence of coronavirus disease (COVID-19). Order D 2020-017 required the Director to identify "critical businesses" that would be exempted from the closures and allowed to continue to operate under certain conditions.

14. The numerous and overlapping executive and public health orders that have been issued continue to be extended and change almost weekly. These orders are based on overstated COVID-19 rates that continue to be downsized and revised lower, in the face of abundant and underutilized medical resources, while the public is left with no foreseeable end that would allow small business such as Plaintiffs' to properly plan and organize their affairs. Plaintiffs remain in a continual state of limbo and uncertainty.

15. On April 6, 2020, the Governor issued Executive Order 2020-024 (EO 2020-024) that amended and extended the requirements of D 2020-017. Effective April 27, 2020, the Governor issued Executive Order D 2020 044 ***(EXHIBIT D)*** authorizing a transition from a stay at home model, as described in Executive Order D 2020 017 and EO 20-24 as amended, to a "Safer at Home" model. These Orders were issued, and ostensibly renewed, pursuant to CRS § 24-33.5-701, *et. seq.* And while Defendants have consistently maintained that these restrictions are temporary, the regulations have been renewed or amended at least four (4) times over the course of the past two months, with no complete end in sight. Indeed, there is no statutory limit on the number of times these orders can be renewed. The history of renewal, together with the lack of any final end date, plan or strategy from Defendants, render all of these actions capable of ongoing repetition while yet evading review. The actions challenged by Plaintiffs are too uncertain in duration to be fully litigated prior to cessation or expiration; and there is a reasonable expectation that the Plaintiffs will be subject to these or similar orders ad infinitum, or again at the start of the next flu season. Thus, even if the current orders change or end, this matter should not be mooted and should be resolved now. *See generally Spencer v. Kemna*, 523 U. S. 1 (1998).

16. In response to the Governor's Orders, local health departments and other local entities issued their own orders. The Tri-County Health Department (TCHD) board voted to

authorize the director to extend the Stay-at-Home order for Adams and Arapahoe counties through May 8, 2020, but not for Douglas County, which was allowed to move ahead with the statewide safer at home order.

17. Also in apparent response to the Governor's Safer at Home Order, the Director issued Public Health Order 20-28 on April 26, 2018 (amended on May 8, 2020, and again on May 14, 2020) (PHO 20-28) ***(EXHIBIT E),*** which, *inter alia*, provides that "restaurants offering food or beverages for on-premises consumption remain closed to ingress, egress, use, and occupancy by members of the public." Specifically, PHO 20-28(II)(A) requires:

> *"The following places of public accommodation remain closed to ingress, egress, use, and occupancy by members of the public:*
>
> *1. Restaurants, food courts, cafes, coffeehouses, and other similar places of public accommodation offering food or beverage for on-premises consumption;*
>
> *2. Bars, taverns, brew pubs, breweries, microbreweries, distillery pubs, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption;*
>
> *3. Cigar bars;*
>
> *4. Gyms, except for the limited purpose authorized in Section I.H;*
>
> *5. Movie and performance theaters, opera houses, concert halls, and music halls;*
>
> *6. Casinos; and*
>
> *7. Horse tracks and simulcast facilities, also known as off-track betting facilities."*

18. That self-same order, as with the Governor's Order, sets forth exceptions to closure for other types of businesses, including certain types of restaurants:

> *These restrictions do not apply to any of the following:*
>
> *1. Room service in hotels;*
> *2. Health care facilities, residential care facilities, congregate care facilities,*

and juvenile justice facilities;
3. Crisis shelters or similar institutions;
4. Airport concessionaires;
5. Institutions of higher education offering dining hall services located in or adjacent to campus dormitories that are accessed through student, staff, faculty, or campus associated identification, as well as grab and go food services within these institutions, while exercising social distancing measures of at least six feet between individuals;
6. Fitness centers and nonessential personal services included in residential facilities, such as hotels, apartment or condominium complexes or similar housing arrangements, that are limited to use only by hotel guests or residents of the housing who are following social distancing requirements of at least 6 feet between individuals, and the hotel or property managers are performing frequent environmental cleaning; and
7. Any emergency facilities necessary for the response to these events.

19. PHO 20-28(II)(C) and (D) did permit "non-critical" restaurants to offer food and beverage using "delivery service, window service, walk-up service, drive-through service, drive-up service, and curbside delivery" so long as "social distancing" requirements were met.

