

The “Target EO” identified.

6. For clarity and brevity, Defendant Polis’ June 30, 2020 **Executive Order D 2020 123** may be referred to as “**EO 123**” or “**the Target EO;**” a copy of this EO 123 is attached to this Complaint as **Exhibit 1**.

Plaintiffs challenge various CDPHE Public Health Orders as unconstitutional.

7. For the reasons more particularly described in this Complaint, Plaintiffs challenge each of various CDPHE Public Health Orders, and, in particular, Defendant CDPHE’s Eighth Amended Public Health Order 20-28, as unconstitutional, both as applied and facially, because Defendant CDPHE’s Public Health Orders do not comply with the requirements of the United States Constitution and the Colorado Constitution, the direct consequence of which is unjust injury to the fundamental civil rights, liberty interests, and property rights of each Plaintiff.

The “Target CDPHE PHO” identified.

8. For clarity and brevity, Defendant CDPHE’s Eighth Amended Public Health Order 20-28 may be referred to as “**the Eighth Amended PHO 20-28**” or “**the Target CDPHE PHO;**” a copy of this Eighth Amended PHO 20-28 is attached to this Complaint as **Exhibit 2**.

Plaintiffs challenge various JCPH Public Health Orders as unconstitutional.

9. For the reasons more particularly described in this Complaint, Plaintiffs challenge various JCPH Public Health Orders, and, in particular, Defendant JCPH Public Health Order 20-007, as unconstitutional, both as applied and facially, because Defendant JCPH’s Public Health Orders do not comply with the requirements of the United States Constitution and the Colorado Constitution, the direct consequence of which is unjust injury to the fundamental civil rights, liberty interests, and property rights of each Plaintiff.

The “Target JCPH PHO” identified.

10. For clarity and brevity, Defendant JCPH’s Public Health Order 20-007 may be referred to as “JCPH PHO 20-007” or “**the Target JCPH PHO;**” a copy of this JCPH PHO 20-007 is attached to this Complaint as **Exhibit 3**.

Link to Defendant Polis’ Executive Orders and Defendant CDPHE’s Public Health Orders.

11. The state actions by state actors about which Plaintiffs complain are based, in part, upon certain EOs issued by Defendant Polis and certain PHOs issued by Defendant Ryan for Defendant CDPHE; these include, but are not limited to, the Target EO and the Target CDPHE PHO. On information and belief, all of Defendant Polis’ EOs and many, but not all, of Defendant CDPHE’s PHOs are published by the State of Colorado at this link:
<https://covid19.colorado.gov/prepare-protect-yourself/prevent-the-spread/public-health-executive-orders>

Link to Defendant JCPH’s Public Health Order 20-007.

12. The state actions by JCPH state actors about which Plaintiffs complain are based, in part, upon certain PHOs issued by Defendant Johnson for Defendant JCPH; these include, but are not limited to, the Target JCPH PHO. On information and belief, the Target JCPH PHO and the other JCPH PHOs are published by Defendant JCPH at this link:
<https://www.jeffco.us/DocumentCenter/View/22689/JeffCo-Public-Health-Order-20-007-072020Signed>

A list of the EOs, CDPHE PHOs, and JCPH PHOs challenged in this Complaint as unconstitutional, collectively “the Subject Orders.”

13. The EOs issued by Defendant Polis, the CDPHE PHOs issued by Defendant Ryan, and the JCPH PHOs issued by Defendant Johnson, about which Plaintiffs complain in this action, are more particularly described elsewhere in this Complaint, but are here listed (in chronological

order) as follows:

- A. CDPHE Public Health Order 20-20, issued March 12, 2020;
- B. CDPHE Public Health Order 20-22, issued March 16, 2020;
- C. CDPHE Updated Public Health Order 20-22, issued March 19, 2020;
- D. Executive Order D 2020 013, issued March 22, 2020;
- E. CDPHE Public Health Order 20-24, issued March 22, 2020;
- F. Executive Order D 2020 017, issued March 25, 2020;
- G. CDPHE Second Updated Public Health Order 20-24, issued March 27, 2020;
- H. CDPHE Third Updated Public Health Order 20-24, issued April 1, 2020;
- I. Executive Order D 2020 024, issued April 6, 2020;
- J. CDPHE Amend Public Health Order 20-20, issued April 20, 2020;
- K. Executive Order D 2020 044, issued April 26, 2020;
- L. CDPHE Public Health Order 20-28, issued April 26, 2020;
- M. CDPHE Amended Public Health Order 20-28, issued May 4, 2020;
- N. CDPHE Second Amended Public Health Order 20-28, issued May 8, 2020;
- O. CDPHE Third Amended Public Health Order 20-28, issued May 14, 2020;
- P. CDPHE Fourth Amended Public Health Order 20-28, issued May 26, 2020;
- Q. Executive Order D 2020 91, issued June 1, 2020;
- R. CDPHE Fifth Amended Public Health Order 20-28, issued June 2, 2020;
- S. CDPHE Sixth Amended Public Health Order 20-28, issued June 5, 2020;
- T. CDPHE Seventh Amended Public Health Order 20-28, issued June 18, 2020;
- U. **Executive Order D 2020 123**, issued June 30, 2020
(the Target EO);

V. **CDPHE Eighth Amended Public Health Order 20-28**, issued June 30, 2020 (**the Target CDPHE PHO**);

W. JCPH Order 20-005, issued July 14, 2020;

X. JCPH Order 20-006, issued July 16, 2020;

Y. **JCPH Order 20-007**, issued July 20, 2020
(**the Target JCPH PHO**);

Z. Executive Order D 2020 142, issued July 21, 2020;

AA. Executive Order D 2020 144, issued July 23, 2020;

BB. JCPH Order 20-008, issued July 24, 2020;

CC. CDPHE Ninth Amended Public Health Order 20-28, issued July 30, 2020;

DD. Executive Order D 2020 170, issued August 21, 2020;

EE. CDPHE Tenth Amended Public Health Order 20-28, issued August 31, 2020

each, and all, as extended or amended or revised or replaced.⁴

The listed EOs, CDPHE PHOs, and JCPH PHOs referred to as “the Subject Orders.”

14. Plaintiffs challenge each and all of the above listed EOs and CDPHE PHOs and JCPH PHOs (collectively, “the Subject Orders”), as unconstitutional, both as applied and facially, because they do not comply with the requirements of the United States Constitution and the

⁴ Most, if not all, of the EOs and PHOs about which Plaintiffs complain in this Complaint have been repeatedly extended or amended or revised or replaced. Plaintiffs intend that each and every reference in this Complaint to a specific EO or PHO will encompass all predecessor EOs and PHOs and successor EOs and PHOs by way of extension, amendment, revision, replacement, or otherwise.

In order to avoid needless redundancy of verbiage, and for clarity and brevity, in this Complaint and all other pleadings of Plaintiffs, reference will be made to only a specific EO or PHO wherever possible, but without the cumbersome trailing inclusion of “... as extended or amended or revised or replaced.”

Colorado Constitution.

The three “Target Orders” which are a subset of the thirty-one Subject Orders.

15. In order to simplify this Complaint and streamline communication about the disputed issues, Plaintiffs have identified a representative subset of only three (3) of the thirty-one (31) Subject Orders; for clarity and brevity, this subset of the Subject Orders is identified in this Complaint and Plaintiffs’ other pleadings collectively as “**the Target Orders.**”

16. The Target Orders subset of the Subject Orders is comprised of: (1) one of the EOs issued by Defendant Polis; (2) one of the CDPHE PHOs issued by Defendant Ryan; and (3) one of the JCPH PHOs issued by Defendant Johnson; these Target Orders are listed as follows:

Executive Order D 2020 123, issued June 30, 2020 (“**the Target EO**”);

the **CDPHE Eighth Amended Public Health Order 20-28**, issued June 30, 2020

(“**the Target CDPHE PHO**”);

JCPH Order 20-007, issued July 20, 2020 (“**the Target JCPH PHO**”).

17. For clarity and brevity, Plaintiffs will frame this Complaint and Plaintiffs’ other pleadings by reference primarily to the Target Orders, each of which is an archetype of the other Subject Orders of like kind.

18. It is Plaintiffs’ intention that each allegation about and complaint against each Target Order in this Complaint and Plaintiff’s other pleadings applies to the other Subject Orders of like kind. Plaintiff respectfully reserves the right to amend this Complaint to address with specificity each and every one of the thirty-one (31) Subject Orders, in the event this approach is objected to by any party or the Court.

Relief Requested by each Plaintiff.

19. In order to compel each and all of the Defendants to cease and desist their unlawful state

actions in violation of the explicit requirements of Article III and Article V (including, but not limited to, Article V, Section 17) of the Colorado Constitution, Plaintiffs bring this action in which they seek:

(as to the Colorado Disaster Emergency Act)

- (a) judicial review of the constitutionality of the Target Statutes, the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, generally, and specifically § 24-33.5-704(2) and § 24-33.5-704(7)(a);
- (b) a declaratory judgment that the Target Statutes do not comply with Article III of the Colorado Constitution which requires distribution of expressly enumerated powers among the executive, legislative, and judicial departments of Colorado government;
- (c) a declaratory judgment that the Target Statutes do not comply with Article III of the Colorado Constitution which explicitly prohibits exercise of Article V legislative powers by the executive department;
- (d) a declaratory judgment that the Target Statutes do not comply with Article V, Section 17 of the Colorado Constitution which explicitly requires that no law shall be passed except by bill in the legislature;
- (e) an injunction to restrain Defendant Polis from any action to enforce, administer, or in any other way take action based upon the purported authority of the Target Statutes;

(as to Defendant Polis and the Executive Orders)

- (f) judicial review of the constitutionality of the Target EO issued by Defendant Polis in his official capacity as Governor of the State of Colorado;

- (g) a declaratory judgment that the Target EO does not comply with Article III of the Colorado Constitution which requires distribution of expressly enumerated powers among the executive, legislative, and judicial departments of Colorado government;
- (h) a declaratory judgment that the Target EO does not comply with Article III of the Colorado Constitution which explicitly prohibits exercise of Article V legislative powers by the executive department;
- (i) a declaratory judgment that the Target EO does not comply with Article V, Section 17 of the Colorado Constitution which explicitly requires that no law shall be passed except by bill in the legislature;
- (j) a declaratory judgment that the Target EO is a set of state executive agency rules issued in violation of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.* generally, and in particular, C.R.S. § 24-1-101, and that as such, the Target EO is a set of state executive agency rules not issued within the power delegated to the agency and as authorized by law, and therefore is void in accord with C.R.S. § 24-1-101 and C.R.S. § 24-4-103(8)(a);
- (k) a declaratory judgment that the Target EO is a set of state executive agency rules issued in violation of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.* generally, and in particular, C.R.S. § 24-4-103(8)(a), and that as such, the Target EO is a set of state executive agency rules issued in conflict with the State Administrative Procedures Act, and therefore is void in accord with C.R.S. § 24-4-103(8)(a);
- (l) a declaratory judgment that the Target EO is a set of state executive agency rules issued in violation of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.*, generally, and in particular, C.R.S. § 24-4-103(8)(b), and that as such, the Target

EO is a set of state executive agency rules issued without first being submitted to the attorney general for his or her opinion as to its constitutionality and legality as required by the State Administrative Procedures Act, and therefore is void in accord with C.R.S. § 24-4-103(8)(b);

(m) a declaratory judgment that the Target EO is a set of state executive agency rules that does not comply with the explicit requirements of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.*, and is void because it is:

- (i) contrary to constitutional rights or privileges;
 - (ii) in excess of the statutory authority or jurisdiction of the county or district board or public health director;
 - (iii) affected by any error of law;
 - (iv) made or promulgated upon unlawful procedure;
 - (v) unsupported by substantial evidence in view of the entire record as submitted;
- or
- (vi) arbitrary or capricious;

(n) an injunction to restrain Defendant Polis from any action to enforce, administer, or in any other way take action based upon the purported authority of the Target EO;

(as to Defendant CDPHE, Defendant Ryan, and the CDPHE PHOs)

(o) judicial review of the constitutionality of the Target CDPHE PHO issued by Defendant Ryan in her official capacity as Executive Director of Colorado Department of Public Health and Environment;

(p) a declaratory judgment that the Target CDPHE PHO does not comply with Article III of the Colorado Constitution which requires distribution of expressly enumerated

powers among the executive, legislative, and judicial departments of Colorado government;

(q) a declaratory judgment that the Target CDPHE PHO does not comply with Article III of the Colorado Constitution which explicitly prohibits exercise of Article V legislative powers by the executive department;

(r) a declaratory judgment that the Target CDPHE PHO does not comply with Article V, Section 17 of the Colorado Constitution which explicitly requires that no law shall be passed except by bill in the legislature;

(s) a declaratory judgment that the Target CDPHE PHO is a set of state executive agency rules issued in violation of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.* generally, and in particular, C.R.S. § 24-1-101, and that as such, the Target CDPHE PHO is a set of state executive agency rules not issued within the power delegated to the agency and as authorized by law, and therefore is void in accord with C.R.S. § 24-1-101 and C.R.S. § 24-4-103(8)(a);

(t) a declaratory judgment that the Target CDPHE PHO is a set of state executive agency rules issued in violation of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.* generally, and in particular, C.R.S. § 24-4-103(8)(a), and that as such, the Target CDPHE PHO is a set of state executive agency rules issued in conflict with the State Administrative Procedures Act, and therefore is void in accord with C.R.S. § 24-4-103(8)(a);

(u) a declaratory judgment that the Target CDPHE PHO is a set of state executive agency rules issued in violation of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.*, generally, and in particular, C.R.S. § 24-4-103(8)(b), and that as such,

the Target CDPHE PHO is a set of state executive agency rules issued without first being submitted to the attorney general for his or her opinion as to its constitutionality and legality as required by the State Administrative Procedures Act, and therefore is void in accord with C.R.S. § 24-4-103(8)(b);

(v) a declaratory judgment that the Target CDPHE PHO is a set of state executive agency rules that does not comply with the explicit requirements of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.*, and is void because it is:

- (i) contrary to constitutional rights or privileges;
 - (ii) in excess of the statutory authority or jurisdiction of the county or district board or public health director;
 - (iii) affected by any error of law;
 - (iv) made or promulgated upon unlawful procedure;
 - (v) unsupported by substantial evidence in view of the entire record as submitted;
- or
- (vi) arbitrary or capricious;

(w) an injunction to restrain Defendant Ryan from any action to enforce, administer, or in any other way take action based upon the purported authority of the Target CDPHE PHO;

(as to Defendant JCPH, Defendant Johnson, and the JCPH PHOs)

(x) judicial review of the constitutionality of the Target JCPH PHO issued by Defendant Johnson in his official capacity as Executive Director of Jefferson County Public Health;

- (y) a declaratory judgment that the Target JCPH PHO does not comply with Article III of the Colorado Constitution which requires distribution of expressly enumerated powers among the executive, legislative, and judicial departments of Colorado government;
- (z) a declaratory judgment that the Target JCPH PHO does not comply with Article III of the Colorado Constitution which explicitly prohibits exercise of Article V legislative powers by the executive department;
- (aa) a declaratory judgment that the Target JCPH PHO does not comply with Article V, Section 17 of the Colorado Constitution which explicitly requires that no law shall be passed except by bill in the legislature;
- (bb) a declaratory judgment that the Target JCPH PHO is a set of state executive agency rules issued in violation of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.* generally, and in particular, C.R.S. § 24-1-101, and that as such, the Target JCPH PHO is a set of state executive agency rules not issued within the power delegated to the agency and as authorized by law, and therefore is void in accord with C.R.S. § 24-1-101 and C.R.S. § 24-4-103(8)(a);
- (cc) a declaratory judgment that the Target JCPH PHO is a set of state executive agency rules issued in violation of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.* generally, and in particular, C.R.S. § 24-4-103(8)(a), and that as such, the Target JCPH PHO is a set of state executive agency rules issued in conflict with the State Administrative Procedures Act, and therefore is void in accord with C.R.S. § 24-4-103(8)(a);

(dd) a declaratory judgment that the Target JCPH PHO is a set of state executive agency rules issued in violation of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.*, generally, and in particular, C.R.S. § 24-4-103(8)(b), and that as such, the Target JCPH PHO is a set of state executive agency rules issued without first being submitted to the attorney general for his or her opinion as to its constitutionality and legality as required by the State Administrative Procedures Act, and therefore is void in accord with C.R.S. § 24-4-103(8)(b);

(ee) a declaratory judgment that the Target JCPH PHO is a set of state executive agency rules that does not comply with the explicit requirements of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.*, and is void because it is:

- (i) contrary to constitutional rights or privileges;
 - (ii) in excess of the statutory authority or jurisdiction of the county or district board or public health director;
 - (iii) affected by any error of law;
 - (iv) made or promulgated upon unlawful procedure;
 - (v) unsupported by substantial evidence in view of the entire record as submitted;
- or
- (vi) arbitrary or capricious;

(ff) an injunction to restrain Defendant Johnson from any action to enforce, administer, or in any other way take action based upon the purported authority of the Target JCPH PHO.

Additional Relief Requested by each Plaintiff.

20. In addition, by and through the Claims more particularly stated elsewhere in this

Complaint, Plaintiffs seek:

(1) declaratory relief from this Court declaring that each of the Subject Orders deprives each Plaintiff of fundamental civil rights, liberty interests, and property rights

fundamental civil rights, liberty interests, and property rights in violation of:

(a) 42 U.S.C. Section 1983 of the Federal Civil Rights Act (“Section 1983”);

(b) Article III, IV, V, and VI of the Colorado Constitution (Distribution of Powers);

(c) Article III of the Colorado Constitution (nondelegation of Article IV, V, and VI powers);

(d) Article V, Section 17 of the Colorado Constitution (no laws except by bill passed in the legislature);

(e) Article II, Section 25 of the Colorado Constitution (due process and equal protection);

(f) Article II, Section 3 of the Colorado Constitution (inalienable rights);

(g) Article II, Section 4 of the Colorado Constitution (religious freedom);

(h) Article II, Section 10 of the Colorado Constitution (freedom of speech and right of association); and

(i) Article II, Section 15 of the Colorado Constitution (taking private property for public use);

(2) equitable and injunctive relief to enjoin the enforcement of each of the Target Orders;

(3) attorney’s fees and costs for the work done by counsel for each Plaintiff in connection with this lawsuit in an amount according to proof; and

(4) for such other and further relief as the Court deems just and appropriate.

Plaintiff, John Bandimere, Jr.

21. Plaintiff John Bandimere, Jr. (“Plaintiff John, Jr.”), is a natural person, the husband of Plaintiff Lorraine Bandimere, and a resident of Jefferson County in the State of Colorado. Plaintiff John, Jr. is currently personally involved in management and ownership of Bandimere Speedway, as he has been his entire adult life.

Plaintiff, Lorraine Bandimere.

22. Plaintiff Lorraine Bandimere (“Plaintiff Lorraine”), is a natural person, the wife of Plaintiff John Bandimere, Jr. and a resident of Jefferson County in the State of Colorado. Plaintiff Lorraine is currently personally involved in management and ownership of Bandimere Speedway, as she has been her entire adult life.

Plaintiff, Bandimere Speedway.

23. Plaintiff Bandimere Auto-Performance Center, Inc., doing business as Bandimere Speedway, Inc. (“Plaintiff Speedway” or “Bandimere Speedway”), is a Colorado corporation in good standing and doing business in Jefferson County, Colorado, with its principal office street address located at 51 South Rooney Road, Morrison, Colorado 80465.

24. "In 1958, John Bandimere, Sr. purchased a parcel of land on the west side of Denver nestled up against the hogback leading up to the Rocky Mountains. He and his family began the process of constructing a small but efficient dragstrip that was used to augment their auto parts business. It was also the fulfillment of a dream of John Sr. and his wife Frances to provide a safe environment for young people to learn about cars and race them off the streets." Quoted from the jacket of the book about the history of the Bandimere family and Bandimere Speedway, *Living It Loud, Faith Family and the Pursuit of Speed*, by Chad Bonham (with Forewards by drag racing legends John Force and Don Garlits).

25. “Now, over [62] years later, the only thing at Bandimere Speedway that has not changed is the facility’s location. A major renovation in 1988 replaced nearly every original structure, allowing the facility to host larger events while providing major exposure opportunities for the race track and its sponsors.” Living It Loud, Faith Family and the Pursuit of Speed, *id.*

26. Bandimere Speedway is now nationally and internationally recognized as a world class racing facility, proudly operated by a third generation of the Bandimere family.

Defendant, Jared Polis.

27. Defendant Jared Polis (“Defendant Polis”), is a natural person, a resident of the State of Colorado, and the current Governor of the State of Colorado (“the Governor”).

28. As Governor, Mr. Polis is the head of the executive department of government of the State of Colorado. Colo. Const. Article IV, Section 2.

29. Defendant Polis issued the Executive Orders which are among the subjects of this action, including the Target EO. Defendant Polis is sued only in his official capacity as Governor of the State of Colorado, pursuant to *Ex Parte Young*, 209 U.S. 123, 152-154 (1908).

Defendant, Colorado Department of Public Health and Environment.

30. The Colorado Department of Public Health and Environment is a state agency in the executive department of Colorado government.

31. Defendant CDPHE is a political subdivision of the State of Colorado established as a state public health agency pursuant to C.R.S. § 24-1-119.

Defendant, Jill Hunsaker Ryan.

32. Defendant, Jill Hunsaker Ryan (“Defendant Ryan”), is a natural person, a resident of the State of Colorado, and the current Executive Director of Defendant CDPHE.

33. As Executive Director of Colorado Department of Public Health and Environment, Defendant Ryan is the head of a state agency in the executive department of government of the State of Colorado.

34. Defendant Ryan issued the Public Health Orders which are among the subjects of this action, including the Target CDPHE PHO.

35. Defendant Ryan is sued only in her official capacity as Executive Director of Colorado Department of Public Health and Environment, pursuant to *Ex Parte Young*, 209 U.S. 123, 152-154 (1908).

Defendant, Jefferson County Public Health.

36. Jefferson County Public Health (“Defendant JCPH”) is a county agency in the executive department of Colorado government.

37. Defendant JCPH is a political subdivision of the State of Colorado established as a county public health agency pursuant to C.R.S. § 25-1-506.

Defendant, Mark B. Johnson.

38. Defendant, Mark B. Johnson, M.D. (“Defendant Johnson”), is a natural person, a resident of the State of Colorado, and the current Executive Director of Jefferson County Public Health (“JCPH”).

39. As Executive Director of JCPH, Defendant Johnson is the head of a county agency in the executive department of government of the State of Colorado.