20. In response to the Director's initial PHO 20-22, which required the closure of all restaurants in the State of Colorado, on March 17, 2010, Plaintiffs ceased normal on-premises dining services. Plaintiffs attempted to provide only "curb side" service to deliver food and beverages to customers in their vehicles outside the restaurant locations in a good faith effort to comply with the orders.

21. Plaintiffs attempted to operate and remain solvent providing only curb side service until May 10, 2020—Mother's Day. Due to severe financial hardship resulting from the series of Defendants' Orders, and in order to exercise their First Amendment rights, Plaintiffs opened the C&C in Castle Rock for on-premises dining on May 10, 2020. Hundreds of customers, friends and members of the community patronized Plaintiffs' restaurant. Many members of the community brought American flags, signs of support and exercised their right to engage in peaceful, political protests against the Defendants and their public policies.

22. The events of May 10, 2020, at Plaintiffs' Castle Rock location received national media attention and became the focus of a Governor's press conference the following day, on May 11, 2020. During this press conference, the Governor stated in a condescending and demeaning tone that he loved his mother "far too much to risk her health by going to a busy restaurant just to take a selfie with omelets and a mimosa." He stated that Coloradans "feel less safe" when they see videos of customers jammed in restaurants and that was the reason why he was going to order Plaintiffs' business license to be suspended "probably for at least thirty days" until "the hazards are removed." The Governor indicated that "it's hard enough to walk without folks shaking the rope because of their ideological and anti-scientific views." Furthermore, because of Plaintiff's actions on May 10, 2020, the Governor indicated Plaintiffs' restaurant would probably be closed after other restaurants are allowed to reopen. ***(EXHIBIT F)*** (*Video available at* https://www.9news.com/video/news/local/gov-polis-full-news-conference-5112020/73-198891ca-2c52-47fa-9cc3-e626bf73e1f0).

23. On May 11, 2020, the same day as the Governor's press conference, the TCHD served an "order to close" on Plaintiffs' Castle Rock location for violating "Public Health Order 20-28 Safer at Home." TCHD indicated Plaintiffs violated PHCO 20-28 by "letting patrons sit at tables in the dining room and on the patio, and otherwise operating the establishment inconsistent with the Amended Notice of Public Health Order 20-28 issued by CDPHE on May 4, 2020, including not complying with social distancing requirements." ***(EXHIBIT G).***

24. Also on May 11, 2020, the same day as the Governor's press conference, the Director issued an "Order of Suspension" against Plaintiffs for violating PHO 20-28 purportedly because allowing customers to dine in the restaurant itself constituted an "imminent health hazard." The Director's Order suspended the Plaintiffs' business license immediately. The

Director further ordered that the business's license would be suspended "as long as it is in violation of the Order." The Order of Suspension indicated that Notice of Charges shall be "promptly prepared and sent to Respondents." ***(EXHIBIT H).***

25. Since May 11, 2020, Plaintiffs have ceased all business operations in Castle Rock. On May 21, 2020, the CDPHE filed a Notice of Charges and Notice of Duty to Answer with the Office of Administrative Courts. To date, there has been no hearing or opportunity to formally respond to the summary Orders. Due to Defendants' actions, Plaintiffs have been left completely unable to operate the business, could not operate profitably under the previous and current schemes even if allowed to open, and are left with no recourse other than court action.

26. Plaintiffs, as a result of the series of Defendants' Orders issued since March 17, 2020, have suffered devastating and possibly insurmountable financial hardship. Between January 1, 2020 and March 14, 2020, Plaintiffs earned a profit and managed a successful business. After March, 17, 2020, when Defendants' Orders required the closure of all on-premises dining, Plaintiffs revenue declined by fifty-per-cent (50%) the first week and began to operate at a further loss even though employees were laid off and other costs were cut. Plaintiffs operated on a curb-side delivery basis, but the business still was losing money each day of operation. Despite these efforts to stay solvent, since March 17, 2020, Plaintiffs are now unable to meet their financial obligations to creditors and are significantly in debt. With each day that passes without being able to normally operate with on-premises dining, the likelihood of recovery becomes more remote.

27. Plaintiffs have been forced to close the profitable portion of their business since March 17, 2020 and close completely since May 11, 2020. Other businesses arbitrarily deemed critical, or excepted to closure by the Governor and executive agencies, have been permitted to

remain open and serve customers on their premises, including certain types of food service entities that were singled out for special treatment in the Defendants' Orders.

28. Defendants maintain a clean and healthy restaurant, in compliance with food safety and health regulations. The only offense that Plaintiffs have been accused of is opening their doors to paying customers for business in violation of Defendants' Orders.

First Claim for Relief
Defendants Acted in Excess of Statutory Authority (*Ultra Vires*) in Violation of the Separation of Powers Doctrine

29. Plaintiffs incorporate by reference and reallege each and every allegation set forth in all proceeding paragraphs as if fully set forth herein.

30. Article III of the Colorado Constitution prohibits one branch of government from exercising powers that the constitution vests in another branch. *Dee Enterprises v. Indus. Claim Appeals Office of State of Colo.*, 89 P.3d 430, 433 (Colo. App. 2003). Thus, orders issued by executive agencies that are legislative in nature and "which fall beyond the purview of the statute granting the agency or body its powers [such orders] are not merely erroneous, but are void. *Flavell v. Dep't of Welfare, City & Cty. of Denver*, 355 P.2d 941, 943 (Colo. 1960). When determining whether agency regulations exceed the scope of their statutory authority, courts must interpret the agency regulations so as not to conflict with the objective of the statute it implements. *Schlapp ex rel. Schlapp v. Colorado Dep't of Health Care Policy & Fin.*, 284 P.3d 177, 180 (Colo. App. 2012).

31. Similarly, the Governor's authority when it comes to issuing executive orders that go beyond the administration of government and call for actions that affect private citizens by force of law is limited by enabling legislation. *See e.g. Colo. Polytechnic College v. State Board*, 476 P.2d 38 (Colo. 1970). It is the province of the general assembly to enact legislation and the

province of the executive to see that the laws are faithfully executed. *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371, 1380 (Colo.1985). Colorado is considered among those states to have adopted a "weak governor" system of executive authority. As such, and as concluded by the Office of Legislative Legal Services, "the Governor lacks authority to formulate policy or impose requirements beyond regulating the internal workings of the executive branch." *See Office of Legislative Legal Services, Memorandum, September 7, 2018.* ***(EXHIBIT I).*** In order for the Governor to impose duties and obligations on the citizenry of the State of Colorado via an executive order, such orders must be authorized by and remain within the scope of enabling legislation.

32. When it comes to rule making concerning public health, administrative agencies, such as CDPHE are subject to the rule making requirements under the Colorado Administrative Procedure Act. C.R.S. § 24-1-103. However, pursuant to the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, et seq., the Governor suspended rule making procedures and ordered all "non-critical" business to be closed and directed the CDPHE to identify "critical businesses" and implement specific rules for their operation (EO D2020-017). The CDPHE imposed PHO 20-22, under which the CDPHE claimed to suspend the Plaintiffs' business license and the TCHD ordered the closure of Plaintiffs' restaurant locations. Thus, the initial authority for the orders and rules that impacted the Plaintiffs were ultimately derived from the Governor's executive orders, purportedly issued under the Colorado Disaster Emergency Relief Act (Act).

33. By passing the Act, the legislature clearly intended to set forth the framework under which the Governor could operate in the event of disaster, including disease epidemics. The Act provides that the Governor may declare by executive order that "a disaster has occurred or that this occurrence or the threat thereof is imminent. The state of disaster emergency shall

continue until the governor finds that the threat of danger has passed or that the disaster has been dealt with to the extent that emergency conditions no longer exist and the governor terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than thirty days unless renewed by the governor." C.R.S. § 24-33.5-704(4).