40. Defendant Johnson issued the Public Health Orders which are among the subjects of this action, including the Target JCPH PHO.

41. Defendant Johnson is sued only in his official capacity as Executive Director of Jefferson County Public Health, pursuant to *Ex Parte Young*, 209 U.S. 123, 152-154 (1908).

Jurisdiction and Venue.

42. This Court has personal jurisdiction over each of the parties Plaintiff because they reside and do business in Jefferson County, Colorado, and they have filed this Complaint in voluntary submission to the jurisdiction of the District Court in Jefferson County, Colorado.

43. This Court has personal jurisdiction over the parties Defendant because each of them is a public officer, the claims brought against them are in virtue of the discharge of their respective duties as a public officer, and each Defendant is located and performs government functions in the State of Colorado.

44. This Court has subject matter jurisdiction over this action pursuant to the Constitution of the State of Colorado, Article VI, Section 9, and C.R.C.P. 106.

45. This Court has jurisdiction over the parties and the subject matter of this case because Plaintiffs are aggrieved and affected by the state actions of Defendant Polis who issued the Target EO, which directed Defendant CDPHE to issue a PHO in accord with the dictates of the Target EO, and the CDPHE PHO issued by Defendant Ryan as directed by Defendant Polis was enforced by the state actions of Defendant JCPH state actors, including Defendant Johnson.

46. This Court has jurisdiction over the parties and the subject matter of this case because Plaintiffs are entitled to judicial review in this district court in accord with C.R.S. § 25-1-515; the fundamental civil rights, liberty interests, and property rights of Plaintiffs have been implicated and injured by the Target EO issued by Defendant Polis, the Target CDPHE PHO issued by Defendant Ryan, and the enforcement actions of Defendant JCPH including, but not limited to enforcement of the Target CDPHE PHO and the Target JCPH PHO issued by Defendant Johnson, which, individually and collectively, are:

(a) contrary to constitutional rights or privileges;

- (b) in excess of the statutory authority or jurisdiction of the county or district board or public health director;
- (c) affected by any error of law;
- (d) made or promulgated upon unlawful procedure;
- (e) unsupported by substantial evidence in view of the entire record as submitted;
- or
- (f) arbitrary or capricious.

C.R.S. § 25-1-515.

47. Venue is proper in this Court under C.R.C.P. 98(b)(2) because each of Defendants Polis, Ryan, and Johnson is a public officer, the claims brought against each of them are in virtue of the discharge of their duties as a public officer, and substantially all of the enforcement actions of Defendant JCPH including, but not limited to, enforcement of the Target CDPHE PHO and the Target JCPH PHO, occurred in Jefferson County, Colorado.

General Allegations.

48. Plaintiffs make the following general allegations in support of their Complaint about and against each Defendant in this action.

The Declaration of Independence.

49. On July 4, 1776, the final text of the Declaration of Independence was approved by Congress, after independence was formally declared on July 2, 1776.⁵

⁵ One of the most widely held misconceptions about the Declaration of Independence is that it was signed on July 4, 1776. In fact, independence was formally declared on July 2, 1776, a date that John Adams believed would be “the most memorable epocha in the history of America.” On July 4, 1776, Congress approved the final text of the Declaration, but it was not signed until August 2, 1776. ConstitutionFacts.com

The United States Constitution.

50. On September 17, 1787, the Constitution of the United States was signed.⁶ The United States Constitution describes the fundamental architecture of America’s system of government.

51. By and through the United States Constitution, the People:

- A. recognized their inherent authority to govern themselves;
- B. created a government that keeps that authority in the hands of the people;
- C. delegated their authority and separated the powers of government into three branches:
 - the legislative branch, which makes the laws;
 - the executive branch, which executes the laws; and
 - the judicial branch, which interprets the laws;
- D. set up a system of checks and balances that ensures no one branch has too much power;
- E. divided power between the states and the federal government;
- F. described the purposes and duties of the government;
- G. defined the scope and limits of government power;
- H. prescribed the system for electing representatives;
- I. established the process for the Constitution’s ratification and amendment; and

⁶ The Constitution did not go into effect the moment it was signed by the delegates. It needed to be approved by the people through the ratification process. Article VII of the Constitution established the process for ratification, by simply stating: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” On June 21, 1788, New Hampshire became the ninth state to ratify, and the Confederation Congress established March 4, 1789 as the date to begin operating a new government under the Constitution. National Constitution Center at constitutioncenter.org

J. recognized and enumerated many rights and freedoms of the people.

52. On December 15, 1791, the first ten amendments to the Constitution were ratified and the “Bill of Rights” became an integral part of the fundamental framework of America’s system of government.

53. The Preamble to the United States Constitution states as follows.

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

U.S. Const. Preamble.

54. The Federal Constitution was, as its preamble recites, ordained and established by the people of the United States. *White v. Hart*, U.S.Ga.1871, 80 U.S. 646, 20 L.Ed. 685, 13 Wall. 646.

55. The Constitution emanated from the people, and was not the act of sovereign and independent states. *M’Culloch v. State*, U.S.Md.1819, 17 U.S. 316, 4 L.Ed. 579, 4 Wheat. 316.

56. The Constitution of the United States was ordained and established not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by “the people of the United States; there can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. *Martin v. Hunter’s Lessee*, U.S.Va.1816, 14 U.S. 304, 4 L.Ed. 97, 1 Wheat. 304.

57. The Constitution of the United States was made by, and for the protection of, the people of the United States. *League v. De Young*, U.S.Tex.1850, 52 U.S. 185, 11 How. 185, 13 L.Ed. 657.

58. Under the Constitution we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution by which it was their will that the state governments should be bound, and to which the state constitutions should be made to conform.

Chisholm v. Georgia, U.S.Ga.1793, 2 U.S. 419, 2 Dall. 419, 1 L.Ed. 440.

59. The United States Constitution is the supreme law of the land, and the Judges in every State are bound thereby. U.S. Const. art. VI, cl. 2.

60. The Supremacy Clause the U.S. Constitution reads as follows.

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

61. The United States Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, anything in the Constitution or laws of any state to the contrary notwithstanding. *Testa v. Katt*, 330 U.S. 386, 390, 67 S.Ct. 810, 813, 91 L.Ed. 967 (1947), citing with approval *Clafin v. Houseman*, 93 U.S. 130, 23 L.Ed. 833 (1876).

62. The Constitution and laws of the United States are the supreme law of the land and states may not enact laws or regulations which are contrary to federal law. *Youakim v. Miller*, C.A.7 (Ill.) 1977, 562 F.2d 483, probable jurisdiction noted 98 S.Ct. 1230, 434 U.S. 1060, 55 L.Ed.2d 760, affirmed 99 S.Ct. 957, 440 U.S. 125, 59 L.Ed.2d 194.

63. Any section of the state Constitution which is contrary to the federal Constitution is, for that reason and to that extent, null and void. *People v. Western Union Telegraph Co.*, 1921, 198 P. 146, 70 Colo. 90.

The Colorado Constitution.

64. On August 1, 1876, Colorado joined the United States as the thirty-eighth state to enter the Union.

65. The Constitution of the State of Colorado is the foundation of the laws and government of the state of Colorado. The current, and only, Colorado State Constitution was drafted March 14, 1876, approved by Colorado voters July 1, 1876, and took effect upon the admission of Colorado into statehood on August 1, 1876.⁷ <https://leg.colorado.gov/colorado-constitution>

66. The Preamble of the Colorado Constitution states as follows.

We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe, in order to form a more independent and perfect government; establish justice; insure tranquility; provide for the common defense; promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the “State of Colorado.”

Colo. Const. Preamble.

67. The People of Colorado apparently saw the wisdom in the architecture and substance of the Federal Constitution because in most respects they echoed it, as - by and through their

Colorado Constitution - the People:

- A. recognized their inherent authority to govern themselves;
- B. created a government that keeps that authority in the hands of the people;
- C. delegated their authority and separated the powers of government into three departments:

the legislative department, which makes the laws;

⁷ The Colorado Constitution was written in three languages: English, Spanish, and German. This was due to the efforts of Casimiro Barela, a territorial legislator who was born in then-Mexico. historycolorado.org

the executive department, which executes the laws; and
the judicial department, which interprets the laws;

- D. set up a system of checks and balances that ensures no one department has too much power;
- E. described the purposes and duties of the government;
- F. defined the scope and limits of government power;
- G. prescribed the system for electing representatives;
- H. established the process for the Constitution's amendment; and
- I. recognized and enumerated many rights and freedoms of the people.

The People of Colorado are the source of all political power.

68. In Article II, Section 1 of the Colorado Constitution, the People unequivocally declared themselves as the source of all political power and the authors of their self-government.

69. Article II, Section 1 of the Colorado Constitution states as follows.

§ 1. Vestment of political power

“All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.”

Colo. Const. art. II, § 1.

The People of Colorado have the authority to delegate their political power.

70. The authors of the Colorado Constitution, i.e. the People, are the “authors” of their republican form of self-government; as the authors of the Colorado Constitution, the People have the “author-ity” to delegate their political power as they see fit by and through their Colorado Constitution.

In Article III, the People of Colorado distributed their political power.

71. In Article III of the Colorado Constitution, the People delegated their authority and invested their powers of government into three separated departments as a system of checks and balances that ensures no one department has too much power.

72. Article III of the Colorado Constitution states as follows.

Distribution of Powers

The powers of the government of this state are divided into three distinct departments, -- the Legislative, Executive and Judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this Constitution expressly directed or permitted.

Colo. Const. art. III.

The Colorado Constitution says what the People intended.

73. Each clause and sentence of a constitution or statute must be presumed to have purpose and use, which neither courts nor legislature may ignore. *Colorado State Civil Service Emp. Ass'n v. Love*, 1968, 448 P.2d 624, 167 Colo. 436.

74. The constitution is to be construed as a whole, including the amendments, giving to each word its proper effect, and so far as possible harmonizing each provision with every other. The same meaning is to be ascribed to the same words in the different articles and sections, unless it clearly appears from the context that a different sense was intended in what is alleged to be an exception. *Dixon v. People*, 1912, 127 P. 930, 53 Colo. 527.

75. Where language of the Constitution is plain and its meaning clear, that language must be declared and enforced as written. *Colorado Ass'n of Public Employees v. Lamm*, 1984, 677 P.2d 1350.

In Article IV, the People of Colorado delegated their authority and certain powers to the Executive Department.

76. In Article IV of the Colorado Constitution, the People delegated their authority and invested their power to execute the laws in the executive branch of Colorado government, the “Executive Department.”

In Article V, the People of Colorado delegated their authority and certain powers the Legislative Department.

77. In Article V of the Colorado Constitution, the People delegated their authority and invested their power to make the laws in the legislative branch of Colorado government, the “Legislative Department.”

In Article VI, the People of Colorado delegated their authority and certain powers the Judicial Department.

78. In Article VI of the Colorado Constitution, the People delegated their authority and invested their power to interpret the laws in the judicial branch of Colorado government, the “Judicial Department.”

In the Administrative Organization Act of 1968, the Colorado Legislature created the structure of state government by which state administrative agencies were delegated limited legislative authority.

79. The “Administrative Organization Act of 1968” (“AOA”) is found in Colo. Rev. Stat. Ann. § 24-4-101, *et seq.*

80. The following Legislative declaration begins the AOA.

§ 24-1-101. Legislative declaration

The general assembly declares that this article is necessary to create a structure of state government which will be responsive to the needs of the people of this state and sufficiently flexible to meet changing conditions; to strengthen the powers of the governor and provide a reasonable span of administrative and budgetary controls within an orderly organizational structure of state government; to strengthen the role of the general assembly in state government; to encourage greater participation of the public in state government; to effect the grouping of state agencies into a limited number of

principal departments primarily according to function; and to eliminate overlapping and duplication of effort. It is the intent of the general assembly to provide for an orderly transfer of powers, duties, and functions of the various state agencies to such principal departments with a minimum of disruption of governmental services and functions and with a minimum of expense. To the ends stated in this section, this article shall be liberally construed.

Colo. Rev. Stat. Ann. § 24-1-101.

In the State Administrative Procedures Act, the Colorado Legislature prescribed the rules by which a state administrative agency is authorized to exercise limited legislative powers.

81. The “State Administrative Procedure Act” (“SAPA”) is found in Colo. Rev. Stat. Ann. § 24-4-101, *et seq.*

82. The following Legislative declaration follows immediately after the short title of the SAPA.

§ 24-4-101.5. Legislative declaration

The general assembly finds that an agency should not regulate or restrict the freedom of any person to conduct his or her affairs, use his or her property, or deal with others on mutually agreeable terms unless it finds, after a full consideration of the effects of the agency action, that the action would benefit the public interest and encourage the benefits of a free enterprise system for the citizens of this state. The general assembly also finds that many government programs may be adopted without stating the direct and indirect costs to consumers and businesses and without consideration of such costs in relation to the benefits to be derived from the programs. The general assembly further recognizes that agency action taken without evaluation of its economic impact may have unintended effects, which may include barriers to competition, reduced economic efficiency, reduced consumer choice, increased producer and consumer costs, and restrictions on employment. The general assembly further finds that agency rules can negatively impact the state's business climate by impeding the ability of local businesses to compete with out-of-state businesses, by discouraging new or existing businesses from moving to this state, and by hindering economic competitiveness and job creation. Accordingly, it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest.

Colo. Rev. Stat. Ann. § 24-4-101.5.

In the State Administrative Procedure Act, the Colorado Legislature prescribed the rules by which a state administrative agency is authorized to issue rules.

83. In the SAPA, the Colorado Legislature has prescribed specific rules and procedures to be followed by state agencies with the authority to make rules in their exercise of the limited legislative authority delegated to the agency by the Legislature. C.R.S. § 24-4-103, *et seq.*

84. The detailed rulemaking procedures provide for due process and include, *inter alia*:
notice of proposed rulemaking in C.R.S. § 24-4-103(2);
publication of the notice in C.R.S. § 24-4-103(2.5)(a);
publication of the proposed rule(s) in C.R.S. § 24-4-103(3)(a);
public hearing C.R.S. § 24-4-103(4)(a);
the making of a record in C.R.S. § 24-4-103(4)(a.5);
the requisites of every proposed rule in C.R.S. § 24-4-103(4)(b); and
the procedure by which to create a temporary or emergency rule under C.R.S. § 24-4-103(6)(a) and (b).

85. The SAPA rulemaking procedures include within the enabling legislation numerous safeguards against abuse of discretion, including all of those listed in the preceding paragraph, and others, e.g. the requirement that:

“On and after July 1, 1967, no rule may be issued nor existing rule amended by any agency unless it is first submitted by the issuing agency to the attorney general for his or her opinion as to its constitutionality and legality. Any rule or amendment to an existing rule issued by any agency without being so submitted to the attorney general is void.”

C.R.S. § 24-4-103(8)(b).

86. As an additional safeguard against state agency abuse of discretion in making new or amended rules, the SAPA provides:

“No rule shall be issued except within the power delegated to the agency and as authorized by law. A rule shall not be deemed to be within the statutory authority and jurisdiction of any agency merely because such rule is not contrary to the specific provisions of a statute. Any rule or amendment to an existing rule issued by any agency, including state institutions of higher education administered pursuant to title 23, C.R.S., which conflicts with a statute shall be void.”

C.R.S. § 24-4-103(8)(a).

The Colorado Disaster Emergency Act.

87. The Colorado Disaster Emergency Act (“CDEA”) is found at C.R.S. § 24-33.5.701, *et seq.* The CDEA (enacted prior to the outbreak of COVID-19 in the United States) establishes a framework under which the Governor may operate in the event of a declared disaster emergency, including a disease epidemic.

88. The CDEA provides *inter alia* that “...the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law.” C.R.S. § 24-33.5-704(2). The CDEA also provides *inter alia* that “...In addition to any other powers conferred upon the governor by law, the governor may: (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;” C.R.S. § 24-33.5-704(7)(a).

89. Plaintiffs challenge the CDEA in general, and specifically C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a), as unconstitutional in violation of the United States Constitution and the

Colorado Constitution, *inter alia*, Article III, IV, V, and VI of the Colorado Constitution (Distribution of Powers, express and implied); Article III of the Colorado Constitution (nondelegation of Article IV, V, and VI powers); and Article V, Section 17 of the Colorado Constitution (no laws except by bill passed in the legislature).

Colorado Legislative Department Response to COVID-19 in Colorado.

90. On **January 8, 2020**, the Second Regular Session of the Seventy-second General Assembly convened and was scheduled to adjourn *sine die* on May 6, 2020, pursuant to Article V, Section 7 of the Colorado Constitution. Senate Joint Resolution 19-009.

https://leg.colorado.gov/sites/default/files/2019a_sjr009_signed.pdf

91. On **March 13, 2020**, Colorado lawmakers announced plans for the General Assembly to adjourn for two weeks from and after March 14, 2020. Executive Committee of the Legislative Council. <https://www.westword.com/news/colorado-lawmakers-to-suspend-session-amid-covid-19-outbreak-11664988>

92. On **March 14, 2020**, the General Assembly made a request pursuant to Article VI, Section 3 of the Colorado Constitution to the Colorado Supreme Court to render its opinion upon a question regarding Section 7 of Article V of the Colorado Constitution. 2020 House Joint Resolution 20-1006.

http://leg.colorado.gov/sites/default/files/documents/2020A/bills/2020a_hjr1006_enr.pdf

93. On **March 16, 2020**, the Colorado Supreme Court *en banc* entered an Order accepting the Interrogatory from the General Assembly. Supreme Court Case No. 2020SA100.

https://www.courts.state.co.us/Media/Opinion_Docs/ORDER%20OF%20COURT.pdf

94. On **April 1, 2020**, the Colorado Supreme Court *en banc* answered the General Assembly's interrogatory, construing the requirement in Article V, Section 7 of the Colorado

Constitution limiting the length of the regular legislative session to "one hundred twenty calendar days." *In Re: Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23. Colorado Supreme Court *en banc*, April 1, 2020.

https://www.courts.state.co.us/Media/Opinion_Docs/20SA100.pdf

95. On **May 11, 2020**, the adjournment of the Seventy-second General Assembly which began March 14, 2020 was extended through **May 25, 2020**.

96. On **May 26, 2020**, the General Assembly was reconvened for legislative work until the end of the 120-day regular session.

97. Despite being adjourned for more than half of March, all of April, and most of May, the full 120-day regular session of the Seventy-second General Assembly was allowed by the Colorado Supreme Court's decision on April 1, 2020. *In Re: Interrogatory on House Joint Resolution 20-1006, id.*

98. On **June 15, 2020**, the Second Regular Session of the Seventy-second General Assembly adjourned.

Colorado Executive Department Response to COVID-19 in Colorado.

99. On **March 5, 2020**, the first case of COVID-19 in Colorado was confirmed. COVID-19 is a disease caused by the SARS-CoV-2 virus.

100. On **March 10, 2020**, in recognition of the emerging global COVID-19 pandemic and the presence of COVID-19 cases in Colorado, Governor Polis verbally declared a disaster emergency pursuant to the Colorado Disaster Emergency Act.

Defendant Polis' Executive Orders.

101. Since **March 11, 2020**, Defendant Polis has issued a plethora of Executive Orders with unprecedented, life-changing consequences for all Coloradans.

102. On information and belief, as of **September 2, 2020**, at 11:00 a.m. Mountain time, Defendant Polis has issued 175 D 2020 series EOs, all but two of which were issued on or after March 11, 2020.

103. On information and belief, all of the Governor’s 175 EOs may be found at the following link:

<https://covid19.colorado.gov/covid-19-in-colorado/public-health-executive-orders>

Defendant Ryan’s CDPHE Public Health Orders.

104. As expressly directed by Defendant Polis in each of the Subject EOs, Defendant Ryan issued CDPHE PHOs.

105. On information and belief, as of **September 2, 2020**, at 11:00 a.m. Mountain time, Defendant Ryan has issued 32 original CDPHE PHOs, including the Target CDPHE PHO; many of the original CDPHE PHOs have been amended or replaced, so that the total number of CDPHE PHO greatly exceeds 34.

106. On information and belief, all of the “current and updated” orders and some of the past (no longer current) CDPHE PHOs may be found at the following link:

<https://covid19.colorado.gov/covid-19-in-colorado/public-health-executive-orders>

Defendant Johnson’s JCPH Public Health Orders.

107. As allowed or directed by some of the EOs and PHOs, some Colorado county public health agencies issued their own public health orders, effective within their respective counties. Defendant Johnson issued JCPH PHOs, including the Target JCPH PHO.

The scope and sweep of the EOs, CDPHE PHOs and county or district PHOs.

108. Early on, the initial EOs were relatively simple, relatively narrow in topical focus, relatively limited in scope, and relatively limited in duration.

109. For example, Executive Order D 2020 001 (“EO 001”), which activated the Colorado National Guard to assist with election cybersecurity defense efforts, exemplifies an Executive Order in which Governor Polis acted within the executive power delegated to him in Article IV, Section 2 of the Colorado Constitution to faithfully execute the laws. Colo. Const. art. IV, § 2.

110. But with each successive “order” from and after the first few EOs and from and after the very first CDPHE PHO, there has been dramatic growth in the scope and sweep of the EOs, CDPHE PHOs and county or district PHOs, i.e. the range of topics, and the depth, breadth, and complexity of the substance in each order has exponentially increased, as the duration of the “orders” has been repeatedly extended.⁸

111. As well-intentioned as the Subject Orders may be with respect to the health, safety and welfare of the general public, the Subject Orders have implicated and damaged each Plaintiff’s individual civil rights, liberty interests and property rights in violation of the United States and Colorado Constitutions. This action challenges the constitutionality of the Target Orders in the many ways they have implicated each Plaintiff’s fundamental civil rights, liberty interests, and property rights.

112. Each Plaintiff’s fundamental civil rights, liberty interests, and property interests have been injured by the JCPH PHOs; those JCPH PHOs stemmed from the CDPHE PHOs; those CDPHE PHO stemmed from the taproot of the unconstitutional conduct that has directly and proximately injured Plaintiffs, Defendant Polis’ directives which grew out of his Executive Orders.

⁸ Plaintiffs find it necessary to utilize the term “order” in reference to each and all of the Subject Orders, but in so doing, Plaintiffs in no way concede that the term “order” is an honest, accurate, or correct characterization of the substance contained in each document. This problem will be addressed by Plaintiffs in more detail elsewhere in this Complaint.

An overview of the Subject Orders.

113. Between **February 26, 2020** and **August 12, 2020**, Defendant Polis issued 162 EOs, all but two of which were issued on or after March 11, 2020. The sheer number of Executive Orders is unprecedented. Likewise, the new law and public policy measures implemented by these Executive Orders is unprecedented in scope and includes, but is not limited to:

- suspension or modification of a wide variety of statutes and procedures;
- directing the actions of numerous state agencies;
- restricting the movements of people in their work and play;
- directing the closure or restricted operation of privately owned businesses;
- reallocating funds previously appropriated by the General Assembly;
- repeatedly amending, extending, rescinding, or replacing previous EOs;

all of which has fundamentally reconfigured the way our society functions on a day-to-day basis.

114. Even the most perfunctory reprise of just the basic details from Defendant Polis' Executive Orders to date would fill a substantial book. Certainly close examination and analysis of each of Defendant Polis' Executive Orders to date would become encyclopedic. The sheer volume of the new law and public policy measures implemented by these Executive Orders is massive.

115. Also noteworthy is the fact that the pace of Defendant Polis in issuing Executive Orders has been swift, averaging more than 1 per day, as Defendant Polis has issued 160 EOs (Executive Orders D 2020 003 through D 2020 162) in the span of 155 days from March 11, 2020 through August 12, 2020.

116. Suffice it to say for purposes of context, that the scope and pace and impact and consequences of Defendant Polis' Executive Orders to date are, individually and collectively, truly breathtaking.

117. There is no reason to expect any change in Defendant Polis' established pattern of frequently issuing sweeping Executive Orders with far-reaching consequences, unless and until this Court orders the Governor to comply with the explicit requirements of Article III of the Colorado Constitution, as requested in this action.

118. In order to have some modicum of appreciation for the ripple effects that Defendant Polis' Executive Orders have caused throughout Colorado government, one must consider the fact that most of the EOs direct numerous state agencies to take specific actions. When those agencies comply with Defendant Polis' EO directives, their agency actions implement new law and public policy measures as Defendant Polis directed.

119. By way of just one example, the profound utility of the EO as a tool for creating new law and public policy may be seen in the reactions of a single state agency to Defendant Polis EO directives, the Colorado Department of Public Health and Environment. Many of Defendant Polis' EOs directed Defendant CDPHE to issue Public Health Orders (PHOs) in accord with terms specified in the EO.

120. As specifically directed in many of Defendant Polis' EOs, between March 11 and July 23, 2020, Defendant CDPHE issued 32 PHOs (many of which were amended, extended, rescinded, or replaced, so that that actual number of PHOs far exceeds 32). The new law and public policy measures implemented by these 32-plus PHOs is unprecedented in scope and represents a substantial body of new law and public policy in addition to the new law and public policies embodied in the Governor's EOs.

121. The total output of EOs and PHOs from Defendant Polis and Defendant CDPHE rivals a productive session of the Colorado General Assembly, but none of it has been the work of the Legislature as required by the Colorado Constitution in Articles III and V.

122. A different EO is illustrative of the immense legislative power wielded by Defendant Polis by Executive Order to the exclusion of the legislative department in complete disregard of Article III of the Colorado Constitution.

123. On April 30, 2020, Defendant Polis issued Executive Order D 2020 50, Declaring Insufficient Revenues Available for Expenditures and Ordering Suspension or Discontinuation of Portions of Certain State Programs and Services to Meet a Revenue Shortfall Due to the Presence of COVID-19 in the State of Colorado (“EO 50”). On information and belief, EO 50 may be found at the following link:

https://drive.google.com/file/d/145ed57_TkitjvxUWyHPHzJMW13i0PRGK/view

124. EO 50 states: “This Executive Order suspends or discontinues portions of the functions or services of departments, boards, bureaus, and agencies of the State government to reduce general fund expenditures before the end of the FY 2019-2020.” EO 50 at page 2, paragraph 3. To this end, EO 50 sequestered \$228,685,915 to reduce general fund expenditures by specific line-item budget reductions from those previously appropriated by the General Assembly.

125. The stated purpose of the sequestration was “To satisfy the provisions of C.R.S. § 24-75-201.5 requiring that the “governor shall promptly notify the general assembly of the plan, ...” to reduce expenditures pursuant to C.R.S. § 24-75-201.5. But Defendant Polis did not simply notify the General Assembly of the plan in accord with C.R.S. § 24-75-201.5, his EO 50 purported to codify the plan into law. EO 50 at page 2, paragraph 2.

126. Codification of Defendant Polis' plan into law is a patently legislative function properly done by only the legislative department in accord with Article V of the Colorado Constitution. Codification of Defendant Polis' plan into law by the executive department is clearly proscribed by Article III of the Colorado Constitution, notwithstanding § 24-33.5-704(2) and § 24-33.5-704(7)(a) of the Colorado Disaster Emergency Act.

127. Examination of EO 50 reveals Defendant Polis, not the General Assembly, as the legislator redirecting disposition of one-quarter Billion dollars of funds previously appropriated by the legislature. In EO 50, we see the profound utility of the EO as a tool for Defendant Polis to purportedly rewrite the budget and implement new law and public policy in a manner explicitly proscribed by Article III of the Colorado Constitution.⁹

Specific Allegations.

128. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

The Target EO, Executive Order D 2020 123.

129. Among the Executive Orders challenged by Plaintiffs in this action is Executive Order D 2020 123 (“**EO 123**” or “**the Target EO**”). Defendant Polis signed EO 123 on June 30, 2020, and it is currently in effect.¹⁰

⁹ Despite the impressive implied authority projected by each of the Subject EOs from their citation to the Colorado Constitution and the Target Statutes, Plaintiffs vehemently dispute whether the Target Statutes *in pari materia* with the Target Orders truly have the legal authority they claim; this position is in accord with Plaintiffs' position that the Target Statutes and the Target Orders are unconstitutional, so they are *ultra vires* and void *ab initio* and, therefore, the Target Orders do not possess the requisite legal authority to have the force of law and binding legal effect. That said for the record, Plaintiffs will avoid the tiresome repetition of qualifying adjectives like ‘purportedly,’ ‘ostensibly,’ and ‘allegedly’ in reference to the legal efficacy of the Subject Orders and the actions of state actors to enforce them.

¹⁰ The origin of EO 123 was on June 1, 2020 in EO 91, Safer at Home and in the Vast, Great Outdoors, which was amended and extended on June 30, 2020 by EO 123, which was amended

Legal Authority to Issue EO 123.

130. EO 123 begins with the following statement of authority.

"Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order amending and extending Executive Order D 2020 091, Safer at Home and in the Vast, Great Outdoors, due to the presence of coronavirus disease 2019 (COVID-19) in Colorado."

EO 123 on page 1.

Definition of "executive order."

131. An executive order is a declaration or directive issued by a president or governor in order to implement powers granted to their office by constitution or statute. A governor may be relatively free to issue executive orders directing the actions of state and local agencies – and their officers – under his purview, i.e. within the executive department. Orders affecting the general public, however, must be "based upon the presence of some constitutional or statutory provision, which authorizes the executive order either specifically or by way of necessary implication." *Shapp v. Butera*, 22 Pa.Cmwlth. 229, 348 A.2d 910, at 913 (1975).

and extended on July 21, 2020 by EO 142, and then again amended and extended on July 23, 2020 by EO 144, and then again amended and extended on August 21, 2020 by EO 170; EO 123, as amended and extended, shall expire thirty (30) days from August 21, 2020, unless extended further by Executive Order. *See* EOs 91, 123, 142, 144, and 170. It is each Plaintiff's intention that any allegation made in this Complaint as to any one of the many predecessor and successor Executive Orders of the Target Order EO 123 is realleged as to each and all of them.

**September 7, 2018 Memorandum and April 30, 1980 Memorandum
prepared by the Office of Legislative Legal Services
on the scope of Governor’s authority to issue Executive Orders.**

132. The citation to *Shapp v. Butera, id.*, appears in a Memorandum dated September 7, 2018, prepared by the Office of Legislative Legal Services to “Interested Persons,” on the subject: “Scope of Governor’s Power to Issue Executive Orders.”

133. The above referenced Memorandum dated September 7, 2018 was self-described as “... a ‘primer’ on the scope of the Governor’s authority to issue executive orders.,” and was “...based on a memorandum prepared by this Office, dated April 30, 1980, titled ‘Legal Analysis of Governor’s Executive Order on Human Settlement Policies.’ That memorandum contains extensive legal discussion of executive orders and the scope of the Governor’s power to issue such orders.”

134. On information and belief, a true and accurate copy of the above referenced **Memorandum dated April 30, 1980, prepared by the Legislative Drafting Office, titled “Legal Analysis of Governor’s Executive Order on Human Settlement Policies,”** is attached hereto as **Exhibit 4.**

135. On information and belief, a true and accurate copy of the above referenced **Memorandum dated September 7, 2018, prepared by the Office of Legislative Legal Services, to “Interested Persons,” on the subject: “Scope of Governor’s Power to Issue Executive Orders”** is attached hereto as **Exhibit 5.**

The Colorado Constitution is no source of legal authority for EO 123.

136. In EO 123, Defendant Polis cited Article IV, Section 2 of the Colorado Constitution and C.R.S. § 24-33.5-701, et seq. as his authority to issue that Order.

137. Article IV, Section 2 of the Colorado Constitution states as follows:

§2. Governor supreme executive.

The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed.

Colo. Const. art. IV, § 2.

138. The general grant of executive power made in Article IV, Section 2 of the Colorado Constitution goes to administrative powers only; Defendant Polis' authority is to execute law and policy made by the legislature. Defendant Polis may not create law and policy, except as and if such legislative power is properly delegated by the state legislature. Article IV, Section 2 contains no language investing Defendant Polis with the authority to legislate as he has done in EO 123, and Article III of the Colorado Constitution eliminates the possibility of delegation by the state legislature of legislative power to Defendant Polis.

139. Having made specific reference to only Article IV, Section 2 of the Colorado Constitution as an inapposite source of constitutional authority to issue EO 123, the Target EO makes no reference to any of the other places in the Colorado Constitution by which authority is vested in the Governor - Article IV, Section 5, Article IV, Section 9, and Article VIII, Section 3 - because not one of those provisions is relevant as legal authority for the Governor's Executive Orders.

The Colorado Disaster Emergency Act is no source of legal authority for EO 123.

140. The CDEA provides that "...the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law." C.R.S. § 24-33.5-704(2).

141. The CDEA also provides that "...In addition to any other powers conferred upon the governor by law, the governor may: (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;” C.R.S. § 24-33.5-704(7)(a).

142. 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, the Governor’s authority is limited by the constraints of the Colorado Constitution and neither C.R.S. § 24-33.5-704(2) nor C.R.S. § 24-33.5-704(7)(a) overcomes those constitutional constraints.

143. The Colorado Supreme Court “... has adopted from *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294, this criteria for determining the constitutionality of the delegation of authority by the legislature:

‘The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.’ ”

Dixon v. Zick, 179 Colo. 278, 284–85, 500 P.2d 130, 133 (1972).

144. See also *Hazlet v. Gaunt*, 126 Colo. 385, 250 P.2d 188; *Prouty v. Heron*, 127 Colo. 168, 255 P.2d 755; and *Swisher v. Brown*, 157 Colo. 378, 402 P.2d 621.

Article V Legislative Power Invested in Only the Colorado Legislature.

145. In Article V of the Colorado Constitution, the People unequivocally expressed their will that their authority to legislate, i.e. to make the laws, be confined within the legislative department.

146. And to emphatically express that it was the will of the People to contain the authority to legislate in only the legislative department as stated in Article V, the People reinforced that point in Article III of the Colorado Constitution, when they unequivocally stated:

The powers of the government of this state are divided into three distinct departments, -- the Legislative, Executive and Judicial; and **no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this Constitution expressly directed or permitted.** (Emphasis added.)

Colo. Const. art. III.

The Nondelegation Doctrine expressed in Article III.

147. After the People distributed their authority and powers into three departments in the first part of Article III, they forcefully expressed the “nondelegation doctrine.” Under the explicit prohibitions of the nondelegation doctrine expressed in Article III, the General Assembly may not delegate its Article V powers to the executive department (or anyone else) unless such delegation is expressly “directed or permitted” within the Colorado Constitution. Nowhere else within the Colorado Constitution is delegation of the legislature’s Article V legislative powers “directed or permitted.”

Only the Colorado Legislature has authority to exercise Article V Legislative Power.

148. C.R.S. § 24-33.5-704(2) in tandem with § 24-33.5-704(7)(a) purports to effect a wholesale delegation from the General Assembly to the Governor of the authority to legislate; it is abundantly clear that the constraints upon legislative authority so clearly and unambiguously expressed in Article V and Article III of the Colorado Constitution do not allow for such a wholesale delegation.

149. In the absence from the Colorado Constitution of any legal authority to issue the Target EO, whether or not the Governor has the statutory legal authority claimed in EO 123 depends upon the efficacy of C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) as legally sufficient authority to issue EO 123. To put it another way, do C.R.S. § 24-33.5-704(2) and § 24-33.5-

704(7)(a) comply with the constraints upon delegation of legislative authority expressed in Article V and Article III of the Colorado Constitution?

150. The question before this Court is whether the legislative authority purportedly delegated by the CDEA to the Governor in C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) is constitutionally permitted despite the clearly prohibitive language of Article V and Article III of the Colorado Constitution. The straight answer to that simple question is “no.”

151. It is manifest that the CDEA in C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) attempts to effect a wholesale delegation of legislative power from the legislature to the Governor which is utterly without any meaningful constraints. Such delegation of legislative power from the legislative department to the executive department is precisely what is proscribed by Article V and Article III of the Colorado Constitution.

152. Due to the truly unprecedented nature of the wholesale delegation of legislative power embodied in C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a), such a wholesale delegation has not been tested in the Colorado courts, so there is no case law guidance in this uncharted territory. Plaintiffs respectfully submit that if one gives the respect due Articles III, IV, V, and VI of the Colorado Constitution, then case law guidance is not required to decide each Plaintiff’s constitutional challenges to EO 123.

Delegation of limited legislative authority to a state agency.

153. Although the wholesale legislative delegation in the CDEA defies close comparison to limited legislative delegation to an administrative agency, there is some guidance in that case law. Any such wholesale delegation from the legislature to an administrative agency most certainly would not survive a close scrutiny challenge based upon the unmistakable import of Article V and Article III of the Colorado Constitution.

154. In the case of legislative delegation to an administrative agency, the test for determining whether delegation of legislative power is impermissibly broad is “whether there are sufficient standards and safeguards and administrative standards and safeguards, in combination, to protect against unnecessary and uncontrolled exercise of discretionary power.” *Regional Transp. Dist. v. Colorado Dept. of Labor and Employment, Div. of Labor*, 830 P.2d 942 (Colo. 1992).

155. Applying this test to the marginally analogous context of the delegation of legislative power to the Governor in the CDEA readily illuminates exactly why the delegation in the CDEA is an unconstitutional delegation in violation of Article V and Article III of the Colorado Constitution: there are many specific powers granted to the Governor in the CDEA, but no constraints upon the exercise of those powers by any statutory standards or safeguards within the CDEA. And because the Governor has unilaterally exercised those powers outside of any administrative agency context, there are no administrative standards and safeguards (like those required by the State Administrative Procedures Act) to act as a check upon the Governor’s otherwise unconstrained exercise of legislative powers.

156. The CDEA purports to delegate legislative power to the Governor without any internal statutory standards or safeguards within the CDEA itself, and without subjecting the Governor to any administrative standards and safeguards, e.g. from the SAPA; under these circumstances, the CDEA purports to make the Governor a law unto himself, empowered to unilaterally make new laws and implement unprecedented new public policies with the stroke of a pen.

157. In *Cottrell v. City & Cty. of Denver* the Colorado Supreme Court *en banc* explained in detail the rationale behind the formulation of the “standards” test with which to assess whether or not a statutory delegation to an administrative agency survives the nondelegation doctrine as expressed in Article III of the Colorado Constitution.

The traditional statement of the nondelegation doctrine is that the legislature may delegate power to an administrative agency only if “the legislature has provided sufficient standards to guide the agency's exercise of that power.” *Elizondo v. Department of Revenue*, 194 Colo. 113, 570 P.2d 518 (1977); accord, *Asphalt Paving Co. v. Board of County Commissioners*, 162 Colo. 254, 425 P.2d 289 (1967); *Swisher v. Brown*, 157 Colo. 378, 402 P.2d 621 (1965). This has been labeled the “standards” test for determining the propriety of a legislative delegation.¹¹ However, in applying the standards test this court has repeatedly emphasized the impracticality and inappropriateness, in many contexts, of requiring anything more than the most broad and general standards to guide administrative action. As a result, violation of the nondelegation doctrine has been an argument frequently invoked but seldom sustained. E. g., *Elizondo v. Department of Revenue*, supra; *People v. Willson*, 187 Colo. 141, 528 P.2d 1315 (1974); *Fry Roofing Co. v. Department of Health*, 179 Colo. 223, 499 P.2d 1176 (1972); *People v. Giordano*, 173 Colo. 567, 481 P.2d 415 (1971); see generally K. Davis, *Administrative Law Treatise*, s 3:1 et seq. (2d Ed. 1978). Thus, we have held in appropriate circumstances that limitation of delegated authority by the mere requirement of “reasonableness” is sufficient to satisfy the standards requirement. *People v. Giordano*, supra; *Asphalt Paving Co. v. Board of County Commissioners*, supra; see also *Fry Roofing Co. v. Department of Health*, supra, 179 Colo. at 230, 499 P.2d at 1180 (“It has been said that the term ‘air pollution’ in itself is a standard, albeit a broad one.”). Nor is Colorado case law unusual in this respect. See F. Cooper, *State Administrative Law 61-70* (1965). It appears, therefore, that in its traditional form the nondelegation doctrine has not proved to be a fully satisfactory approach to the delegation question.

It would be incorrect to conclude, however, that no substantial issues are involved in the exercise of legislatively delegated power. The extensive authority delegated to administrative bodies has created important repositories of power largely insulated from the constraining force of the democratic process. It is important that individuals be protected against the unnecessary and uncontrolled exercise of this discretionary power, while still permitting a broad scope to legislative delegation where narrow legislative standards are not feasible. Courts across the land are increasingly coming to recognize the delegation doctrine as an appropriate vehicle for providing these needed protections and are recasting that doctrine in new molds to serve that purpose. See generally comment, *Delegation of Legislative Authority: Westervelt v. Natural Resources Commission*, *Detroit College of Law Rev.* 281, 284 n. 20, 285 n. 22 (1979).

The modern view is to recognize that the traditional standards test to determine the validity of delegation of legislative authority is inadequate, and that the proper focus should be upon the totality of protection provided by standards and procedural safeguards at both the statutory and administrative levels. See, e. g., *State v. Peloquin*, 427 A.2d 1327 (R.I.1981); *Westring v. James*, 71 Wis.2d 462, 238 N.W.2d 695 (1976); *Yakima County Clean Air Authority v. Glascam Builders, Inc.*, 85 Wash.2d 255, 534 P.2d 33 (1975); *Avant v. Clifford*, 67 N.J. 496, 341 A.2d 629 (1975); see generally comment, *Delegation of Legislative Authority: Westervelt v. Natural Resources Commission*, *Detroit College of Law Rev.* 281, 284 n. 20, 285 n. 22, 284-86 (1979). In our most recent thorough review of the nondelegation

doctrine, we indicated our approval of this modern view. *Elizondo v. Department of Revenue*, supra. We stated there that in addition to considering whether standards have been articulated by the legislature, “It is important to recognize that, as a practical matter, procedural safeguards in administrative proceedings are just as essential as a broad legislative statement of standards. See generally K. Davis, *Administrative Law Treatise*, s 2.00-1 et seq. (1970 Supp.)” *Elizondo v. Department of Revenue*, supra, 194 Colo. at 117, 570 P.2d at 521.

We now make explicit that the test is not simply whether the delegation is guided by standards, but whether there are sufficient statutory standards and safeguards and administrative standards and safeguards, in combination, to protect against unnecessary and uncontrolled exercise of discretionary power. The guiding consideration is whether these constraints are sufficient to insure that administrative action will be rational and consistent in the first instance and that subsequent judicial review of that action is available and will be effective. See *Hide-A-Way Massage Parlor v. Board of County Commissioners*, 198 Colo. 175, 597 P.2d 564 (1979); *Elizondo v. Department of Revenue*, supra.¹² Therefore, the appropriate analysis is to determine first whether sufficient statutory standards or safeguards exist to fulfill these functions. Second, if those standards and safeguards are inadequate, it must be determined whether additional administrative standards and safeguards accomplish the necessary protection from arbitrary action.

FN 11. See F. Cooper, *State Administrative Law* 54-61 (1965). Under Colorado law, the standards test has also been articulated in two other forms. The first states, “The legislature does not abdicate its function when it describes what job must be done, who must do it, and the scope of his authority.” *Swisher v. Brown*, supra, 157 Colo. at 388, 402 P.2d at 626; accord, *Fry Roofing Co. v. Department of Health*, 179 Colo. 223, 499 P.2d 1176 (1972); *People v. Giordano*, 173 Colo. 567, 481 P.2d 415 (1971). The second states, “(T)he legislature may not delegate the power to make or define a law, but it may delegate the power to determine the applicable facts and situations to which the law applies.” *People v. Willson*, 187 Colo. 141, 143, 528 P.2d 1315, 1316 (1974); accord, *Swisher v. Brown*, supra. These various formulations are obviously interrelated and our prior cases usually mention each prior to application of the nondelegation doctrine. E. g., *People v. Willson*, supra; *Fry Roofing Co. v. Department of Health*, supra. However, while the first two formulations provide some guidance in analyzing a delegation challenge, the last manner of stating the test is particularly unhelpful although it has exercised great influence. See K. Davis, *Administrative Law Treatise*, s 3:14 (2d Ed. 1978).

FN 12. *Elizondo* and *Hide-A-Way*, as relevant on this point, were concerned with the unconstitutionality of the statute as applied in light of the requirements of procedural due process. While some commentators and courts view the modern delegation doctrine discussed above as an aspect of due process, e. g., K. Davis, *Administrative Law Treatise*, s 2.00-6 (1970 Supp.); *Westervelt v. Natural Resources Commission*, 402 Mich. 412, 263 N.W.2d 564 (1978); *Holmes v. New York City Housing Authority*, 398 F.2d

262 (2d Cir. 1968), and while we find that the due process concerns help give content to the delegation doctrine, we view these doctrines as independent. Not all delegations of authority will sufficiently impinge a “liberty or property” interest to invoke the protections of due process, e. g., *Asphalt Paving Co. v. Board of County Commissioners*, *supra*, but it is nevertheless important to assure that discretionary authority will be constrained from abuse. Moreover, the central concern with notice and hearing under procedural due process analysis is only one of several concerns addressed by the delegation doctrine. Although the protections afforded by these doctrines will often overlap, they are not coextensive.