34. The Act also sets forth the powers granted to the Governor to respond to the declared emergency under C.R.S. § 24-33.5-704(7):

> *(a) Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency;*
>
> *(b) Utilize all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency;*
>
> *(c) Transfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency services;*
>
> *(d) Subject to any applicable requirements for compensation under section 24-33.5-711, commandeer or utilize any private property if the governor finds this necessary to cope with the disaster emergency;*
>
> *(e) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;*
>
> *(f) Prescribe routes, modes of transportation, and destinations in connection with evacuation;*
>
> *(g) Control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises therein;*
>
> *(h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, or combustibles;*
>
> *(i) Make provision for the availability and use of temporary emergency housing; and*
>
> *(j) Determine the percentage at which the state and a local government will contribute moneys to cover the nonfederal cost share required by the federal "Robert T. Stafford Disaster Relief and Emergency Assistance Act"...*

35. By setting forth the powers and limitations of the Governor, the legislature made it clear that the Governor was not given *carte blanche, plenary* authority to craft any regulation scheme he singularly desired to deal with an emergency that he declared. The Governor's authority to issue executive orders with the force of law must be grounded in a specific grant of authority. Out of the specific powers granted to the Governor by the legislature, only subsection (g) relates to ingress and egress, movement and occupancies within a "disaster area."

36. Although the Governor has declared a disaster emergency pursuant to C.R.S. 24-33.5-701, et. seq., and although the Governor may issue orders concerning the egress, movement and occupancies within a "disaster area," no statutory authority is given to the Governor to designate and discriminate among various types of citizens and business for selective imposition of emergency orders. The governor has not declared any specific disaster area. Rather, the Governor has arbitrarily established a legislative type scheme that determines which businesses are "critical" and which ones are not, and then orders how those businesses must operate in order to avoid complete shut-down. In fact, the Governor has authorized numerous businesses to permit ingress and egress, movement and occupancies within properties throughout Douglas County. Requiring Plaintiffs to cease in-store dining operations and dictating how the business must operate in order to avoid the risk of being shut down exceeds the statutory authority given the Governor by the legislature. Nothing within the enabling legislation of the Act provides that the Governor may issue such comprehensive orders and regulations that discriminate between "critical and "non-critical" services, dictate strict limitations on how businesses must operate, and/or selectively target certain businesses, or a single business, for enforcement or punishment. At best, the legislation allows for rules of general applicability over a certain "area" but not the type of intrusive micromanagement over the economy and individual business operations that the

Governor seeks to impose. These actions exceed the Governor's authority and therefore must be considered null and void with respect to the actions taken against Plaintiffs.

37. Based on these invalid and *ultra vires* executive orders, the CDPHE and TCPH have issued their own orders, including those that purportedly provided authority to close down the Plaintiffs' business and suspend their retail establishment food license. Any order from state agencies that lack an independent foundation in statutory authority or are based upon invalid and *ultra vires executive orders* are null and void.

Second Claim for Relief
Deprivation of Life, Liberty and Property Interests in violation of Colo. Constitution Art. II, § 25; Fourteenth Amendment to the U.S. Constitution; and 42 U.S.C. § 1983

38. Plaintiffs incorporate by reference and reallege each and every allegation set forth in all proceeding paragraphs as if fully set forth herein.

39. Both the Colorado Constitution and United States Constitution provide that no person shall be deprived of "life, liberty or property without due process of law." Colo. Const. Art II, § 25; U.S Const. Amend. XIV.

40. The concept of due process has been an integral part of not only American jurisprudence but all of Western Civilization dating back to the time of the Magna Carta. In its most basic sense and meaning, "[t]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, [citations omitted] or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective [citations omitted]. While due process protection in the substantive sense limits what the government may do in both its legislative, [citations omitted], and its executive capacities, [citations omitted], criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a

governmental officer that is at issue." *City of Sacramento v. Lewis,* 523 U.S. 833, 845-46 (1998). This case involves abuse of the executive power.

41. The Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression.... Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). Due process rights protect individuals from state action that is "arbitrary and capricious" or that run counter to the concept of "ordered liberty". *Palko v. State of Connecticut,* 302 U.S. 319, 325 (1969).

42. Plaintiff has a fundamental liberty and property interest in the use and enjoyment of their restaurant locations, including to conduct business and have the opportunity to earn a profit and make a living. Defendants, using their executive authority under the color of law, violated the due process rights of Plaintiffs when they arbitrarily and capriciously deprived Plaintiffs of their liberty and property interest by issuing Orders that prohibited on-premises dining in Plaintiffs' restaurant and suspended their business license without a hearing, thereby prohibiting all business activity on the property.

43. The situation that the Governor has placed Plaintiffs and other similarly situated small businesses in is fundamentally unfair, irrational and establishes dangerous precedent. Plaintiffs were forced to close their business for an uncertain amount of time, based on unproven scientific allegations by the Governor, without any adequate pre-deprivation remedy simply, based on the unchecked, and arbitrary will of the Governor and unelected agency staff members. This situation is not just illegal, but immoral. Plaintiffs cannot possibly hope to compete with large corporations who are allowed to remain open and take advantage of the executive and

public health orders that cater to their business models which in some cases include in-premises dining. If Defendants are permitted this type of intrusive authority in this case, there appears to be no limit whatsoever that would check the executive authority so long as the Governor continues to renew emergency declarations.

44. Moreover, the actions of the Governor indicate that there is a particular hostility and desire for revenge upon the Plaintiffs, specifically when he publicly indicated his office would work with the health department to suspend Plaintiffs' restaurant license indefinitely. The Governor in his May 11, 2020, press conference indicated that the state is "walking a tightrope" and "it's hard enough to walk without folks shaking the rope because of their own ideological and anti-scientific views." The Governor stated that because of their actions on May 10, 2020, Plaintiff's business will be closed after other restaurants are allowed to reopen. Plaintiffs received the TCHD and CDPHE Orders on the same day as the Governor's press conference.

45. Defendants' action against Plaintiffs represent an unconscionable and malicious act designed with the specific intent to punish Plaintiffs rather than abate an "imminent" health hazard. Without a judicial injunctive remedy afforded in this case, there is no opportunity for Plaintiffs to operate their business and remain solvent absent the "good will" of the Governor, who continues to update and issue new orders entirely based on speculative, sometimes false and demonstrably unchecked grounds.

Third Claim for Relief
Deprivation of Equal Protection Under the Laws in Violation of Colo. Constitution Art. II, § 25; Fourteenth Amendment to the U.S. Constitution; and 42 U.S.C. § 1983

46. Plaintiffs incorporate by reference and reallege each and every allegation set forth in all proceeding paragraphs as if fully set forth herein.

47. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution mandates that "[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV § 1. Likewise, inherent in the due process clause of Art. II, § 25 of the Colorado Constitution is a guarantee of equal protection of the laws. The right to equal protection of the laws guarantees that all parties who are similarly situated receive like treatment by the law. *J. T. v. O'Rourke In & For Tenth Judicial Dist.*, 651 P.2d 407, 413 (Colo. 1982).

48. Furthermore, "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Thus, the Equal Protection Clause applies to executive agents as well as the legislature.

49. Plaintiff C&C is properly classified as a restaurant and coffee shop that serves customers on-premises. Plaintiff C&C, and other entities similarly situated, have been arbitrarily deemed "non-critical" services by Defendants.

50. Defendants arbitrarily and unreasonably discriminated against Plaintiffs and other "dine-in" restaurants when Defendants ordered them to remain closed to ingress, egress, use and occupancy by the public in Public Health Order 20-28 (Section IIA) and Executive Order D 2020-044, while allowing other services, including those that serve food, to remain open. For example, while restaurants, cafes and coffeehouses like the Plaintiffs must remain closed, room service in hotels, dining rooms in higher education institutions and airport concessionaires were allowed to remain open to the public.

51. Defendants' Orders also arbitrarily and unreasonably designate certain business as "critical" while others are designated as "non-critical". For example, restaurants and bars (for take-out/delivery only), liquor stores and establishments engaged in the retail sale of food and any other household consumer products are deemed "critical" (PHO 20-28 Appendix F). Any retail that is not included in the long list of "critical retail service" is deemed "non-critical." Plaintiff C&C is considered a "non-critical" business.

52. The Orders provide no rationale or standard to explain which entities are able to receive the coveted designation of "critical" as opposed to the remaining business entities that are considered "non-critical." The practical consequence, as is the case with Plaintiffs, is that the government's arbitrary designation between "critical" and "non-critical" entities means the government is picking and choosing who has the opportunity to continue to remain open and potentially operate at a profit and those who will be doomed to bankruptcy and economic ruin.