Cottrell v. City & Cty. of Denver, 636 P.2d 703, 709–10 (Colo. 1981).

Summary of Each Plaintiff’s Constitutional Challenges.^{11, 12}

158. If allowed to stand, the Target Orders will not only continue to violate each Plaintiff’s fundamental civil rights, liberty interests, and property rights under both the United States and Colorado Constitutions, but they will continue to needlessly inflict personal injury and other damages upon each Plaintiff.

159. Plaintiffs are not asking the Court to consider a difference of opinion about the scientific evidence, or lack thereof, of the danger from COVID-19 or the propriety of the governmental response to COVID-19 in Colorado. No such reasoned inquiry is even possible because each of the Target Orders has been an impermissible unilateral executive decree of purportedly new law

¹¹ In addition to the many issues of law which arise in this case under the Colorado Constitution and Colorado state law, this case also raises numerous federal questions and other issues of law under the United States Constitution and other Federal laws; however, each Plaintiff hereby expressly reserves for adjudication in the Federal courts all federal questions and issues arising under the United States Constitution.

¹² Under the Supremacy Clause of the United States Constitution, the State of Colorado is obliged to recognize the fundamental rights of each Plaintiff to life, liberty, and the pursuit of happiness, and to protect them, in accordance with the United States Constitution, as construed in the case law of the Supreme Court of the United States. Accordingly, citation to the United States Constitution, as amended, or the case law of the Supreme Court of the United States (and any other Federal court) in this document is appropriate; however, such citations in no way constitute a request by each Plaintiff for adjudication by this (or any other) Colorado state court of the questions of law each Plaintiff has reserved for adjudication in the Federal courts, as stated in fn. 11 of this Complaint.

and public policy based upon only conclusory allegations with no meaningful statement of specific scientific basis, if any.

160. The EO/PHO process of Defendant Polis not only is devoid of the usual constraints inherent in the legislative process in accord with Article V of the Colorado Constitution, it totally avoids the due process constraints of administrative rulemaking in accord with the SAPA. Instead of being founded upon a constitutionally compliant process appropriate to the gravitas of the unprecedented changes Defendant Polis has dictated by Executive Order, Defendant Polis has issued the Target Orders without any transparent fact-finding process or the making of public record of the evidence upon which those Orders are based.

161. Thus, the Target Orders are the product of executive department state actors exclusive of any meaningful legislative department role and beyond the reach of the SAPA's thoughtful provisions for judicial review and other due process mechanisms.

162. There has been no opportunity for elected representatives of the people to even have any meaningful input into the substance of the Target Orders, much less any oversight, so the EOs have been issued by Defendant Polis without lawful authority and without any real transparency or accountability to anyone.

163. Much has been made by the Governor, various public health agency representatives, and the media about how important it is that we all obey the rules expressed in the Target Orders.

164. Plaintiffs understand and respect the principle that we all should obey the rules, subject to a *proviso* which is integral to the Rule of Law in the American System of Justice, i.e. we all should obey the rules, *provided* those rules comply with the rules of the United States Constitution, the Colorado Constitution, and applicable Colorado statutes.

165. Plaintiffs also understand and respect the principle that a statute, or order, or rule, which does not comply with the requirements of the United States Constitution and the Colorado Constitution is void, and without any legal force or effect, and need not be obeyed.

166. Plaintiffs also understand and respect the principle that when a citizen recognizes that a statute, or order, or rule, does not comply with the requirements of the United States Constitution and the Colorado Constitution, it is the duty of the citizen to seek judicial review of the conduct of state actors who otherwise would use the unconstitutional statute, or order, or rule to perpetrate, with impunity, a fraud upon the People of Colorado.

167. The interplay of these principles is precisely what brings each Plaintiff to this Court seeking judicial review. At issue before this Court is a profound question about the most important rules of law in our constitutional republic, those being the rules expressed by the People in their United States and Colorado Constitutions. Are the Governor and unelected executive agency officials required to obey the preeminent rules expressed in the United States Constitution and the Colorado Constitution?

168. The Subject Orders reflect Defendant Polis' unbridled discretion to do as he pleases without any meaningful check or balance upon his asserted power to legislate. This is so because when the General Assembly passed the CDEA: they did not include appropriate and sufficient statutory standards and safeguards within the CDEA, and they did not expressly require the administrative standards and safeguards from the SAPA or otherwise, so Defendant Polis has evaded the mechanisms required to protect the People against unnecessary and uncontrolled executive exercise of discretionary power.

169. It is manifest from the plain language of the Colorado Constitution that in accord with Article IV, the Governor may execute, i.e. administer, the laws which already exist, but

Defendant Polis has no constitutional authority to make new laws (as his EOs purport to do on an epic scale) in violation of Article V, and the General Assembly has no constitutional authority to delegate to the Governor their authority to make the laws in violation of Article III, as they purported to do in the CDEA generally, and specifically, in C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a). Colo. Const. arts. III, IV, and V.

170. Respect for the distribution of powers in accord with the requirements of the Colorado Constitution is well established in Colorado jurisprudence.

171. It is the province of the Legislature to enact legislation and the province of the executive to see that the laws are faithfully executed. *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1380 (Colo. 1985).

172. Likewise, 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, the Governor's authority is limited by enabling legislation. See e.g. *Colo. Polytechnic College v. State Board*, 476 P.2d 38 (Colo. 1970).

173. For these reasons, the Memorandum of the Office of Legislative Legal Services, September 7, 2018, is correct when it states: "... *the Governor lacks authority to formulate policy or impose requirements beyond regulating the internal workings of the executive branch.*" See the Memorandum of the Office of Legislative Legal Services, September 7, 2018, *id.*, at page 5 (Exhibit 5 of this Complaint).

174. Despite the language in C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) and Defendant Polis' citation in each EO to Article IV, Section 2 of the Colorado Constitution and the CDEA as authority, the Target EO is invalid because neither Article IV, Section 2 of the Colorado Constitution nor the CDEA is legally sufficient as authority for Defendant Polis to issue EO 123.

175. In the absence of any legal authority to issue EO 123, the Target EO brazenly usurps the authority and powers of the Legislature, in that only the Legislature has the authority to enact legislation. Colo. Const. art. III and art. V.

176. 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). Thus, each of the Defendant Polis’ EOs may be fairly characterized as a constitutionally unauthorized, unilateral executive decree which was and is *ultra vires* and void *ab initio*.

177. In light of the unconstitutionality of the Target EO, the Target CDPHE PHO is invalid because Defendant CDPHE issued it on the sole authority of Defendant Polis’ directive in EO 123 which was *ultra vires* and void *ab initio*, and Defendant CDPHE had no other legally sufficient authority to issue the Target CDPHE PHO without rulemaking as required by the SAPA. As a direct consequence, the Target CDPHE PHO is *ultra vires* and void *ab initio* because it is:

- (a) contrary to constitutional rights or privileges; and
- (b) in excess of the statutory authority or jurisdiction of the county or district board or public health director; and
- (c) affected by any error of law; and
- (d) made or promulgated upon unlawful procedure; and
- (e) unsupported by substantial evidence in view of the entire record as

submitted;¹³ and

(f) arbitrary or capricious.

C.R.S. § 25-1-515.

178. In the same way, the actions of Defendant JCPH to enforce the Target CDPHE PHO and the Target JCPH PHO are invalid because each of the Target CDPHE PHOs upon which the enforcement action was based is *ultra vires* and *void ab initio* and Defendant JCPH had no other legal authority upon which to base the Target JCPH PHO and JCPH's enforcement actions.

179. Under these extraordinary circumstances, the conduct of JCPH state actors to enforce the Target CDPHE PHO and the Target JCPH PHO is *ultra vires* and *void ab initio* because it is:

(a) contrary to constitutional rights or privileges; and

(b) in excess of the statutory authority or jurisdiction of the county or district board or public health director; and

(c) affected by any error of law; and

(d) made or promulgated upon unlawful procedure; and

(e) unsupported by substantial evidence in view of the entire record as submitted;¹⁴ and

¹³ Because there is no record, there is no evidence, substantial or otherwise. Thus, the conclusory allegations in the Target Orders about their basis and intent are self-serving, yet it is the lack of any record which makes the basis and intent of the Target Orders largely immune to close scrutiny challenge in any forum that matters.

¹⁴ The text of footnote 13 is not repeated here merely because it is equally applicable; it is repeated because it is so important that it bears repeating since the premises are at the core of why the Target Orders must be struck down.

Because there is no record, there is no evidence, substantial or otherwise. Thus, the conclusory allegations in the Target Orders about their basis and intent are self-serving, yet it is the lack of any record which makes the basis and intent of the Target Orders largely immune to close scrutiny challenge in any forum that matters.

(f) arbitrary or capricious.

C.R.S. § 25-1-515.

Defendants have issued PHOs without rulemaking as required by law.

180. State administrative agencies, including Defendants CDPHE and JCPH, are subject to rule making requirements under the State Administrative Procedure Act (“SAPA”). C.R.S. § 24-1-103, *et seq.*

181. However, Defendants CDPHE and JCPH have issued their respective Target Orders with none of the condition precedent rulemaking procedures required by the SAPA.

In January 2020, Bandimere Speedway prepares for the upcoming 2020 racing season.

182. On or about **January 31, 2020**, Bandimere Speedway submitted an application to JCPH requesting approval to operate a food service event on July 4, 2020, at the Bandimeres’ annual Independence Day celebration. The application named the event the “Jet Car Nationals/Fireworks Show” (the “Event”) and indicated an expected peak attendance of 15,000 people.

183. On information and belief, JCPH received and approved the Bandimeres’ application on January 31, 2020, and in due course the Bandimeres received the license from JCPH dated February 13, 2020.

The willful evasion of due process and accountability by each of the Defendants in the process of issuing their Target Orders reflects such a profound disrespect for our constitutional system that it must be stopped lest it infect others.

In March 2020, the Governor’s response to COVID-19 in Colorado begins.

184. On **March 10, 2020**, as a result of the emerging global COVID-19 pandemic, pursuant to the Colorado Disaster Emergency Act, Colorado Governor Jared Polis verbally declared a disaster emergency due to the presence of COVID-19 cases in Colorado.

March 10, 2020, Memorandum prepared by the Office of Legislative Legal Services on the Governor’s Constitutional and Statutory Emergency Powers.

185. On **March 10, 2020**, the Office of Legislative Legal Services prepared a Memorandum to the Executive Committee of the Legislative Council on the subject: “Governor’s Constitutional and Statutory Emergency Powers.”

186. On information and belief, a true and accurate copy of the above referenced **Memorandum dated March 10, 2020, prepared by the Office of Legislative Legal Services, to the Executive Committee of the Legislative Council, on the subject: “Governor’s Constitutional and Statutory Emergency Powers”** is attached hereto as **Exhibit 6**, and same is hereby incorporated by reference as though fully set forth herein.¹⁵

**CDPHE Public Health Order 20-20
(replaced by CDPHE Ninth Amended PHO 20-28).**

187. On **March 12, 2020**, Defendant Ryan issued CDPHE Notice of Public Health Order 20-20 (“**PHO 20-20**”).

188. PHO 20-20 has been amended or extended and replaced.

¹⁵ Unlike the Office of Legislative Legal Services Memorandum dated September 7, 2018, (Exhibit 5 of this Complaint) which disclosed the Memorandum dated April 30, 1980, (Exhibit 4 of this Complaint) as relevant to the subject of the Governor’s authority to issue executive orders, their Memorandum dated March 10, 2020, curiously makes no reference whatsoever to these two prior memoranda.

189. PHO 20-20 cites no constitutional authority for its existence, and - unlike most of the subsequent PHOs - there is no recitation near the beginning of PHO 20-20 of a directive from Defendant Polis in an EO as authority.

190. The only references to statute(s) in PHO 20-20 are in functional parts of the PHO (not in the preliminary recitations) which state:

(in paragraph number 4 on page 1), “Pursuant to the authority in section 25-1.5-102(1), C.R.S., I am ordering ...;” and

(in penultimate paragraph on page 3), “This Public Health Order is necessary to control any potential transmission of disease to others. Section 25-1.5-102(1), C.R.S.,” and

(at the end of the penultimate paragraph on page 3), “Immediate issuance of this Order is necessary for the preservation of public health, safety, or welfare, and the requirements of the Administrative Procedure Act, article 4, title 24, C.R.S. do not apply to this Order.”¹⁶

191. On information and belief, Defendant Ryan issued PHO 20-20 solely on her own initiative and authority, neither of which is legally sufficient to excuse noncompliance with the rulemaking requirements under the SAPA. C.R.S. § 24-1-101, *et seq.*

192. The statute cited in PHO 20-20, Colo. Rev. Stat. § 25-1.5-102(1), provides Defendant Ryan no legal authority to issue rules of general applicability without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

¹⁶ CDPHE Notice of PHO 20-20 and CDPHE Amended Notice of PHO 20-20 have no page numbers.

193. The last paragraph of PHO 20-20 states the criminal penalties for non-compliance with PHO 20-20 as follows:

“FAILURE TO COMPLY WITH THIS ORDER IS SUBJECT TO THE PENALTIES CONTAINED IN SECTIONS 25-1-114 C.R.S., INCLUDING A FINE UP TO ONE THOUSAND (1,000) DOLLARS AND IMPRISONMENT IN THE COUNTY JAIL FOR UP TO ONE YEAR.”

PHO 20-20, last paragraph, on page 3.

194. The statute cited in PHO 20-20, Colo. Rev. Stat. § 25-1.5-102(1), provides Defendant Ryan no legal authority to issue new rules which criminalize previously lawful conduct without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

195. On information and belief, CDPHE’s PHO 20-20 was originally issued and then extended or amended or replaced by the Amended Notice of PHO 20-20 issued on April 20, 2020, all without rulemaking as required by the SAPA. C.R.S. § 24-4-101, *et. seq.*

196. Plaintiffs reallege the immediately preceding nine paragraphs as to the CDPHE Amended Notice of PHO 20-20, except that it was issued on April 20, 2020.

The ongoing session of Colorado General Assembly was suspended.

197. On **March 14, 2020**, the ongoing regular session of the Seventy-second Colorado General Assembly was suspended until May 11, 2020.

**CDPHE Public Health Order 20-22
(replaced by CDPHE Ninth Amended PHO 20-28).**

198. On **March 16, 2020**, Defendant Ryan issued CDPHE Notice of Public Health Order 20-22 (“**PHO 20-22**”).

199. PHO 20-22 has been amended or extended and replaced.

200. PHO 20-22 cites no constitutional authority for its existence, and - unlike most of the subsequent PHOs - there is no recitation near the beginning of PHO 20-22 of a directive from Defendant Polis in an EO as authority.

201. The only references to statute(s) in PHO 20-22 are in functional parts of the PHO (not in the preliminary recitations) which states:

(in paragraph number 6 on page 2), “Pursuant to Colo. Rev. Stat. § 25-1-101(1)(a) and § 25-1-101(1)(a)(1), this Public Health Order closes bars, restaurants, ... ;” and (in penultimate paragraph on page 6), “*See* sections 25-1-101(1)(a) and § 25-1-101(1)(a)(1), C.R.S.”¹⁷

202. On information and belief, Defendant Ryan issued PHO 20-22 solely on her own initiative and authority, neither of which is legally sufficient to excuse noncompliance with the rulemaking requirements under the SAPA. C.R.S. § 24-1-101, *et seq.*

203. Neither of the two statutes referenced in PHO 20-22, Colo. Rev. Stat. § 25-1-101(1)(a) and § 25-1-101(1)(a)(1), provides Defendant Ryan the legal authority to issue rules of general applicability without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

204. The last paragraph of PHO 20-22 states the criminal penalties for non-compliance with PHO 20-22 as follows:

“FAILURE TO COMPLY WITH THIS ORDER IS SUBJECT TO THE PENALTIES CONTAINED IN SECTIONS 25-1-114 C.R.S., INCLUDING A FINE UP TO ONE THOUSAND (1,000) DOLLARS AND IMPRISONMENT IN THE COUNTY JAIL FOR UP TO ONE YEAR.”

PHO 20-22, last paragraph, on page 6.

¹⁷ CDPHE Notice of PHO 20-22 and CDPHE Updated Notice of PHO 20-22 have no page numbers.

205. Neither of the two statutes referenced in PHO 20-22, Colo. Rev. Stat. § 25-1-101(1)(a) and § 25-1-101(1)(a)(1), provides Defendant Ryan the legal authority to issue new rules which criminalize previously lawful conduct without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

206. On information and belief, CDPHE’s PHO 20-22 was originally issued and then extended or amended or replaced by the Updated Notice of PHO 20-22 issued on March 19, 2020, all without rulemaking as required by the SAPA. C.R.S. § 24-4-101, *et. seq.*

207. Plaintiffs reallege the immediately preceding nine paragraphs as to the CDPHE Updated Notice of PHO 20-22, except that it was issued on March 19, 2020.

**Executive Order D 2020 013
(purported authority for CDPHE to issue CDPHE Public Health Order 20-24).**

208. **On March 22, 2020**, Defendant Polis issued Executive Order D 2020 013 “Ordering Colorado Employers To Reduce In-Person Workforce by Fifty Percent Due to the Presence of COVID-19 in the State” (“**EO 13**”).

209. EO 13 has been repeatedly amended or extended and replaced.

210. EO 13 begins with the following statement of authority:

"Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.* (Act), I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order ordering Colorado employers to reduce in-person work requirements by fifty percent for non-critical workplaces due to the presence of coronavirus disease 2019 (COVID-19) in the State." EO 13 on page 1.

211. In EO 13 Defendant Polis stated: “I direct the Executive Director of the Colorado Department of Public Health and Environment to issue a public health order consistent with the directives in this Executive Order.” EO 13 on page 2 in II. C. Defendant Polis’ EO 13 directives to Defendant CDPHE went on to specify additional details with which the new PHO must comply.

**CDPHE Public Health Order 20-24,
(amended, extended, or replaced by numerous CDPHE PHOs,
the most current being the Tenth Amended PHO 20-28).**

212. On **March 22, 2020**, Defendant Ryan issued CDPHE Public Health Order 20-24 “Implementing Fifty Percent Reduction in Nonessential Business In-person Work and Extreme Social Distancing” (“**PHO 20-24**”).

213. PHO 20-24 has been amended or extended and replaced.

214. PHO 20-24 begins with the following statement of authority:

“I issue this Public Health Order (PHO or Order) pursuant to the Governor’s directive in Executive Order D 2020 013” PHO 20-24 on page 1.

215. PHO 20-24 cites no constitutional or statutory authority for its existence. It appears from the recitation of authority at the beginning of PHO 20-24 that Defendant Ryan issued PHO 20-24 solely on the authority, if any, from the directive she received from Defendant Polis set forth in Executive Order D 2020 013 (“EO 13”).

216. EO 13 begins with the following statement of authority.

"Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. §, *et seq.* [sic]¹⁸

¹⁸ The missing citation is repeated exactly as in Defendant Polis’ Executive Order D 2020 013.

(Act), I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order ordering Colorado employers to reduce in-person work requirements by fifty percent for non-critical workplaces due to the presence of coronavirus disease 2019 (COVID-19) in the State.” EO 13 on page 1.

217. Defendant Polis states at the beginning of EO 13 that it is issued on the legal authority of the Colorado Disaster Emergency Act, C.R.S. §§ 24-33.5-701, *et seq.* However, the only two applicable statutes within the CDEA are C.R.S. §§ 24-33.5-704 and 24-33.5-704.5, and neither statute provides Defendant Polis the legal authority to issue rules of general applicability without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

218. Likewise, Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue rules of general applicability like those contained in PHO 20-28 (and numerous other PHOs issued by Defendant CDPHE as directed by Defendant Polis in numerous EOs) without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-103, *et. seq.*

219. The third from last paragraph of PHO 20-24 (on page 9) states the criminal penalties for non-compliance with PHO 20-24 as follows:

This order will be enforced to the greatest extent possible by all legal means. Failure to comply with this order is subject to the penalties contained in sections 25-1-114, C.R.S.

including a fine of up to one thousand (1,000) dollars and imprisonment in the county jail for up to one year. PHO 20-24 (on page 9).¹⁹

220. Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue new rules of general applicability which criminalize previously lawful conduct without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

221. On information and belief, CDPHE’s PHO 20-24 which was originally issued on March 22, 2020, was then extended or amended or replaced by the Second Updated Public Health Order 20-24 issued on March 27, 2020, and then extended or amended or replaced by the Third Updated Public Health Order 20-24 issued on April 1, 2020, all without rulemaking as required by the SAPA. C.R.S. § 24-4-101, *et. seq.*

222. Plaintiffs reallege the immediately preceding eight paragraphs about CDPHE PHO 20-24 as to both the Second Updated Public Health Order 20-24 issued on March 27, 2020, and the Third Updated Public Health Order 20-24 issued on April 1, 2020.

**Executive Order D 2020 017
(purported authority for CDPHE to issue
Second and Third Updated Public Health Order 20-24).**

223. On **March 25, 2020**, Defendant Polis issued Executive Order D 2020 013 “Ordering Coloradans to Stay at Home Due to the Presence of COVID-19 in the State” (“**EO 17**”).

224. EO 17 begins with the following statement of authority.

"Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the

¹⁹ CDPHE’s PHO 20-24, and Second Updated Notice of PHO 20-24, and Third Updated Notice of PHO 20-24 have no page numbers.

relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.* (Act), I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order ordering Coloradans to stay at home whenever possible due to the presence of coronavirus disease 2019 (COVID-19) in the State.” EO 17 on page 1.

225. In EO 17 Defendant Polis stated: “I direct the Executive Director of the CDPHE to issue a public health order consistent with the directives in this Executive Order.” EO 17 on page 2 in II. D. Defendant Polis’ EO 17 directives to Defendant CDPHE went on to specify additional details with which the new PHO must comply. EO 17 on pages 2 and 3 in II. D.1., *et seq.*

**CDPHE Second Updated Public Health Order 20-24
(replaced by CDPHE Ninth Amended PHO 20-28).**

226. On **March 27, 2020**, Defendant Ryan issued CDPHE Second Updated Public Health Order 20-24 (“Second Updated PHO 20-24”).

227. The Second Updated PHO 20-24 has been amended or extended and replaced.

228. The Second Updated PHO 20-24 begins with the following statement of authority:

“I issue this Public Health Order (PHO or Order) pursuant to the Governor’s directive in Executive Orders D 2020 017” Second Updated PHO 20-24 on page 1.