53. Not only do Defendants' Orders fail to provide any rationale or standard for determining which business will be deemed "critical" other than the Governor's and Director's arbitrary will, but the distinctions among various businesses defy reason and common sense. The practical outcome and effect of Defendants' Orders is that some businesses Defendants deemed "critical" such as Walmart, Home Depot and liquor stores are permitted to have patrons physically enter their premises to purchase goods and services, while Plaintiffs are not permitted to do the same. Why would the public be any less safe grabbing a cup of coffee at the C&C restaurant as opposed to shopping for a new television or utilizing food services at the local Walmart? Defendants have failed to provide any rational basis or explanation as to why COVID-19 would not as likely be transmitted in other large venues with hundreds of people

shopping at one time as opposed to Plaintiffs' operations if protection of the public is the purported basis for issuing such Orders.

54. Therefore, because there is no rational basis to discriminate between restaurants who serve patrons on-premises and other retailers of goods and services who serve patrons, including in some cases providing food services, on-premises and are deemed "critical," Defendants' enforcement of the Orders, under the color law, violate the United States and Colorado Constitutional Equal Protection guarantees, both facially and as applied to Plaintiffs.

Fourth Claim for Relief
Deprivation of Plaintiffs' Freedom of Speech and Right of Association Under Colo. Constitution Art. II, § 10; the First Amendment to the U.S Constitution; and 42 U.S.C. 1983

55. Plaintiffs incorporate by reference and reallege each and every allegation set forth in all proceeding paragraphs as if fully set forth herein.

56. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amend. I. Similarly, the Colorado Constitution provides "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty." Colo. Const. Art. II, § 10.

57. The federal constitutionally protected right to "freedom of association" may be considered under either the First Amendment's guarantee of protection for purposes of speech, assembly, petition for the redress of grievances, and the exercise of religion or under the Fourteenth Amendment's substantive due process guarantee of personal liberty. *Roberts v. U.S.*

Jaycees, 468 U.S. 609, 618 (1984). Both senses of "freedom of association" are implicated in this action.

58. Under Article II, § 10 of the Colorado Constitution, the freedom of speech is given even broader protection than under the federal constitution. *People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 356 (Colo. 1985). The freedom of expression includes freedom of association and guarantees the right to associate or refuse to associate with whomever one chooses. *Brandon v. Springspree, Inc.*, 888 P.2d 357, 359 (Colo. App. 1994).

59. Governmental regulations that have a "chilling effect" on the exercise of First Amendment rights are often found unconstitutional. While not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm, governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights. *Laird v. Tatum*, 408 U.S. 1, 11-13 (1972).

60. Plaintiffs' ability to associate with family, friends and members of the community in order to engage in protected expression was violated when Defendants' Order prohibited ingress, egress, use and occupancy to members of the public. Furthermore, acting under color of law, CDPHE violated the ability of Plaintiffs to associate for personal and expressive purposes when it suspended Plaintiffs' business license because patrons were no longer permitted on Plaintiffs' private property. Plaintiff is no longer able to utilize its private property for purposes of association with family, friends or members of the community due to Defendants' Orders.

61. Considering gatherings of individuals for purposes of shopping at other businesses such as Walmart, Home Depot and liquor stores is permitted, Defendants have failed to provide a compelling interest to justify prohibiting the association of family, friends and community members on Plaintiffs' premises.

62. Furthermore, the purpose and basis for issuing orders closing the Plaintiffs' small business and suspending the business license was not motivated by a desire to mitigate an "imminent" threat. Rather, it was clear from the Governor's press conference that he disagreed with the Plaintiffs' ideology and "unscientific views" and sought to close down Plaintiffs' business as a result of the Plaintiffs' political statement that caused "fear" among the public. No compelling or narrowly tailored reason was offered to justify the closure of Plaintiffs' business other than the Governor's statement that he disagreed with the public policy views of the Plaintiffs and intended to shut them down to avoid public "fear." It is unclear what the government considered the "imminent health hazard" other than having other human beings inside the Plaintiffs' location, this despite people being permitted on premises in other businesses and locations in the same area including the Walmart across the street.

Fifth Claim for Relief
Violation of Excessive Fines Clause under Colo. Const. Art. II, § 20, Eighth Amendment to the U.S. Constitution, and 42 U.S.C. § 1983

63. Plaintiffs incorporate by reference and reallege each and every allegation set forth in all proceeding paragraphs as if fully set forth herein.

64. Both the Eighth Amendment and Colo. Const. art. II, § 20 state: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Under both the Colorado and U.S. constitutions, protections against excessive fines under the Eighth Amendment apply to individuals and corporations. *Colorado Department of Labor and Employment v. Dami Hospitality*, 442 P.3d 94, 100 (Colo. 2019).

65. The proper standard for determining whether a regulatory penalty amounts to a constitutionally excessive fine in violation of the Eighth Amendment is whether it is grossly

disproportional to the gravity of the underlying offense. *Id.* at 101. Significantly, ability to pay is an appropriate element of the Excessive Fines Clause gross disproportionality analysis. A fine that would bankrupt a person or put a company out of business would be a substantially more onerous fine than one that did not. *Id.* at 102. A governmental action that serves "punitive and deterrent purposes" and "imposes an economic penalty" will implicate Eight Amendment protections. *Austin v. U.S.* 509 U.S. 602, 618 (1993).

66. In this case, by issuing the Order to Close and Order for Summary Suspension, Defendants sought to punish Plaintiffs and deter other similarly situated restaurants and coffee shops from violating Defendants' public health orders. The Orders issued were not temporary or short in nature but undefined and open ended. The May 11, 2020 Order to Close and Order of Summary Suspension effectively shut down Plaintiffs' ability to earn any revenue or profit and constituted a complete termination of the ability to earn a living with this small business.

67. Defendants' actions constitute a punishment and deterrent, rather than a remedial measure to secure public health. Patrons of other businesses deemed "critical" are permitted to allow patrons on their premises. Presumably, Plaintiffs' opening up their property to patrons cannot constitute a public health threat that needs a remedy when the government permits other businesses to open their premises to patrons. Moreover, the Governor made it clear in his May 11, 2020 press conference that Plaintiffs' restaurant would probably be closed after other restaurants are allowed to reopen due to their disobedience of the orders. If the "imminent hazard" CDPHE claimed Plaintiffs' actions constituted in their Order of Suspension was removed once all the patrons left the building on May 10, 2020, it also remains unclear what the government would be attempting to remedy now as the business remains closed and unable to

function. Defendants are using the Orders to punish Plaintiffs and use them as a deterrent to coerce other similarly situated "non-critical" businesses into compliance.

Sixth Claim for Relief
Attorneys' Fees Pursuant to 42 U.S.C. 1983 & 1988

68. Plaintiffs re-allege here each and every allegation and averment set forth in this Complaint.

69. The Arellano Plaintiffs are United States citizens and desire to exercise their fundamental rights as granted under the United States Constitution and the laws of the United States.

70. 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

71. 42 U.S.C. § 1988(b) provides that "[i]n any action or proceeding to enforce a provision of [section 1983 of this title]... the court, in its discretion, may allow the prevailing party... a reasonable attorney's fee as part of the costs....."

72. The Defendants, acting under color of state law, have deprived the Plaintiffs of constitutional rights as set forth in this Complaint and are seeking relief under 42 U.S.C. § 1983.

73. Plaintiffs are entitled to reasonable attorney's fees, costs and expenses for prosecuting these claims.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

A. Enter judgment in favor of Plaintiffs and against the Defendants on all claims;

B. That the Governor's Executive Orders to the extent they restrict ingress, egress, use and occupancy by members of the public and prohibit on-premises dining in restaurants, food courts, cafes, coffeehouses, and other similar places of public accommodation be declared unenforceable, null and void;

C. That the Director's Orders to the extent they restrict ingress, egress, use and occupancy by members of the public and prohibit on-premises dining in restaurants, food courts, cafes, coffeehouses, and other similar places of public accommodation be declared unenforceable, null and void;

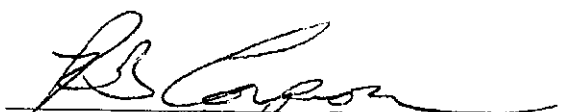
D. That the Director and Colorado Department of Public Health & Environment be permanently enjoined from enforcing the May 11, 2020, Order of Summary Suspension against Plaintiffs and that the Order be reversed;

E. That the Tri-County Health Department be permanently enjoined from enforcing the May 11, 2020 Order to Close against Plaintiffs and that the order be reversed;

F. That this Court grant Plaintiffs an award of their reasonable attorney fees, costs and expenses incurred in this action pursuant to 42 U.S.C. § 1988 or as otherwise provided by law;

G. That this Court order such other and further relief as the Court deems just and appropriate.

Respectfully submitted this 22nd day of May, 2020.



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