229. The Second Updated PHO 20-24 cites no constitutional or statutory authority for its existence. It appears from the recitation of authority at the beginning of the Second Updated PHO 20-24 that Defendant Ryan issued the Second Updated PHO 20-24 solely on the authority, if any, from the directive she received from Defendant Polis set forth in Executive Order D 2020 017 (“EO 17”).

230. EO 17 begins with the following statement of authority.

"Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.* (Act), I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order ordering Coloradans to stay at home whenever possible due to the presence of coronavirus disease 2019 (COVID-19) in the State." EO 17 on page 1.

231. Defendant Polis states at the beginning of EO 17 that it is issued on the legal authority of the Colorado Disaster Emergency Act, C.R.S. §§ 24-33.5-701, *et seq.* However, the only two applicable statutes within the CDEA are C.R.S. §§ 24-33.5-704 and 24-33.5-704.5, and neither statute provides Defendant Polis the legal authority to issue rules of general applicability without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

232. Likewise, Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue rules of general applicability like those contained in the Second Updated PHO 20-24 (and numerous other PHOs issued by Defendant CDPHE as directed by Defendant Polis in numerous EOs) without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-103, *et. seq.*

233. The third from last paragraph of the Second Updated PHO 20-24 (on page 12 of 12) states the criminal penalties for non-compliance with the Second Updated PHO 20-24 as follows:

This order will be enforced by any appropriate legal means. Local authorities are encouraged to determine the best course of action to encourage maximum compliance. Failure to comply with this order could result in penalties including a fine of up to one thousand (1,000) dollars and imprisonment in the county jail for up to one year, pursuant to 25-1-114, C.R.S.

Second Updated PHO 20-24, in paragraph V., on page 12 of 12.²⁰

234. Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue new rules of general applicability which criminalize previously lawful conduct without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

235. On information and belief, CDPHE’s Second Updated PHO 20-24 was originally issued on March 27, 2020, and then extended or amended and replaced, all without rulemaking as required by the SAPA. C.R.S. § 24-4-101, *et. seq.*

**CDPHE Third Updated Public Health Order 20-24
(replaced by CDPHE Ninth Amended PHO 20-28).**

236. On **April 1, 2020**, Defendant Ryan issued CDPHE Third Updated Public Health Order 20-24 (“**Third Updated PHO 20-24**”).

237. The Third Updated PHO 20-24 has been amended or extended and replaced.

238. The Third Updated PHO 20-24 begins with the following statement of authority:

“I issue this Public Health Order (PHO or Order) pursuant to the Governor’s directive in Executive Orders D 2020 017” Third Updated PHO 20-24 on

²⁰ CDPHE’s PHO 20-24, and Second Updated Notice of PHO 20-24, and Third Updated Notice of PHO 20-24 have no page numbers.

page 1.

239. The Third Updated PHO 20-24 cites no constitutional or statutory authority for its existence. It appears from the recitation of authority at the beginning of the Third Updated PHO 20-24 that Defendant Ryan issued the Third Updated PHO 20-24 solely on the authority, if any, from the directive she received from Defendant Polis set forth in Executive Order D 2020 017 ("EO 17").

240. EO 17 begins with the following statement of authority.

"Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.* (Act), I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order ordering Coloradans to stay at home whenever possible due to the presence of coronavirus disease 2019 (COVID-19) in the State." EO 17 on page 1.

241. Defendant Polis states at the beginning of EO 17 that it is issued on the legal authority of the Colorado Disaster Emergency Act, C.R.S. §§ 24-33.5-701, *et seq.* However, the only two applicable statutes within the CDEA are C.R.S. §§ 24-33.5-704 and 24-33.5-704.5, and neither statute provides Defendant Polis the legal authority to issue rules of general applicability without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et seq.*

242. Likewise, Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue rules of general applicability like those contained in the Third Updated PHO 20-24

(and numerous other PHOs issued by Defendant CDPHE as directed by Defendant Polis in numerous EOs) without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-103, *et. seq.*

243. The Third Updated PHO 20-24 states the criminal penalties for non-compliance as follows:

This order will be enforced by any appropriate legal means. Local authorities are encouraged to determine the best course of action to encourage maximum compliance. Failure to comply with this order could result in penalties including a fine of up to one thousand (1,000) dollars and imprisonment in the county jail for up to one year, pursuant to 25-1-114, C.R.S.

Third Updated PHO 20-24, in paragraph V., on page 12 of 13.²¹

244. Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue new rules of general applicability which criminalize previously lawful conduct without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

245. On information and belief, CDPHE’s Third Updated PHO 20-24 was originally issued on April 1, 2020, and then extended or amended and replaced, all without rulemaking as required by the SAPA. C.R.S. § 24-4-101, *et. seq.*

**Executive Order D 2020 024,
“Amending and Extending Executive Order D 2020 017
Ordering Coloradans to Stay at Home Due to the Presence of COVID-19.”**

²¹ CDPHE’s PHO 20-24, and Second Updated Notice of PHO 20-24, and Third Updated Notice of PHO 20-24 have no page numbers.

246. On **April 6, 2020**, Defendant Polis issued Executive Order D 2020 024 “Amending and Extending Executive Order D 2020 017 Ordering Coloradans to Stay at Home Due to the Presence of COVID-19” (“**EO 24**”).

247. In EO 24 Defendant Polis amended *inter alia* one provision in EO 17 on page 2 in II.D., and concluded: “... In all other respects Executive Order D 2020 017 as extended and amended shall remain in full force and effect.”

**CDPHE Fourth Updated Public Health Order 20-24
(replaced by CDPHE Ninth Amended PHO 20-28).**

248. On **April 9, 2020**, Defendant Ryan issued CDPHE Fourth Updated Public Health Order 20-24 (“**Fourth Updated PHO 20-24**”).

249. The Fourth Updated PHO 20-24 has been amended or extended and replaced.

250. The Fourth Updated PHO 20-24 begins with the following statement of authority:

“I issue this Public Health Order (PHO or Order) pursuant to the Governor’s directive in Executive Orders D 2020 017” Fourth Updated PHO 20-24 on page 1.

251. The Fourth Updated PHO 20-24 cites no constitutional or statutory authority for its existence. It appears from the recitation of authority at the beginning of the Fourth Updated PHO 20-24 that Defendant Ryan issued the Fourth Updated PHO 20-24 solely on the authority, if any, from the directive she received from Defendant Polis set forth in Executive Order D 2020 017 (“EO 17”).

252. EO 17 begins with the following statement of authority.

“Pursuant to the authority vested in the Governor of the State of Colorado and, in

particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.* (Act), I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order ordering Coloradans to stay at home whenever possible due to the presence of coronavirus disease 2019 (COVID-19) in the State.” EO 17 on page 1.

253. Defendant Polis states at the beginning of EO 17 that it is issued on the legal authority of the Colorado Disaster Emergency Act, C.R.S. §§ 24-33.5-701, *et seq.* However, the only two applicable statutes within the CDEA are C.R.S. §§ 24-33.5-704 and 24-33.5-704.5, and neither statute provides Defendant Polis the legal authority to issue rules of general applicability without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

254. Likewise, Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue rules of general applicability like those contained in the Fourth Updated PHO 20-24 (and numerous other PHOs issued by Defendant CDPHE as directed by Defendant Polis in numerous EOs) without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-103, *et. seq.*

255. The Fourth Updated PHO 20-24 states the criminal penalties for non-compliance as follows:

This order will be enforced by any appropriate legal means. Local authorities are encouraged to determine the best course of action to encourage maximum compliance. Failure to comply with this order could result in penalties including a fine of up to one

thousand (1,000) dollars and imprisonment in the county jail for up to one year, pursuant to 25-1-114, C.R.S.

Fourth Updated PHO 20-24, in paragraph V., on page 13 of 13.

256. Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue new rules of general applicability which criminalize previously lawful conduct without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

257. On information and belief, CDPHE’s Fourth Updated PHO 20-24 was originally issued on April 9, 2020, and then extended or amended and replaced, all without rulemaking as required by the SAPA. C.R.S. § 24-4-101, *et. seq.*

The Stay at Home Order.

258. Defendant Polis’ **EO 17, EO 24, and** Defendant CDPHE’s **PHO 20-24**, all as extended and amended, may be collectively referred to as “**The Stay At Home Order.**”

Executive Order D 2020 044, the “Safer at Home Order”.

259. On **April 26, 2020**, Defendant Polis issued Executive Order D 2020 044 “Safer at Home” (“**EO 44**”), which modified the existing Stay-At-Home Order.

260. EO 44 begins with the following statement of authority.

"Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order continuing stay-at-home requirements for vulnerable individuals and permitting the limited reopening of postsecondary institutions and certain

business operations due to the presence of coronavirus disease 2019 (COVID-19) in the State.” EO 44 on page 1.

261. In EO 44 Defendant Polis stated: “I direct the Executive Director of CDPHE to issue a public health order consistent with the directives in this Executive Order.” EO 44 on page 2 in II. H. Defendant Polis’ EO 44 directives to Defendant CDPHE went on to specify additional details with which the new or amended PHO must comply. EO 44 on page 3 in II. I.

**CDPHE Public Health Order 20-28,
and successor PHOs purportedly issued on the authority of EO 44.**

262. On **April 26, 2020**, Defendant Ryan issued CDPHE Public Health Order 20-28 (“PHO 20-28”), implementing Safer at Home standards in a PHO comprised of 14 initial pages, followed by seven appendices in an additional 20 pages.

263. PHO 20-28 has been amended or extended or replaced eight times, with the current iteration being the “CDPHE Ninth Amended PHO 20-28” issued on July 30, 2020.

264. PHO 20-28 begins with the following statement of authority:

“I issue this Public Health Order (PHO or Order) pursuant to the Governor’s directive in Executive Order D 2020 044” PHO 20-28 on page 1.

265. PHO 20-28 cites no constitutional or statutory authority for its existence. It appears from the recitation of authority at the beginning of PHO 20-28 that Defendant Ryan issued PHO 20-28 solely on the authority, if any, from the directive she received from Defendant Polis set forth in Executive Order D 2020 044 (“EO 44”), captioned “Safer at Home.”

266. Defendant Polis states at the beginning of EO 44 that it is issued on the legal authority of the Colorado Disaster Emergency Act, C.R.S. §§ 24-33.5-701, *et seq.* However, the only two applicable statutes within the CDEA are C.R.S. §§ 24-33.5-704 and 24-33.5-704.5, and

neither statute provides Defendant Polis the legal authority to issue rules of general applicability without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

267. Likewise, Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue rules of general applicability like those contained in PHO 20-28 (and numerous other PHOs issued by Defendant CDPHE as directed by Defendant Polis in numerous EOs) without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-103, *et. seq.*

268. The third from last paragraph of PHO 20-28 (on page 13 of 34 total pages) states the criminal penalties for non-compliance with PHO 20-28 as follows:

This order will be enforced by all appropriate legal means. Local authorities are encouraged to determine the best course of action to encourage maximum compliance. Failure to comply with this order could result in penalties, including jail time, and fines, and may also be subject to discipline on a professional license based upon the applicable practice act.

PHO 20-28, in paragraph VI., on page 13 of 34 total pages.

269. Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue new rules of general applicability which criminalize previously lawful conduct without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

270. On information and belief, CDPHE's **PHO 20-28** which was originally issued on **April 26, 2020**, was repeatedly extended or amended or replaced, by:

CDPHE **Amended PHO 20-28**, issued **May 4, 2020** on the purported authority of EO 44 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 14 of 36 total pages);

CDPHE **Second Amended PHO 20-28**, issued **May 8, 2020** on the purported authority of EO 44 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 14 of 36 total pages);

CDPHE **Third Amended PHO 20-28**, issued **May 14, 2020** on the purported authority of EO 44 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 14 of 36 total pages); and

CDPHE **Fourth Amended PHO 20-28**, issued **May 26, 2020** on the purported authority of EO 44 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 14 of 41 total pages).

271. On information and belief, each and all of the CDPHE PHOs which amended or extended or replaced PHO 20-28 (identified in the immediately preceding paragraph) were issued by CDPHE without rulemaking as required by the SAPA. C.R.S. § 24-4-101, *et. seq.*

272. Plaintiffs reallege the immediately preceding ten paragraphs as to each and all of the amendments and extensions and replacements of PHO 20-28 which was originally issued on April 26, 2020, and then repeatedly extended or amended or replaced, by:

CDPHE Amended PHO 20-28, issued May 4, 2020;

CDPHE Second Amended PHO 20-28, issued May 8, 2020;

CDPHE Third Amended PHO 20-28, issued May 14, 2020); and

CDPHE Fourth Amended PHO 20-28, issued May 26, 2020.

Suspension of the General Assembly continues.

273. On **May 11, 2020**, the previously announced suspension of the regular session of the Seventy-second Colorado General Assembly (from March 14, 2020 to May 11, 2020) was extended until May 26, 2020.

**Executive Order D 2020 91,
“Safer at Home and in the Vast, Great Outdoors”.**

274. On **June 1, 2020**, Defendant Polis issued Executive Order D 2020 91 “Safer at Home and in the Vast, Great Outdoors” (“**EO 91**”), which modified EO 44.

275. EO 91 begins with the following statement of authority.

"Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order due to the presence of coronavirus disease 2019 (COVID-19) in the State." EO 91 on page 1.

276. In EO 91 Defendant Polis stated: “I direct the Executive Director of CDPHE to issue a public health order consistent with the directives in this Executive Order.” EO 91 on page 2 in II. E. Defendant Polis’ EO 91 directives to Defendant CDPHE went on to specify additional details with which the new or amended PHO must comply. EO 91 on page 3 in II. E., *et seq.* and page 4 and 5 in II. F., *et seq.*

277. In EO 91 (section II.E. and the immediately following section II.F.) Defendant Polis specified a two-page list of requirements, protocols, definitions, operations requirements, guidelines, guidance, and mandatory requirements and protocols which must be identified and developed in “... any new or amended PHO issued pursuant to this Executive Order.” EO 91 on pages 3, 4, and 5 in II. E. and F. Near the conclusion of EO 91, it states: “Except as modified by this Executive Order, Executive Orders issued due to COVID-19 that are currently in effect shall remain in full force and effect as promulgated.”

**CDPHE Fifth Amended Public Health Order 20-28,
and successor PHOs purportedly issued on the authority of EO 91.**

278. On **June 2, 2020**, Defendant Ryan issued CDPHE’s Fifth Amended Public Health Order 20-28 (“Fifth Amended PHO 20-28”), in a PHO comprised of 17 initial pages, followed by eleven appendices in an additional 28 pages, for a total of 45 pages.

279. CDPHE’s Fifth Amended PHO 20-28 has been amended or extended or replaced four times, with the current iteration being the “CDPHE Ninth Amended PHO 20-28” issued on July 30, 2020.

280. CDPHE’s Fifth Amended PHO 20-28 begins with the following statement of authority:

“I issue this Public Health Order (PHO or Order) pursuant to the Governor’s directive in Executive Order D 2020 091” Fifth Amended PHO 20-28 on page 1.

281. CDPHE’s Fifth Amended PHO 20-28 cites no constitutional or statutory authority for its existence. It appears from the recitation of authority at the beginning of CDPHE’s Fifth Amended PHO 20-28 that Defendant Ryan issued that PHO 20-28 solely on the authority, if any, from the directive she received from Defendant Polis set forth in Executive Order D 2020 091 (“EO 91”), captioned “Safer at Home and in the Vast, Great Outdoors.”

282. Defendant Polis states at the beginning of EO 91 that it is issued on the legal authority of the Colorado Disaster Emergency Act, C.R.S. §§ 24-33.5-701, *et seq.* However, the only two applicable statutes within the CDEA are C.R.S. §§ 24-33.5-704 and 24-33.5-704.5, and neither statute provides Defendant Polis the legal authority to issue rules of general applicability without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

283. Likewise, Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue rules of general applicability like those contained in PHO 20-28 (and numerous other PHOs issued by Defendant CDPHE as directed by Defendant Polis in numerous EOs) without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-103, *et. seq.*

284. The third from last paragraph of CDPHE's Fifth Amended PHO 20-28 (on page 16 of 45) states the criminal penalties for non-compliance with CDPHE's Fifth Amended PHO 20-28 as follows:

This order will be enforced by all appropriate legal means. Local authorities are encouraged to determine the best course of action to encourage maximum compliance. Failure to comply with this order could result in penalties, including jail time, and fines, and may also be subject to discipline on a professional license based upon the applicable practice act.

CDPHE's Fifth Amended PHO 20-28, in paragraph VI., on page 17 of 45.

285. Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no independent constitutional or statutory source of authority upon which to issue new rules of general applicability which criminalize previously lawful conduct without the rulemaking process required by the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

286. On information and belief, CDPHE's **PHO 20-28** which was originally issued on April 26, 2020, was repeatedly extended or amended or replaced (as previously described in more detail) by four successors on the purported authority of EO 44, as follows:

CDPHE Amended PHO 20-28, issued May 4, 2020;

CDPHE Second Amended PHO 20-28, issued May 8, 2020;

CDPHE Third Amended PHO 20-28, issued May 14, 2020; and

CDPHE Fourth Amended PHO 20-28, issued May 26, 2020.

287. Then, after EO 91 was issued by Defendant Polis on June 1, 2020, CDPHE's PHO 20-28 which was originally issued on April 26, 2020, was repeatedly extended or amended or replaced by four additional successors on the purported authority of EO 91, as follows:

CDPHE Fifth Amended PHO 20-28, issued June 2, 2020 on the purported authority of EO 91 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 16 of 45 total pages);

CDPHE Sixth Amended PHO 20-28, issued June 5, 2020 on the purported authority of EO 91 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 17 of 46 total pages);

CDPHE Seventh Amended PHO 20-28, issued June 18, 2020 on the purported authority of EO 91 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 19 of 47 total pages);

CDPHE Eighth Amended PHO 20-28, issued June 30, 2020 on the purported authority of EO 91 as amended by EO 123 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 19 of 48 total pages);

CDPHE Ninth Amended PHO 20-28, issued May 26, 2020 on the purported authority of EO 91 as amended by EO 123 and EO 142 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 20 of 51 total pages); and

CDPHE **Tenth Amended PHO 20-28**, issued August 21, 2020 on the purported authority of EO 91 as amended and extended by EO 123 and EO 142 and EO 144 and EO 170 (with the same criminal enforcement language as PHO 20-28, but in paragraph VI., on page 20 of 52 total pages).

288. On information and belief, each and all of the CDPHE PHOs which amended or extended or replaced PHO 20-28 (identified in the immediately preceding two paragraphs) were issued by CDPHE without rulemaking as required by the SAPA. C.R.S. § 24-4-101, *et. seq.*

289. Plaintiffs reallege the immediately preceding eleven paragraphs as to each and all of the amendments and extensions and replacements of PHO 20-28, which was originally issued on April 26, 2020, and then repeatedly extended or amended or replaced,

first by four successors on the purported authority of EO 44:

CDPHE Amended PHO 20-28, issued May 4, 2020;

CDPHE Second Amended PHO 20-28, issued May 8, 2020;

CDPHE Third Amended PHO 20-28, issued May 14, 2020); and

CDPHE Fourth Amended PHO 20-28, issued May 26, 2020;

and then by three successors on the purported authority of EO 91:

CDPHE Fifth Amended PHO 20-28, issued June 2, 2020;

CDPHE Sixth Amended PHO 20-28, issued June 5, 2020;

CDPHE Seventh Amended PHO 20-28, issued June 18, 2020;

and then by one successor on the purported authority of EO 91 and EO 123:

CDPHE Eighth Amended PHO 20-28, issued June 30, 2020;

and then by one successor on the purported authority of EO 91 and EO 123 and EO 142:

CDPHE Ninth Amended PHO 20-28, issued July 30, 2020;

and then by one successor on the purported authority of EO 91 and EO 123 and EO 142 and EO 144, as amended and extended by EO 170, issued on August 21, 2020;²²

CDPHE Tenth Amended PHO 20-28, issued August 21, 2020;

each and all without rulemaking as required by the SAPA. C.R.S. § 24-4-101, *et. seq.*

Sixth Amended Public Health Order 20-28.

290. On **June 5, 2020**, Defendant CDPHE issued the Sixth Amended Public Health Order 20-28 Safer at Home and in the Vast, Great Outdoors (“**Sixth Amended PHO 20-28**”).

291. The Sixth Amended PHO 20-28 has been amended and extended.

292. The Sixth Amended PHO 20-28 begins with the following statement of authority:

“I issue this Public Health Order (PHO or Order) pursuant to the Governor’s directive in Executive Order D 2020 091” Sixth Amended PHO 20-28 on page 1.

Seventh Amended Public Health Order 20-28.

293. On **June 18, 2020**, Defendant CDPHE issued the Seventh Amended Public Health Order 20-28 Safer at Home and in the Vast, Great Outdoors (“**Seventh Amended PHO 20-28**”).

294. The Seventh Amended PHO 20-28 has been amended and extended.

295. The Seventh Amended PHO 20-28 begins with the following statement of authority:

“I issue this Public Health Order (PHO or Order) pursuant to the Governor’s directive in Executive Order D 2020 091” Seventh Amended PHO 20-28 on page 1.

²² It is each Plaintiff’s intention that any allegation made in this Complaint as to any one of the many iterations of CDPHE’s Health Order 20-28 Safer at Home and in the Vast, Great Outdoors is realleged as to each and all of them.

Defendant JCPH's enforcement actions begin in May and June 2020.

296. Prior to the Seventh Amended PHO 20-28 issued on June 18, 2020, PHO 20-28 prohibited spectator events. Although spectator events were not allowed, the Bandimeres and JCPH collaborated so that Bandimere Speedway conducted auto racing events in May and June 2020 as outdoor recreation that complied with PHO 20-28 based on the Bandimeres' voluntary actions, e.g. implementing track rules which created sufficient spacing of vehicles, imposing limits on the number of crew members, etc.

**On June 29, 2020, Defendant Johnson abruptly changes
Defendant JCPH's enforcement actions.**

297. On **June 29, 2020**, Defendant Johnson initiated written communication with the Bandimeres about their scheduled Fourth of July event (food license previously approved by JCPH on January 31, 2020), demanding that the Bandimeres furnish "... a plan that details the protocols Bandimere has put into place to ensure that the upcoming 4th of July event operates in compliance with PHO 20-28."

**On June 30, 2020, Defendant Polis issues the Target EO,
Executive Order D 2020 123,
"Amending and Extending Executive Order D 2020 091 Safer at Home and in the Vast,
Great Outdoors."**

298. On **June 30, 2020**, Defendant Polis issued the **Target EO, Executive Order D 2020 123**, "Amending and Extending Executive Order D 2020 091 Safer at Home and in the Vast Great Outdoors" ("**EO 123**").

299. EO 123 has been amended or extended and replaced.

300. EO 123 begins with the following statement of authority.

"Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant

portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order amending and extending Executive Order D 2020 091, Safer at Home and in the Vast, Great Outdoors, due to the presence of coronavirus disease 2019 (COVID-19) in Colorado.”
EO 123 on page 1.

301. In EO 123 Defendant Polis amended *inter alia* four provisions in EO 91 and concluded: “Executive Order D 2020 091, as extended and amended by this Executive Order, shall expire thirty (30) days from June 30, 2020, unless extended further by Executive Order. In all other respects Executive Order D 2020 091 shall remain in full force and effect as originally promulgated.” EO 123 on page 3.

**On June 30, 2020, Defendant Ryan issues the Target CDPHE PHO,
Eighth Amended Public Health Order 20-28.**

302. On **June 30, 2020**, Defendant CDPHE issued the Eighth Amended Public Health Order 20-28 Safer at Home and in the Vast, Great Outdoors (“**Eighth Amended PHO 20-28**”). The Eighth Amended PHO 20-28 begins with the following statement of authority:

“I issue this Public Health Order (PHO or Order) pursuant to the Governor’s directive in Executive Order D 2020 091 as amended by Executive Order D 2020 123” Eighth Amended PHO 20-28 on page 1.

303. The Eighth Amended Public Health Order 20-28 provides that “[o]utdoor venues may allow up to 175 people within their usable space calculated using the Social Distancing Space Calculator, excluding staff, per designated activity with a minimum of 6 feet of distance between individuals or non-household contacts.” (Eighth Amended PHO 20-28, at page 6, in ¶ I.H.4.a.)

On July 1, 2020, Defendant Johnson involves Jefferson County Attorneys in JCPH enforcement actions.

304. On **July 1, 2020**, the Bandimeres' counsel (the undersigned attorney) responded to Defendant Johnson, and Defendant Johnson immediately referred the matter to the Jefferson County Attorney's office.

On July 1, 2020, the Supreme Court of Colorado issues their opinion in *Ritchie v. Polis*.

305. On **July 1, 2020**, the Colorado Supreme Court announced their opinion in *Richie v. Polis*, No. 20SC453, finding that Governor Polis exceeded his lawful authority by Executive Order 065, in which he purported to: (1) suspend the operation of certain statutes governing the ballot initiative process that require signature collection to take place in person, and (2) authorize the Secretary of State to create temporary rules to permit signature gathering by mail and email. *Ritchie v. Polis*, 2020 CO 69, ¶ 2, 467 P.3d 339, 241.

On July 1, 2020, JCPH takes *de facto* control of Bandimere Speedway.

306. On **July 2, 2020**, Bandimere Speedway employees and their counsel communicated back and forth repeatedly with JCPH employees and their counsel (various attorneys with the County Attorney's office of Jefferson County) in an effort to understand the Target EO and the Target CDPHE PHO - both issued on June 30, 2020 - and negotiate plans for the Bandimeres' 4th of July God and Country Celebration satisfactory to Defendant JCPH under the confusing new requirements of the Target EO and the Target CDPHE PHO.

On July 2, 2020, DORA Liquor Enforcement agents summarily suspend the Bandimeres' liquor license.

307. On **July 2, 2020**, the Bandimeres received telephonic notice from Colorado Department of Revenue Liquor Enforcement authorities that their liquor license was summarily suspended. Later the same day, DORA Liquor Enforcement agents arrived at Bandimere Speedway, served

written notice, and directed the posting of notice to the public on the Bandimere Speedway grounds.

**On July 2, 2020, the District Court conducts a hearing
on JCPH’s Emergency request for TRO against Bandimere Speedway.**

308. On **July 2, 2020**, Bandimere Speedway received short notice of a hearing on JCPH’s *ex parte* Complaint for Injunctive Relief, Including a Motion for Temporary Restraining Order and Telephonic Hearing to force the Bandimeres to comply with the Target EO and the Target CDPHE PHO on the 4th of July. The Bandimeres’ undersigned counsel was allowed to appear for Bandimere Speedway via WebEx. At the conclusion of the hearing, the Court issued a TRO ordering Bandimere Speedway to comply with the Target EO and the Target CDPHE PHO and set a hearing on the merits of JCPH’s request for injunction on July 8, 2020.

**On July 3, 2020, the Bandimeres work to avoid
JCPH cancellation of the annual 4th of July Event.**

309. On **July 3, 2020**, Bandimere Speedway employees and their counsel communicated back and forth repeatedly with JCPH employees and their counsel in an effort to address and resolve JCPH concerns about the 4th of July Event and how the Bandimeres’ planned “to ensure compliance” with the Target EO and the Target CDPHE PHO. After halting tickets sales advertising, cutting off ticket sales early, and implementing numerous other measures in an effort to comply with the Target EO and the Target CDPHE PHO, the Bandimeres understood they had JCPH approval to proceed with their 4th of July Event.

Bandimere Speedway hosts their annual 4th of July God and Country Celebration.

310. On **July 4, 2020**, Bandimere Speedway hosted their 4th of July God and Country Celebration for approximately 1/3 of the people the Bandimeres expected to be in attendance on Independence Day. JCPH personnel went to Bandimere Speedway during the event to observe

and collect evidence of noncompliance with the Target EO and the Target CDPHE PHO by Bandimere Speedway and their customers.

**On July 8 and 9, 2020, District Court
conducts the hearing on JCPH's request for Injunction.**

311. On **July 8, 2020**, JCPH and Bandimere Speedway engaged in the first day of an in-person hearing on JCPH's Complaint for Injunctive Relief. At the end of the day, the hearing was continued into the next day.

312. On **July 9, 2020**, JCPH and Bandimere Speedway engaged in the second day of an in-person hearing on JCPH's Complaint for Injunctive Relief. At the end of the hearing on July 9, 2020, the Court took the matter under advisement and set July 21, 2020, for announcement of the Court's decision.

**On July 20, 2020, JCPH issues the Target JCPH PHO,
JCPH Order 20-007.**

313. On **July 20, 2020**, JCPH issued a Public Health Order, JCPH Order 20-007, entitled "Jefferson County Public Health Order 20-007 Requiring JCPH Pre-approval for Events and Venues to Allow More Than 100 Patrons Indoors or 175 Patrons Outdoors."

314. On **July 20, 2020**, JCPH filed a Notice in the pending Case No. 2020CV30773, the JCPH complaint against Bandimere Speedway Inc. for injunctive relief, asking the Court to take judicial notice of JCPH Order 20-007 issued by Defendant Johnson on July 20, 2020.

**On July 21, 2020, the District Court
dismisses the JCPH case against Bandimere Speedway.**

315. On **July 21, 2020**, District Court Judge Tamara S. Russell announced her decision in the pending Case No. 2020CV30773, finding the issues disputed at the preliminary injunction hearing to be moot in light of the recent orders issued by JCPH, JCPH Orders 20-006, 20-006,

and 20-007, the Temporary Restraining Order granted by the Court on July 2, 2020, was vacated, and the case closed. Minute Order issued July 21, 2020 and filed at 11:11 a.m. on July 21, 2020.

JCPH control of Bandimere Speedway from and after July 21, 2020.

316. Since **July 21, 2020**, the Bandimeres have had frequent, detailed, and extensive communications with JCPH employees in a vain effort to submit a plan acceptable to JCPH for Bandimere Speedway to conduct larger events than allowed by the Target EO, the Target CDPHE PHO, and the Target JCPH PHO.²³

317. The Target JCPH PHO, JCPH PHO 20-007, was issued on June 20, 2020, and then amended and extended on August 21, 2020, by an “order” entitled “First Extension of Jefferson County Public Health Order 20-007 Requiring JCPH Pre-approval for Events and Venues to Allow More Than 100 Patrons Indoors or 175 Patrons Outdoors.”

318. The first extension of the Target JCPH PHO states that it will continue in force “until midnight on September 20, 2020, or until it is extended, rescinded, superseded, or amended” First Extension of JCPH PHO 20-007, on page 5, at paragraph number 8.

319. The First Extension of JCPH PHO 20-007 states criminal and civil penalties for violation as follows:

5. This Order has the effect of law. Pursuant to C.R.S. §§ 25-1-114.1 and 25-1-516, it is unlawful for any person to fail to comply with this Order. Any person who fails to comply with this Order may also be subject to a fine of up to one thousand dollars

²³ As previously stated near the beginning of this Complaint, it is Plaintiffs’ intention that each allegation about and complaint against each Target Order in this Complaint and Plaintiffs’ other pleadings applies to the other Subject Orders of like kind. Plaintiff respectfully reserves the right to amend this Complaint to address with specificity each and every one of the thirty-one (31) Subject Orders, in the event this approach is objected to by any party or the Court.

(\$1,000) per violation and imprisonment in the county jail for up to one year. For violations of this Order, JCPH may seek a court order in Colorado state district court to enforce this Order and/or to restrain or enjoin any violation of this Order.

6. Any business open to the public that fails to obtain JCPH approval before hosting an event with more than one designated activity may be subject to the suspension or revocation of its license by the appropriate licensing authority as provided by law.

First Extension of JCPH PHO 20-007, on page 5, at paragraph numbers 5 and 6.

320. The 2020 Bandimere Speedway racing season is coming to a close and some of the biggest events of the 2020 schedule have not been allowed by JCPH under the terms of the current version of the Target EO 123 (now EO 170), the current version of the Target CDPHE PHO (now the Tenth Amended CDPHE PHO 20-28), and the current version of the Target JCPH PHO (now the First Extension of JCPH PHO 20-007).

321. Bandimere Speedway's many and repeated efforts to obtain a variance or other accommodation from JCPH for the truly one-of-a-kind venue and entertainment operation at Bandimere Speedway have failed. Only small scale events have been approved by JCPH, and then only after extensive advance communications with JCPH to the point of JCPH micro-management of each small event.

322. As a direct result of JCPH actions, the major events on the 2020 Bandimere Speedway schedule have been postponed or cancelled altogether.

323. In 2019, during their April through October racing season, Bandimere Speedway was host to over 150 events and welcomed racers, fans, and sponsors alike to enjoy their state-of-the-art, 23,500 seat facility on 160 acres.

324. The premier racing event on the 2019 schedule, the Dodge Mile-High NHRA Nationals, brought nearly \$15 million into the local economy.
325. The Mile-High Nationals is a world class racing event sanctioned by the National Hot Rod Association which draws competitors from all over the nation.
326. As a direct result of JCPH actions, the 2020 Mile-High Nationals event (originally scheduled for July 17-19) has been repeatedly postponed to the point that the last available remaining dates that it may be scheduled are September 25-27, 2020.
327. Due to the lead time required to prepare for the Mile-High Nationals and the logistics involved, the small window of opportunity for it to be rescheduled in the 2020 season is closing fast.
328. If the Mile-High Nationals event is not immediately scheduled with the approval of the sanctioning body, the NHRA, it will not be held in 2020.
329. As a direct result of JCPH past actions approving only small events and refusing to approve large events, it is apparent that JCPH will not approve the Mile-High Nationals.
330. As a direct result of JCPH enforcement of the Target Orders, Bandimere Speedway is now faced with business failure for only one reason: the Target Orders and JCPH enforcement of the Target Orders.
331. Bandimere Speedway personnel have tried their best to comply with the Target Orders, despite the fact that the Target Orders have no category of business narrowly tailored to Bandimere Speedway's truly one-of-a-kind business model and venue.
332. Bandimere Speedway's requests to JCPH for a "workaround" the Target Orders in the form of a variance or other accommodation to obtain approval for large events have been denied, despite the fact that the Bandimere Speedway format (largely outdoors), facility size (160 plus

acres) and configuration (multiple activities and focal points spread out over a wide area) easily allows for social distancing by those who choose to do so.

333. As a direct result of the Target Orders and JCPH's actions to enforce them, the Bandimeres have already suffered ruinous financial losses, irreparable damage to reputation and standing in the community, and grievous losses of liberty, civil rights, and property rights.

334. If judicial review of the Target Orders does not result in the relief requested in this Complaint, then Bandimere Speedway may not survive in business.

335. Under these unreasonable and unsustainable circumstances, the Bandimeres seek immediate judicial relief from the Target Orders and JCPH's actions to enforce them.

**Defendant Polis ignored
constitutionally compliant options by which to implement new laws and policies.**

336. At all times relevant to this action, Defendant Polis had multiple options by which to implement new laws and policies in a manner that complied with the requirements of the Colorado Constitution.

**Option One
for Defendant Polis' to have new laws and public policies implemented
and comply with the Colorado Constitution –
seek enactment of a bill during the Regular Session of the Legislature.**

337. At all times relevant to this action, during those time periods when the legislature was in session in 2020, Defendant Polis had a constitutionally compliant course of action by which to have new laws and policies implemented in response to COVID-19 in Colorado and comply with the Colorado Constitution:

the Governor could have presented the substance of any given executive order to the General Assembly with the request that its substance be put into the form of a bill which

the legislature could then enact (or not) as explicitly required by Article V, Section 17 of the Colorado Constitution.

338. Article V, section 17 of the Colorado Constitution states as follows.

§ 17. No law passed but by bill--amendments

No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose.

Colo. Const. art. V, § 17.

Option Two
for Defendant Polis' to have new laws and public policies implemented
and comply with the Colorado Constitution –
seek enactment of a bill during a Special Session of the Legislature.

339. At all times relevant to this action, during those time periods when the legislature was not in session in 2020, Defendant Polis has had a second constitutionally compliant course of action by which to have new laws and policies implemented in response to COVID-19 in Colorado and comply with the Colorado Constitution:

the Governor could have called the Colorado legislature into a special legislative session under the authority of Article IV, section 9 of the Colorado Constitution, which authorizes the governor, on "extraordinary occasions" to convene the General Assembly in a special legislative session.

340. Article IV, section 9 of the Colorado Constitution states as follows.

§ 9. Governor may convene legislature or senate

The governor may, on extraordinary occasions convene the general assembly, by proclamation, stating therein the purpose for which it is to assemble; but at such special session no business shall be transacted other than that specially named in the proclamation. He may by proclamation, convene the senate in extraordinary session for the transaction of executive business.

Colo. Const. art. IV, § 9.

341. Under the authority of Article IV, section 9 of the Colorado Constitution, Defendant Polis could have called a special session of the General Assembly by proclamation, stating therein that the purpose for which the legislature was to assemble: to enact the substance of his proposed executive order in the form of a bill as explicitly required by Article V, Section 17 of the Colorado Constitution.

342. If Defendant Polis had called a special session and offered the substance of his EO(s) for the General Assembly to put in the form of a bill and enact, then Defendant Polis would not have usurped the Article V legislative power of the legislature, and he would have complied with Colorado Constitution's Article III requirements that "...no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this Constitution expressly directed or permitted." Colo. Const. art. III.

343. Whether the bill was enacted in the regular or special legislative session, immediately upon passage of the bill enacting the substance of the Governor's executive order into law by the General Assembly as required by Article III and Article V, Section 17 of the Colorado Constitution, the Governor then could have lawfully acted with dispatch to faithfully execute the laws as provided by Article IV, section 2 of the Colorado Constitution.

344. In so doing, Defendant Polis would have honored three of the most fundamental precepts of Colorado Constitutional law: (1) that the legislative department makes the laws in accord with Article V of the Colorado Constitution; and (2) that the executive department executes the laws in accord with Article IV, Section 2 of the Colorado Constitution; and (3) that the executive department will not usurp the authority and powers of the legislative department in violation of

Article III of the Colorado Constitution. But Defendant Polis did not honor those three most fundamental precepts in Colorado Constitutional law when he issued EO 123.

**Option Three
for Defendant Polis' to have new laws and public policies implemented
and comply with the Colorado Constitution –
direct CDPHE to issue rules after rulemaking as prescribed by SAPA.**

345. At all times relevant to this action, Defendant Polis has had a third constitutionally compliant course of action by which to have new laws and policies implemented in response to COVID-19 in Colorado and comply with the Colorado Constitution:

the Governor could have directed either Defendant Ryan or the State Board of Health to engage in rulemaking as prescribed in the State Administrative Procedures Act, C.R.S. § 24-4-101, *et. seq.*

346. For clarity and accuracy in analyzing whether the Target Orders were issued in accord with the State Administrative Procedures Act (the “SAPA”), it is imperative to properly distinguish a “rule” from an “order”.

347. The term “rule” is defined in the State Administrative Procedures Act in C.R.S. § 24-4-102(15) as follows:

(15) "Rule" means the whole or any part of every agency statement **of general applicability and future effect implementing, interpreting, or declaring law or policy** or setting forth the procedure or practice requirements of any agency. "Rule" includes "regulation." (Emphasis added.)

348. The term “order” is defined in the State Administrative Procedures Act in C.R.S. § 24-4-102(10) as follows:

(10) "Order" means the whole or any part of **the final disposition (whether affirmative, negative, injunctive, or declaratory in form) by any agency in any matter other than rulemaking.** (Emphasis added.)

349. Applying the definitions above to the content of the Target Orders reveals that despite the fact that each is entitled as an "Order," in fact the Target Order is comprised of a number of different "rules" wearing the erroneous and misleading collective label, "Order."

350. Erroneously identifying the rules in the Target Orders as "orders" when that term of art is a patent falsehood contributes to confusion from mixed signals about whether the Target Orders are "guidance," whether or not they have any binding legal effect, and whether or not they are enforceable by criminal penalties as some state.

351. More importantly, erroneously characterizing the rules in the Target Orders as "orders" obscures the fact that no Defendant had constitutional or statutory authority to issue any of the rules in the Target Orders without first complying with the SAPA rulemaking process.

**Option Four
for Defendant Polis' to have new laws and public policies implemented
and comply with the Colorado Constitution –
direct CDPHE to issue temporary or emergency rules in accord with the SAPA.**

352. At all times relevant to this action, Defendant Polis has had a fourth constitutionally compliant course of action by which to have new laws and policies implemented in response to COVID-19 in Colorado and comply with the Colorado Constitution:

the Governor could have directed either Defendant Ryan or the State Board of Health to enact the rules through temporary or emergency rulemaking as prescribed in the State Administrative Procedures Act in C.R.S. § 24-4-103(6)(a).

353. C.R.S. § 24-4-103(6)(a) provides as follows:

(6)(a) A temporary or emergency rule may be adopted without compliance with the procedures prescribed in subsection (4) of this section and with less than the twenty days' notice prescribed in subsection (3) of this section, or where circumstances imperatively require, without notice, **only if the agency finds that immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation or for the preservation of public health, safety, or welfare and compliance with the requirements of this section would be contrary to the public interest and makes such a finding on the record. Such findings and a statement of the reasons for the action shall be published with the rule.** A temporary or emergency rule may be adopted without compliance with subsections (2.5) and (2.7) of this section, but shall not become permanent without compliance with such subsections (2.5) and (2.7). A temporary or emergency rule shall become effective on adoption or on such later date as is stated in the rule, shall be published promptly, and shall have effect for not more than one hundred twenty days after its adoption or for such shorter period as may be specifically provided by the statute governing such agency, unless made permanent by compliance with subsections (3) and (4) of this section. (Emphasis added.)

354. On information and belief, none of the rules in the Target Orders were issued in compliance with the provisions for temporary or emergency rules prescribed in the State Administrative Procedures Act. C.R.S. § 24-4-103(6)(a).

The rules in the Target Orders were issued by Defendants without lawful authority.

355. As described in this Complaint, the rules in the Target Orders were issued by Defendants without lawful authority from either constitution or statute, and the Target Statutes are no source of authority because they are unconstitutional. Under these circumstances, each of the Target Orders is void because it either does not comply with the SAPA, or it violates the Colorado Constitution, or both.

Even if the Target Orders are based upon legally sufficient authority, they are unconstitutionally overbroad and void for vagueness.

356. The Target Orders deprive each Plaintiff of due process because the Target Orders generally, and the Target Orders in particular, are not narrowly tailored as required by Article II, Section 25 of the Colorado Constitution. Colo. Const. art II, § 25.

357. For state actors to restrict the fundamental civil rights, liberty interests, and property rights of each Plaintiff on the basis of the unconstitutionally overbroad Target Orders is arbitrary and capricious state action. “The overbreadth doctrine addresses the concern that the scope of a law may be so broad that it restricts speech protected by the First Amendment or has a chilling effect on such constitutionally protected speech. *People v. Shell*, 148 P.3d 162, 174 (Colo.2006). The doctrine permits a litigant to bring a facial challenge to a law that impacts speech or expressive conduct protected by the First Amendment. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612–13, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *Bd. of Educ. of Jefferson Cty. Sch. Dist. R-1 v. Wilder*, 960 P.2d 695, 702–03 (Colo.1998).” *People v. Graves*, 2016 CO 15, ¶ 12, 368 P.3d 317, 322–23.

358. The use of force by state actors to coerce Plaintiffs into compliance with the Target Orders is state action which deprives each Plaintiff of substantive and procedural due process in violation of Article II, Section 25 of the Colorado Constitution.

359. In addition, the Target Orders deprive Plaintiffs of due process because they are unconstitutionally vague. “The essential inquiry in addressing a void for vagueness challenge is whether the statute ‘forbids or requires the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application.’” *People ex rel. Rein v. Meagher* (Colo. 2020). *People v. Gross*, 830 P.2d 933, 937 (Colo. 1992) (quoting *People v. Becker*, 759 P.2d 26, 31 (Colo. 1988)).

360. In the personal experience of each Plaintiff, the Subject Orders generally, and the Target Orders in particular, are vague, overbroad, and confusing. Of one thing each Plaintiff is certain - the result of Defendant Polis’ EO and PHO process to date, as applied to Plaintiffs, is simultaneously a deprivation of procedural due process and substantive due process in violation of Article II, Section 25 of the Colorado Constitution.

**Each Plaintiff has suffered personal injury
from the state actions of each Defendant.**

361. As a direct result of the Subject Orders generally, and the Target Orders in particular, each Plaintiff has suffered a grievous loss of their fundamental civil rights, liberty interests, and property rights from the conduct of each Defendant.

362. Plaintiffs seek immediate judicial relief from the Subject Orders generally, and the Target Orders in particular, so as to restore their constitutional rights unjustly taken by the state actions described in this Complaint. Each Plaintiff has standing, having suffered an injury to a legally-protected interest as a result of each Defendant’s actions. *Colorado Medical Society v. Hickenlooper*, 349 P.3d 1133 (2015).

CLAIMS FOR RELIEF

363. Each and all of Plaintiffs’ claims for relief in this action are grounded in Colorado state law, i.e. the Colorado Constitution and Colorado state statutes and other Colorado state laws, as

enforced by and through 42 U.S.C. §§ 1983 and 1988. References in this Complaint (and all other Plaintiffs' pleadings) to the United States Constitution and U.S. Constitutional jurisprudence are to place in proper context the Colorado state laws upon which Plaintiffs rely as the basis of their claims. *Cnf. People Ex Rel. Salazar v. Davidson*, 79 P.3d 1221 (2003)(We base our decision on the Colorado Constitution, but to put state law in context, we begin with a discussion of federal law.). Each Plaintiff does not waive, and hereby expressly reserves for adjudication as federal questions in the federal courts, all of their rights, remedies, and claims grounded in the United States Constitution and U.S. Constitutional jurisprudence.

FIRST CLAIM
(Each Plaintiff as against each Defendant)

Plaintiffs are entitled to Judicial Review of the Subject Orders pursuant to the Colorado Constitution, Article VI, Section 9.

364. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

365. Each Plaintiff is a person aggrieved or affected by EO 123 issued by Defendant Polis.

366. Each Plaintiff is a person aggrieved or affected by the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*

367. Each Plaintiff is a person aggrieved or affected by C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a).

368. Each Plaintiff is a person aggrieved or affected by the CDPHE Eighth Amended PHO 20-28 issued by Defendant Ryan.

369. Each Plaintiff is a person aggrieved or affected by the JCPH PHO 20-007 issued by Defendant Johnson.

370. A real and actual controversy exists between each Plaintiff, on the one hand, and each Defendant, on the other hand, concerning the constitutionality the Target Statutes and the Target Orders.

371. This Court should enter an order to relieve the parties of uncertainty.

372. Each Plaintiff's Complaint in this action is a petition for redress of grievances to which each Plaintiff is entitled under Article II, Section 24 of the Colorado Constitution.

373. Plaintiffs request that Court exercise judicial power in accord with Article VI, Section 9 of the Colorado Constitution and conduct judicial review of the constitutionality of each of the Target Statutes and the Target Orders.

374. On information and belief, Defendants issued the Target Orders without the regular or emergency or temporary rulemaking prescribed by the State Administrative Procedures Act, C.R.S. § 24-4-103, *et. seq.* In the absence of rulemaking in accord with the SAPA, Plaintiffs are entitled to immediate judicial review of the Target Orders because they issued without either the standard rulemaking or emergency rulemaking required by the SAPA, and without any other legally sufficient constitutional or statutory authority.

375. The State Administrative Procedures Act governs judicial review only of state agency actions. *Colorado State Bd. of Medical Examiners v. Colorado Court of Appeals*, 920 P.2d 807, 811 (Colo.1996).

376. The APA defines "agency" as "any board, bureau, commission, department, institution, division, section, or officer of the state." § 24-4-102(3), C.R.S.2011. *Crow v. Penrose-St. Francis Healthcare Sys.*, 2012 COA 43, ¶ 11, 292 P.3d 1018, 1021.

377. The Colorado Supreme Court *en banc* explained when judicial review of a state agency is available without exhaustion of remedies in *Envirotest Sys., Corp. v. Colorado Dep't of Revenue*.

The Colorado Administrative Procedure Act (APA), sections 24–4–101 to 108, C.R.S. (2004), governs this case. The APA reflects concern for separation of powers by requiring parties involved in administrative proceedings to exhaust their administrative remedies before seeking judicial review. *State Personnel Bd. v. Dist. Court*, 637 P.2d 333, 335 (Colo.1981); *see also* § 24–4–106(2), C.R.S. (2004)(“Final agency action under this or any other law shall be subject to judicial review as provided in this section. ...”.)¹

Generally, under the APA and exhaustion of remedies principles, courts will not review or grant relief in regard to any aspect of administrative proceedings until the agency has taken final action. *Colo. Health Facilities Review Council v. Dist. Court In and For City and County of Denver*, 689 P.2d 617, 621 (Colo.1984).

The exception to this rule is stated in section 24–4–106(8). For a district court to intervene, the agency proceeding or action must clearly exceed the constitutional or statutory jurisdiction or authority of the agency and the party seeking to enjoin the proceedings must show that the agency action will cause irreparable injury. Section 24–4–106(8) states:

Upon a showing of *irreparable injury*, any court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is *clearly beyond the constitutional or statutory jurisdiction or authority of the agency*. (emphasis added).

Unless the requirements of section 24–4–106(8) are met, interlocutory judicial review of an issue presented in the agency proceeding encroaches on the executive function; thus, courts otherwise will not interfere with ongoing agency proceedings until they are finalized. *T & S Leasing v. Dist. Court*, 728 P.2d 729, 731 (Colo.1986); *see also State Personnel Bd.*, 637 P.2d at 337 (agency's action is entitled to a presumption of validity and constitutionality).

FN1 Requiring exhaustion of administrative remedies allows agencies to develop the factual record upon which the agency and subsequent reviewing courts may base their decisions, promotes administrative efficiency, and preserves the autonomy of the agency. *City and County of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212–13(Colo.2000).

Envirotest Sys., Corp. v. Colorado Dep't of Revenue, 109 P.3d 142, 143–44 (Colo. 2005)

378. On information and belief, Defendants issued the Target Orders without regular rulemaking or emergency or temporary rulemaking required by the SAPA, and without any other legally sufficient constitutional or statutory authority.

379. The Target Statutes and the Target Orders, individually and collectively, have implicated and injured the fundamental civil rights, liberty interests, and property rights of each Plaintiff.

380. This Court should conduct the judicial review of the Target Statutes, the Target EO, the Target CDPHE PHO, and the Target JCPH PHO, individually and collectively, using the strict scrutiny standard of review appropriate in cases where state actions by state actors infringe upon any constitutional right. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

381. Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217, 102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982).

382. This Court should declare that each of the Target Statutes, the Target EO, the Target CDPHE PHO, and the Target JCPH PHO, individually and collectively, both facially and as applied to each Plaintiff, does not comply with the requirements of the Colorado Constitution, and thereby violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution.

383. Each Plaintiff has no adequate remedy at law, has suffered serious and irreparable harm to their constitutional rights, and will continue to suffer serious and irreparable harm to their fundamental civil rights, liberty interests, and property rights, unless and until each Defendant is enjoined from enforcing the Target Orders. In order to establish standing, a plaintiff must allege that he or she has suffered an injury to a legally protected interest. *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 8, 338 P.3d 1002, 1006.

384. Defendants issued the Target Orders without any other legally sufficient constitutional or statutory authority, and without regular rulemaking or emergency or temporary

rulemaking required by the SAPA; as such, the Target Orders are clearly beyond the respective constitutional or statutory jurisdiction or authority of each Defendant, and the actions of each Defendant have caused each Plaintiff to unjustly suffer irreparable personal injury from the loss of fundamental civil rights, liberty interests, and property rights.

385. Under these circumstances, each Plaintiff is entitled to immediate judicial review of the Target Orders and the actions of each Defendant in issuing the Target Orders.

386. Pursuant to 42 U.S.C. §§ 1983 and 1988, each Plaintiff is entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief invalidating EO 123 and restraining each Defendant's enforcement of EO 123 and all PHOs issued by Defendants.

387. Each Plaintiff found it necessary to engage the services of private counsel to vindicate their rights under the law. Each Plaintiff is therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

SECOND CLAIM
(Each Plaintiff as against each Defendant)

The Target Orders do not comply with the requirements in Article III of the Colorado Constitution for distribution of powers and nondelegation of powers, and they violate 42 U.S.C. § 1983.

388. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

389. This Court should enter findings of fact and conclusions of law that Defendant Polis' power under Article IV, Section 2 of the Colorado Constitution is limited to the administration of existing laws, i.e. the power to faithfully execute the laws already extant, and Article IV, Section 2 in no way empowers Defendant Polis to enact new laws or public policies. *See* Articles III, IV, V, and VI of the Colorado Constitution and the separation of powers required by the U.S. Constitution.

390. This Court should enter findings of fact and conclusions of law that Defendant Polis has

no authority, under either the Colorado Constitution or C.R.S. § 24-33.5-701, *et seq.*, the Colorado Disaster Emergency Act, to issue any executive order which creates, enacts, or implements new law or new public policy, or punishes with civil or criminal liability any person who does not comply with any Executive Order purporting to create, enact, or implement new laws or public policies. *See* Articles III, IV, V, and VI of the Colorado Constitution.

391. This Court should enter findings of fact and conclusions of law that, to the extent C.R.S. § 24-33.5-704, *et seq.*, grants the Governor power to legislate without incorporating proper standards and safeguards, the legislature disregarded the explicit constitutional prohibition of nondelegation of legislative power in Article III of the Colorado Constitution; consequently, C.R.S. § 24-33.5-704, *et seq.*, does not comply with the requirements of the Colorado Constitution and violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Articles III, IV, V, and VI of the Colorado Constitution and the separation of powers required by the U.S. Constitution.

392. This Court should enter findings of fact and conclusions of law that, to the extent C.R.S. § 24-33.5-704(2) purports to empower the Governor to issue, amend, or rescind executive orders, proclamations, and regulations which have the force and effect of law, and § 24-33.5-704(7)(a) purports to empower the Governor to “.. [s]uspend ... any statute, order, rule, or regulation ...,” the legislative department cannot delegate their legislative authority to the executive department without including in the enabling statute standards defining what is to be done and procedural safeguards to control arbitrary action or abuse of power; consequently, each of C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) is a constitutionally impermissible attempt by the legislative department to delegate their legislative authority to the executive department which does not comply with the requirements of the Colorado Constitution and violates the rights, privileges,

and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Articles III, IV, V, and VI of the Colorado Constitution and the separation of powers required by the U.S. Constitution.

393. This Court should enter findings of fact and conclusions of law that each of EO 123, the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, in general, and C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) in particular, the Eighth Amended PHO 20-28, and JCPH PHO 20-007, individually and collectively, both facially and as applied to each Plaintiff, does not comply with the requirements of the Colorado Constitution and thereby violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Articles III, IV, V, and VI of the Colorado Constitution.

THIRD CLAIM
(Each Plaintiff as against each Defendant)

The Target Orders do not comply with the requirements in Article V, Section 17 and Article II, Section 25 of the Colorado Constitution, and the Fifth and Fourteenth Amendments of the U.S. Constitution, and they violate 42 U.S.C. § 1983.

394. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

395. When Defendant Polis issued EO 123 he did not lawfully act with dispatch to faithfully execute the laws as required by Article IV, section 2 of the Colorado Constitution; instead, Defendant Polis acted in flagrant disregard of Article III and Article V, Section 17 of the Colorado Constitution to unilaterally issue in EO 123 a constitutionally impermissible executive decree which violated not only Article III and Article V, Section 17, but also Article IV, section 2, because EO 123 is in no way “law” within the meaning of the Colorado Constitution Article V, Section 17, despite the language in the Colorado Disaster Emergency Act which purports to say otherwise. C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a).

396. This Court should enter findings of fact and conclusions of law that Defendant Polis' power under Article IV, Section 2 of the Colorado Constitution is limited to the administration of existing laws, i.e. the power to faithfully execute the laws already extant, and that Article IV, Section 2 in no way empowers Defendant Polis to enact new laws or public policies as he purportedly did in EO 123, and that the Colorado Disaster Emergency Act which purports to say otherwise in C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) does not comply with the explicit requirements of the Colorado Constitution. *See* specifically, Article V, Section 17 and generally, Articles III, IV, V, and VI of the Colorado Constitution, and the separation of powers required by the U.S. Constitution.

397. This Court should enter findings of fact and conclusions of law that Defendant Polis has no authority, under either the Colorado Constitution or C.R.S. § 24-33.5-701, *et seq.*, the Colorado Disaster Emergency Act, to issue any executive order, proclamation, or regulation which creates, enacts, or implements new law or new public policy, or punishes with civil or criminal liability any person who does not comply with any executive order, proclamation, or regulation purporting to create, enact, or implement new laws or public policies. *See* specifically, Article V, Section 17 and generally, Articles III, IV, V, and VI of the Colorado Constitution, and the separation of powers required by the U.S. Constitution.

398. This Court should enter findings of fact and conclusions of law that Defendant Polis has no authority, under either the Colorado Constitution or C.R.S. § 24-33.5-701, *et seq.*, the Colorado Disaster Emergency Act, to issue EO 123, and that EO 123 is unconstitutional because it does not comply with the requirements of the Colorado Constitution, and because it violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado

Constitution. *See* specifically, Article V, Section 17 and generally, Articles III, IV, V, and VI of the Colorado Constitution, and the separation of powers required by the U.S. Constitution.

399. This Court should enter findings of fact and conclusions of law that, to the extent C.R.S. § 24-33.5-704, *et seq.*, purports to grants the Governor power to legislate without incorporating proper standards and safeguards, the legislature disregarded the explicit constitutional prohibition of nondelegation of legislative power in Article III of the Colorado Constitution and the explicit requirement that no law shall be passed except by a bill in the legislature; consequently, C.R.S. § 24-33.5-704, *et seq.*, does not comply with the requirements of the Colorado Constitution and violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* specifically, Article V, Section 17, and generally, Articles III, IV, V, and VI of the Colorado Constitution, and the separation of powers required by the U.S. Constitution.

400. This Court should enter findings of fact and conclusions of law that, to the extent C.R.S. § 24-33.5-704(2) purports to empower the Governor to issue, amend, or rescind executive orders, proclamations, and regulations which have the force and effect of law, and § 24-33.5-704(7)(a) purports to authorize the governor to suspend any statute, order, rule, or regulation, Article III and Article V, Section 17 of the Colorado Constitution unequivocally prohibit the legislative department from delegating their legislative authority to the executive department by C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a); consequently, each of C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) is a constitutionally impermissible attempt by the legislative department to delegate their legislative authority to the executive department which does not comply with the requirements of the Colorado Constitution and violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* specifically, Article V, Section

17 and generally, Articles III, IV, V, and VI of the Colorado Constitution, and the separation of powers required by the U.S. Constitution.

FOURTH CLAIM
(Each Plaintiff as against each Defendant)

**The Target Orders do not comply with
the Due Process Clauses of Article II, Section 25 of the Colorado Constitution
and the Fifth and Fourteenth Amendments of the U.S. Constitution,
and they violate 42 U.S.C. § 1983.**

401. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

402. This Court should enter findings of fact and conclusions of law that Defendant Polis has no authority, under either the Colorado Constitution or C.R.S. § 24-33.5-701, *et seq.*, to create, enact, or implement new laws that are not issued pursuant to the constitutionally required procedure for enacting new laws in accord with Article V, Section 17 of the Colorado Constitution; consequently, EO 123 and the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, in general, and C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) in particular, do not comply with the procedural due process requirements of the Colorado Constitution, and violate the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Article V, Section 17 of the Colorado Constitution, Article II, Section 25 of the Colorado Constitution, and the Fifth and Fourteenth Amendments of the U.S. Constitution.

403. This Court should enter findings of fact and conclusions of law that EO 123, and the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, in general, and C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) in particular, do not comply with the procedural requirements of the Colorado Constitution; consequently, EO 123 and the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, in general, and C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) in particular, individually and collectively, both facially and as applied to each

Plaintiff, violate the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Article V, Section 17 of the Colorado Constitution, Article II, Section 25 of the Colorado Constitution, and the Fifth and Fourteenth Amendments of the U.S. Constitution.

404. This Court should enter findings of fact and conclusions of law that each of EO 123, the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, in general, and C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) in particular, the Eighth Amended PHO 20-28, and JCPH PHO 20-007, individually and collectively, both facially and as applied to each Plaintiff, is not narrowly tailored, is unconstitutionally overbroad, and does not comply with the substantive due process requirements of the Colorado Constitution, and thereby violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Article V, Section 17 of the Colorado Constitution, Article II, Section 25 of the Colorado Constitution, and the Fifth and Fourteenth Amendments of the U.S. Constitution.

405. This Court should enter findings of fact and conclusions of law that each of EO 123, the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, in general, and C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) in particular, the Eighth Amended PHO 20-28, and JCPH PHO 20-007, individually and collectively, both facially and as applied to each Plaintiff, is not narrowly tailored, is unconstitutionally vague, and does not comply with the substantive due process requirements of the Colorado Constitution, and thereby violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Article V, Section 17 of the Colorado Constitution, Article II, Section 25 of the Colorado Constitution, and the Fifth and Fourteenth Amendments of the U.S. Constitution.

406. This Court should enter findings of fact and conclusions of law that Defendant Polis has no authority, under either the Colorado Constitution or C.R.S. § 24-33.5-701, *et seq.*, to enact new law that criminalizes non-compliance with EO 123, and that each of EO 123, the Eighth Amended PHO 20-28, and JCPH PHO 20-007, individually and collectively, both facially and as applied to each Plaintiff, do not comply with the substantive due process requirements of the Colorado Constitution, and violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Article V, Section 17 of the Colorado Constitution, Article II, Section 25 of the Colorado Constitution, and the Fifth and Fourteenth Amendments of the U.S. Constitution.

407. This Court should enter findings of fact and conclusions of law that each of EO 123, the Eighth Amended PHO 20-28, and JCPH PHO 20-007, individually and collectively, both facially and as applied to each Plaintiff, do not comply with the substantive and procedural due process requirements of the Colorado Constitution, and thereby violates the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Article V, Section 17 of the Colorado Constitution, Article II, Section 25 of the Colorado Constitution, and the Fifth and Fourteenth Amendments of the U.S. Constitution.

408. As specifically directed by Defendant Polis in EO D2020 017 and subsequent Executive Orders including, but not limited to, EO 123, Defendant CDPHE has issued PHO 20-28 and related amendments thereto including, but not limited to CDPHE's Eighth Amended PHO 20-28, which Defendant JCPH has used, along with JCPH PHO 20-007, to force each Plaintiff to substantially alter their personal conduct or suffer civil and criminal liability for non-compliance.

409. The Target Orders, individually and collectively, both facially and as applied to each Plaintiff, do not comply with the substantive due process requirements of the Colorado

Constitution, and violate the rights, privileges, and immunities to which each Plaintiff is entitled by the Colorado Constitution. *See* Article V, Section 17 of the Colorado Constitution, Article II, Section 25 of the Colorado Constitution, and the Fifth and Fourteenth Amendments of the U.S. Constitution.

410. The Target Statutes and the Target Orders, individually and collectively, both facially and as applied to each Plaintiff, do not comply with the constitutionally required due process to which each Plaintiff is entitled by Article II, Section 25 of the Colorado Constitution; consequently, the Target Statutes and the Target Orders, individually and collectively, deprive each Plaintiff of fundamental civil rights, liberty interests, and property rights without due process of law, have caused proximate and legal harm to each Plaintiff, and violate the Colorado Constitution. *See* Article V, Section 17 of the Colorado Constitution, Article II, Section 25 of the Colorado Constitution, and the Fifth and Fourteenth Amendments of the U.S. Constitution. Defendants' violations of the Colorado Constitution by and through the Target Orders have caused proximate and legal harms to each Plaintiff.

411. Plaintiffs have no adequate remedy at law and they have suffered and will continue to suffer serious and irreparable harm to their constitutional rights, liberty interests, and property rights unless each Defendant is enjoined from enforcing the Target Orders.

412. Pursuant to 42 U.S.C. §§ 1983 and 1988, each Plaintiff is entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief invalidating the Target Orders and restraining each Defendant's enforcement of the Target Orders.

413. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

FIFTH CLAIM
(Each Plaintiff as against each Defendant)

**The Target Orders do not comply with
Equal Protection of the Laws in Violation of Colo. Constitution Art. II, § 25,
and they violate 42 U.S.C. § 1983.**

414. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

415. Although the Colorado Constitution has no express counterpart to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Colorado courts have interpreted article II, Section 25 of the Colorado Constitution to guarantee equal protection similar to that of the Due Process and Equal Protection Clauses of the federal constitution. R. Collins and D. Oesterle, *The Colorado State Constitution: A Reference Guide* 60 (2002).

416. “The Fourteenth Amendment to the United States Constitution provides that “[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.” Although the Colorado Constitution does not contain an identical provision, “it is well-established that a like guarantee exists within the constitution's due process clause, Colo. Const. art. II, sec. 25, and that its substantive application is the same insofar as equal protection analysis is concerned.” *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 2013 CO 39, ¶ 22, 304 P.3d 217 (quoting *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1014 (Colo.1982)).” *Colorado Ins. Guar. Ass'n v. Sunstate Equip. Co., LLC*, 2016 COA 64, ¶ 19, 405 P.3d 320, 328.

417. Thus, the guarantee of “equal protection of the laws” is inherent in the due process clause of Art. II, § 25 of the Colorado Constitution. 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).

418. Plaintiffs challenge the Target Statutes and the Target Orders as unconstitutional, both facially and as applied, because they do not comply with the requirements of the United States Constitution and the Colorado Constitution for equal protection of the laws.

419. Plaintiffs may properly raise both “facial” and “as applied” challenges pursuant to constitutional equal protection guarantees. U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 25; *Cnf. Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901, 906 n. 7 (Colo.1993) (right to equal protection is encompassed by due process clause of Colorado Constitution). *See Western Metal*, 851 P.2d at 880 n. 7 (“ ‘as applied’ ” analysis requires inquiry into whether “ ‘government officials who administer the law are applying it with different degrees of severity to different groups of persons’ ” despite a facially benign statutory framework) (quoting John E. Nowak et al., *Constitutional Law* at 600 (2d ed.1983)).

420. Each of Defendant Polis, Defendant CDPHE, and Defendant JCPH arbitrarily and unreasonably discriminated against Bandimere Speedway, and other entities similarly situated, when they were ordered by EO 044 and CDPHE PHO 20-28 to remain closed to ingress, egress, use and occupancy by the public, while allowing other services, including those that serve food, to remain open. For example, while some restaurants, cafes, coffeehouses and food service operations like Bandimere Speedway were forced by the Target Orders to close or restrict their operations, others were allowed to remain open to the public, e.g. room service in hotels, dining rooms in higher education institutions, and airport concessionaires.

421. As a provider of food, beverages, and entertainment, Bandimere Speedway, and other entities similarly situated, have been deemed “non-critical” services by Defendant Polis, Defendant CDPHE, and Defendant JCPH.

422. The Target Orders 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.” *See* PHO 20-28, Appendix F. Any retail business not included in the long list of “critical retail service” is deemed “non-critical.” Bandimere Speedway is considered a “non-critical” business.

423. The Target Orders provide no rationale or objective standard to explain why some entities are able to receive the coveted designation of “critical” as opposed to the other business entities that are considered “non-critical.” The practical consequence, as is the case with Bandimere Speedway, is that Defendant Polis’ selection of “critical” and “non-critical” entities means the government is picking and choosing between those who have the opportunity to continue to remain open for business and potentially operate at a profit, and those who will be doomed to business failure and economic ruin.

424. Not only do the Target Orders fail to provide any rationale or objective standard for determining which business is “critical” (other than the will of Defendant Polis and Defendant Ryan and Defendant Johnson), but the distinctions among various businesses defy reason and common sense.

425. The direct effect of the Target Orders is that some businesses deemed “critical” by Defendant Polis and the Defendant Ryan and Defendant Johnson, such as Walmart, Home Depot and liquor stores, are permitted to have patrons physically enter their premises to purchase goods and services in large numbers, while Bandimere Speedway is not permitted to do the same. It there any reasonable basis to believe the public is any less safe grabbing a cup of coffee at the

Bandimere Speedway concession stand as opposed to shopping for a new television or buying food from the McDonald's inside the local Walmart?

426. At no point in any of the EOs or PHOs is there explanation whatsoever as to why some comparable business operations are deemed "critical" while, for no apparent reason, others are deemed "non-critical." This is where the absence from Defendant Polis' EOs of the due process inherent in a SAPA rulemaking procedure becomes conspicuous.

427. The lack of any record of the basis for Defendant Polis' EOs not only frustrates the Bandimeres and others subjected to the "Orders," it denies them procedural due process because it frustrates any meaningful appellate review of the Target Orders. Without the record which results from rulemaking under SAPA, every Court which undertakes judicial review of the EOs can only speculate about what empirical data, if any, they are based upon. The same is true with respect to judicial review of the PHOs.

428. Under these circumstances, each of the Target Orders issued by Defendant Polis and Defendant Ryan and Defendant Johnson, creates a suspect class subjected to disparate treatment by state actors under color of state law.

429. To be more precise, the Target Orders - having been issued by executive department officers without the requisite due process inherent in a rulemaking process - created a suspect class subjected to disparate treatment by state actors under color of state law.

430. "An equal protection claim is appropriate where legislation leads to disparate impacts on different elements of the group that the legislature intended to embrace within a law. "The Equal Protection Clause comes into question only when a law 'has a special impact on less than all the persons subject to its jurisdiction.' " *People in Interest of C.B.*, 740 P.2d 11, 17 (Colo.1987) (quoting *Board of County Comm'rs v. Flickinger*, 687 P.2d 975, 982 (Colo.1984)). Therefore, an

equal protection analysis must begin with a threshold inquiry as to whether (1) persons who are in fact similarly situated, (2) are subjected by some governmental act to disparate treatment. *E.g., C.B.*, 740 P.2d at 17; *Flickinger*, 687 P.2d at 982.” *People v. Black*, 915 P.2d 1257, 1266 (Colo. 1996).

431. Not only did the Target Orders issued by Defendant Polis and Defendant Ryan create a suspect class with disparate impact, but enforcement of the Target Orders by Defendant Johnson through Defendant JCPH implicated the fundamental civil rights, liberty interests, and property rights of each Plaintiff.

432. State actions which either create a suspect class or implicate fundamental civil rights, liberty interests, and property rights are subject to strict scrutiny judicial review, and the Target Orders do both. *City of Cleburne, id.*, 473 U.S. at 440, 105 S.Ct. at 3254. Even assuming *arguendo* that the Target Orders advance a compelling state interest, they cannot be sustained under strict scrutiny because they are not narrowly drawn to achieve that interest in the least restrictive manner possible. *Plyler v. Doe, id.*, 457 U.S. 202, 217, 102 S.Ct. 2382, 2395.

433. To merely state that the Target Orders do not comply with the Colorado Constitution’s requirement for equal treatment under law, and violate the Equal Protection guarantees in the Colorado Constitution, hardly begins to communicate what enforcement of the Target Orders has done to Plaintiffs’ business. In short, if the Target Orders survive, then Bandimere Speedway will not.

434. The disparate impact upon Bandimere Speedway from enforcement of the Target Orders is manifest. The disparate impact upon Plaintiff John and Plaintiff Lorraine is not so apparent, but it is very real, and no less harmful. Defendants’ violations of the Colorado Constitution by and through the Target Orders have caused proximate and legal harms to each Plaintiff.

435. Plaintiffs have no adequate remedy at law and they have suffered and will continue to suffer serious and irreparable harm to their constitutional rights, liberty interests, and property rights unless each Defendant is enjoined from enforcing the Target Orders.

436. Pursuant to 42 U.S.C. §§ 1983 and 1988, each Plaintiff is entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief invalidating the Target Orders and restraining each Defendant's enforcement of the Target Orders.

437. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

SIXTH CLAIM
(Each Plaintiff as against each Defendant)

The Target Orders do not comply with the requirements of the Colorado Constitution in Article II, Section 3 (inalienable rights); Article II, Section 4 (religious freedom); Article II, Section 10 (freedom of speech and right of association); and Article II, Section 25 (due process and equal protection), and they violate 42 U.S.C. § 1983.

438. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

439. 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.

440. 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 by the Target Orders and JCPH enforcement of the Target Orders.

441. The freedom of expression includes freedom of association and guarantees the right to associate or refuse to associate with whomever one chooses. *Brandon v. Springspre, Inc.*, 888 P.2d 357, 359 (Colo. App. 1994).

442. 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).

443. Because free speech protection afforded by the Colorado Constitution is of greater scope than that guaranteed by the First Amendment, the level of scrutiny required to safeguard the broader free speech protections afforded by the Colorado Constitution is necessarily more

stringent than that associated with First Amendment analysis. *Browne v. City of Grand Junction*, 2015, 136 F.Supp.3d 1276. 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).

444. The Target Orders have had far more than a chilling effect upon each Plaintiff, in that the Bandimeres’ right to freely associate with family, friends and members of the community and engage in protected expression on Independence Day was violated by JCPH enforcement of the Target Orders to limit ticket sales and control ingress, egress, use and occupancy of Bandimere Speedway’s facilities by members of the public.

445. For many decades, the Bandimere Speedway 4th of July Event has been one of the most popular dates on the entire Bandimere Speedway calendar, so much so that thousands of people have made spending their 4th of July at Bandimere Speedway an annual family tradition.

446. The Bandimere Speedway 4th of July activities have always included the usual full range of car races, but it is an extra special day upon which to glorify God and celebrate the nation’s independence with public prayers, the national anthem, a military honor guard to present the colors, speeches to honor God and country and military veterans and law enforcement and then - when night falls - the fireworks show (highly regarded as one of the best around, it draws hundreds to the highways and roads around Bandimere just to see that annual spectacle).

447. For the Bandimeres and hundreds (if not thousands) of Bandimere Speedway customers, just being there to take it all in is constitutionally protected worship and speech and association

and political expression, each and all of which are fundamental liberty interests which Plaintiffs are entitled to freely exercise by the Colorado Constitution in Article II, Section 3 (inalienable rights); Article II, Section 4 (religious freedom); Article II, Section 10 (freedom of speech and association); and Article II, Section 25 (due process and equal protection).

448. Acting under color of state law, when JCPH state actors enforced the Target Orders in advance of the 4th of July, they violated the liberty of the Bandimeres and Bandimere Speedway customers to freely associate for personal and expressive purposes.

449. As a direct result of the JCPH prior restraints on liberty, the Bandimeres restricted advertising and ticket sales and so Bandimere Speedway customers who otherwise would have attended the event were not permitted on the Bandimeres' private property.

450. Despite the efforts of the Bandimeres since the 4th of July to find a way to satisfy Defendant Johnson and the other state actors at Defendant JCPH, Bandimere Speedway has not found a way to comply with the requirements of the Target Orders, so the ongoing enforcement actions of Defendant Johnson and the other state actors at Defendant JCPH have caused the postponement or cancellation of multiple Bandimere Speedway events which would otherwise be held.

451. The most notable event postponed is the Mile-High Nationals, a world class racing event sanctioned by the National Hot Rod Association which draws competitors from all over the nation. Due to the lead time required to prepare for the Mile-High Nationals and the logistics involved, the small window of opportunity for it to be rescheduled in the 2020 season is closing fast.

452. Based upon the experience of the Bandimeres to date in dealing with Defendant Johnson and the other state actors at Defendant JCPH, the Bandimeres have no hope of obtaining a variance from the Target Orders so that the Mile-High Nationals event can be held this year.

453. In the personal experience of each Plaintiff, the Target Orders constitute both a specific present objective harm and a threat of specific future harm.

454. So long as JCPH enforces the Target Orders, the Bandimeres no longer enjoy the liberty to utilize their private property for purposes of association with family, friends and members of the community. Meanwhile, other outdoor activities involving large numbers of people are allowed without any enforcement actions by JCPH, e.g. hundreds of people at a park within sight of Bandimere Speedway, Soda Lake Park.

455. The JCPH state actors forcing the Bandimeres to comply with PHO 20-28 have no compelling state interest in prohibiting freedom of association among the Bandimeres and their customers who freely choose to accept the risk of COVID-19 infection which is inescapable in any contact with any other people, whether at Bandimere Speedway or elsewhere.

456. To the extent the state under strict scrutiny can articulate and defend a compelling state interest which justifies implicating the Bandimeres' fundamental civil rights, liberty interests, and property rights, all state actions to effectuate that compelling state interest must be narrowly tailored or they are unconstitutionally overbroad. *Plyler v. Doe, id.*

457. The Target Orders are framed around categories of entity or activity, not the conduct of individual persons; as such, the Target Orders are unconstitutionally vague because of their very architecture. The confusion which stems directly from that inherent vagueness is exacerbated by the fact that there is no category remotely applicable to the unique venue and business operation of Bandimere Speedway. So it is no wonder JCPH has refused to grant a variance or waiver or

otherwise accommodate larger events at Bandimere Speedway's 23,500 seat facility on 160 acres, where even very large crowds would have ample room for social distancing. Such is the doctrinaire approach of JCPH to forcing Bandimere Speedway into a shoe which could not possibly fit.

458. Each Plaintiff's right to freely associate with family, friends and members of the community at a Bandimere Speedway event - whether small or large - is a matter of personal choice about a form of protected expression violated by the Target Orders.

459. As a direct and proximate result of the Target Orders, Plaintiffs no longer enjoy the liberty to exercise their God-given inalienable rights (both enumerated and unenumerated) to which they are entitled by Article II, Section 3 of the Colorado Constitution, among them being the right to freely associate with family, friends, and members of the community without unwarranted state interference.

460. So long as Defendants enforce the Target Orders (and any subsequent Orders which may replace the Target Orders), each Plaintiff has suffered, and will continue to suffer, unjust loss of fundamental civil rights, liberty interests, and property rights in freedom of expression and association.

461. Plaintiffs' fundamental civil rights, liberty interests, and property rights, their inalienable rights, and their freedom of association and expression find robust protection in the due process and equal protection provisions of the Colorado Constitution. *See* the Colorado Constitution, Article II, Section 3 (inalienable rights); Article II, Section 4 (religious freedom); Article II, Section 10 (freedom of speech and right of association); and Article II, Section 25 (due process and equal protection).

462. The Target Orders do not comply with the requirements of the Colorado Constitution in Article II, Section 3 (inalienable rights); Article II, Section 4 (religious freedom); Article II, Section 10 (freedom of speech and right of association); and Article II, Section 25 (due process and equal protection); and when the JCPH state actors enforce the Target Orders, they violate 42 U.S.C. § 1983.

**SEVENTH CLAIM
(Each Plaintiff as against each Defendant)**

**The Target Orders do not comply with the requirements of
the Takings Clause of the Colorado Constitution in Article 2, Section 15,
and they violate 42 U.S.C. § 1983.**

463. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

464. Article 2, Section 15 of the Colorado Constitution provides, in pertinent part, as follows.

§ 15. Taking property for public use--compensation, how ascertained

Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Colo. Const. art. II, § 15.

465. Colorado courts have routinely held that the Colorado Constitution provides just compensation to property owners when their land is taken for public use because the law seeks to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

466. When the People required just compensation for property taken for public use in their Constitution, their intent was put the property owner in as good a position monetarily as he or she would have been if his or her property had not been taken by the state.

467. The constitutional guarantee of just compensation for property taken by the government is not only intended to protect the landowner (or business owner), but it also protects the public by limiting its liability to losses that can fairly be attributed to the taking. Inverse condemnation is “a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.” *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980).

468. At a minimum, the effect of the Target Orders on the Bandimeres constitutes a “partial” taking under the Penn-Central test. See *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

469. The Target Orders and enforcement thereof have caused proximate and legal harm to the Bandimeres in the form of (at a minimum) a partial regulatory and physical taking of the Bandimeres’ property without just compensation in violation of the Takings Clause of the Colorado Constitution. Colo. Const. art. II, § 15.

470. The Bandimeres have received no compensation for the financial consequences which are the direct and proximate result of the Target Orders and enforcement of the Target Orders by Defendant Johnson and the other state actors at Defendant JCPH.

471. On information and belief, there is no present interest or intention on the part of Defendant Johnson and the other state actors at Defendant JCPH in even quantifying the Bandimeres’ financial losses from the Target Orders, much less actually paying the Bandimeres for those losses.

472. On information and belief, Defendant Polis, Defendant Ryan, and Defendant Johnson think themselves free to issue draconian new public policies with no institutional accountability whatsoever for the catastrophic direct effects of those policies upon the governed.

473. Where a state agency enters upon land or injures land within the constitutional provision prohibiting taking or damaging of private property for public or private use without just compensation and fails to pay just compensation therefor or to commence condemnation proceedings to ascertain compensation due, the act of such agency is unauthorized, unlawful, and not the act of the state of Colorado. *People of Colo. ex rel. Watrous v. District Court of U. S. for Dist. of Colo.*, 1953, 207 F.2d 50.

474. The Target Orders and enforcement thereof have caused proximate and legal harm to the Bandimeres in the form of a complete and total regulatory and physical taking of the Bandimeres' property without just compensation in violation of the Takings Clause of the Colorado Constitution. Colo. Const. art. II, § 15.

475. The Target Orders and enforcement thereof have required the Bandimeres to abstain from conducting otherwise lawful business in the State of Colorado, despite the fact that the Bandimeres have implemented numerous measures to satisfy the public health interests at stake.

(The Bandimere Speedway customers who continue to attend Bandimere Speedway events apparently regard those efforts as sufficient, otherwise they would not pay to attend.)

476. The Target Orders and enforcement thereof by Defendant Johnson and the other state actors at Defendant JCPH deprive the Bandimeres of liberty and property rights, and flagrantly violates the Takings Clause of the Colorado Constitution. Colo. Const. art. II, § 15.

EIGHTH CLAIM
(Each Plaintiff as against each Defendant)

Each Plaintiff is entitled to Declaratory Relief
pursuant to Colorado Revised Statutes §13-51-101, *et seq.*,
and Colorado Rule of Civil Procedure 57.

477. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

478. Each Plaintiff is a “*person*” whose “*rights, status, or other legal relations*” are affected by the Target Orders. Each Plaintiff is entitled to have this Court construe the meaning and determine the validity or invalidity of each of the Target Orders; and each Plaintiff is entitled to obtain a declaration of their rights, status, and other legal relations thereunder, pursuant to Colorado Revised Statutes §13-51-101 *et seq.* and Colorado Rule of Civil Procedure 57.

479. Defendants’ violations of the Colorado Constitution by and through the Target Orders have caused proximate and legal harms to each Plaintiff.

480. Plaintiffs have no adequate remedy at law and they have suffered and will continue to suffer serious and irreparable harm to their constitutional rights, liberty interests, and property rights unless the Court adjudicates, pursuant to Colorado Revised Statutes §13-51-101 *et seq.* and Colorado Rule of Civil Procedure 57, the meaning and validity of each of the Target Orders.

481. Each Plaintiff requests that the Court adjudicate, pursuant to Colorado Revised Statutes §13-51-101 *et seq.* and Colorado Rule of Civil Procedure 57, the meaning and validity of each of the Subject Orders, beginning with the Target Orders.

482. Each Plaintiff also requests such other and further relief as the Court may deem appropriate.

491. The issuance of a preliminary injunction is necessary in this case. The public interest and balance of equities favor the issuance of a preliminary injunction, as shown by Defendants' manifestly unconstitutional actions and Target Orders which have unjustly caused irreparable injury to each Plaintiff's fundamental civil rights, liberty interests, and property rights asserted in this Complaint.

492. The issuance of a temporary injunction is necessary in this case. The actions of each Defendant and their Target Orders will not survive strict scrutiny judicial review by this Court; thus, Plaintiffs are likely to prevail on the merits of this case, warranting the issuance of a temporary injunction. *City of Cleburne, id.; Plyler v. Doe, id.; Evans v. Romer*, 854 P.2d 1270, 1275 (Colo. 1993).

493. The public interest is in favor the issuance of a permanent injunction pursuant to Colorado Revised Statutes §13-51-101, *et seq.*, and Colorado Rule of Civil Procedure 65. Without regard to whether the relief is preliminary, temporary, or permanent, there is no better way for the judicial power of this Court to find exercise than to protect and defend the fundamental civil rights, liberty interests, and property rights of each Plaintiff by requiring Defendant Polis, Defendant CDPHE, Defendant Ryan, Defendant JCPH, and Defendant Johnson to submit all of their state actions to the requirements of the Colorado Constitution; no doubt such an exercise of the Court's judicial powers is in the public interest.

494. Likewise, the balance of equities is in favor of the issuance of a permanent injunction pursuant to Colorado Revised Statutes §13-51-101, *et seq.*, and Colorado Rule of Civil Procedure 65.

495. Again, without regard to whether the relief is preliminary, temporary, or permanent, there is no better way for the equity powers of this Court to find exercise than to protect and defend

the fundamental civil rights, liberty interests, and property rights of each Plaintiff, by requiring Defendant Polis, Defendant CDPHE, Defendant Ryan, Defendant JCPH, and Defendant Johnson to submit all of their state actions to the requirements of the Colorado Constitution; no doubt such an exercise of the Court's equity powers finds the balance of equities in favor of the Plaintiffs.

496. In light of the legal and equitable considerations stated in this Complaint, each Plaintiff requests that the Court issue:

before a hearing on the merits –

an Order granting a preliminary or temporary injunction against any and all Executive Department actions based upon the authority of the Target Statutes, the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, in general, and C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) in particular, individually and collectively;

an Order granting a preliminary or temporary injunction against any and all Executive Department enforcement actions based upon the purported authority of the Target Statutes and the Target Orders; and

an Order granting such other and further relief to Plaintiffs as the Court may deem appropriate;

after a hearing on the merits of this case –

an Order granting a permanent injunction against any and all Executive Department actions based upon the purported authority of the Target Statutes, the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, in general, and

C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) in particular, individually and collectively;

an Order granting a permanent injunction against any and all Executive Department enforcement actions based upon the purported authority of each of the Subject Orders, individually and collectively, beginning with the Target Orders, i.e. EO 123, the Eighth Amended PHO 20-28, and JCPH PHO 20-007; and

an Order granting such other and further relief to Plaintiffs as the Court may deem appropriate.

497. Each Plaintiff has no adequate remedy at law and will suffer serious, irreparable, and continuing harm to their constitutional rights unless each Defendant is enjoined from any and all Executive Department actions based upon the Target Statutes and Subject Orders, individually and collectively, beginning with the Target Orders.

498. Pursuant to 42 U.S.C. §§ 1983 and 1988, each Plaintiff is entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief invalidating each of the Target Statutes and Subject Orders, individually and collectively, beginning with the Target Orders.

TENTH CLAIM
(Each Plaintiff as against each Defendant)

**Defendant's actions under color of state law violate
Plaintiff's fundamental civil rights, liberty interests, and property rights,
and 42 U.S.C. §§ 1983,
and Plaintiff is entitled to attorney's fees under 42 U.S.C. § 1988.**

499. Plaintiffs incorporate by reference all prior allegations as though fully set forth herein.

500. Each Plaintiff is a United States citizen and has rights, privileges and immunities as expressed in the Colorado Constitution and the laws of the State of Colorado, and the United States Constitution and the laws of the United States. Each Defendant has deprived each Plaintiff of those rights as articulated in the claims stated in this Complaint.

501. 42 U.S.C. §1983 provides, “[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 subject, 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 law, shall be liable to the party injured in an action at law, suit or in equity, or other proper proceeding for redress...”.

502. “‘In essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from ‘personal injuries.’” *Almond v. Kent*, 459 F.2d 200, 204 (CA4 1972).” *Wilson v. Garcia*, 471 U.S. 261, 278, 105 S. Ct. 1938, 1948, 85 L. Ed. 2d 254 (1985).

503. As set forth in this Complaint, Defendant Polis, acting as a state actor under color of state law, has deprived each Plaintiff of their constitutional rights and fundamental civil rights, liberty interests, and property rights and other rights, privileges, and immunities secured by the Colorado Constitution and Colorado state law and the United States Constitution and federal law. Each Plaintiff seeks relief under 42 U.S.C. §1983 from the unlawful conduct of Defendant Polis and his unconstitutional Executive Orders.

504. As set forth in this Complaint, Defendant CDPHE, acting under color of state law, has deprived each Plaintiff of their constitutional rights and fundamental civil rights, liberty interests,

and property rights and other rights, privileges, and immunities secured by the Colorado Constitution and Colorado state law and the United States Constitution and federal law. Each Plaintiff seeks relief under 42 U.S.C. §1983 from the unlawful conduct of Defendant CDPHE and their unconstitutional Public Health Orders.

505. As set forth in this Complaint, Defendant Ryan, acting as a state actor under color of state law, has deprived each Plaintiff of their constitutional rights and fundamental civil rights, liberty interests, and property rights and other rights, privileges, and immunities secured by the Colorado Constitution and Colorado state law and the United States Constitution and federal law. Each Plaintiff seeks relief under 42 U.S.C. §1983 from the unlawful conduct of Defendant Ryan and her unconstitutional CDPHE Public Health Orders.

506. As set forth in this Complaint, Defendant JCPH, acting under color of state law, has deprived each Plaintiff of their constitutional rights and fundamental civil rights, liberty interests, and property rights and other rights, privileges, and immunities secured by the Colorado Constitution and Colorado state law and the United States Constitution and federal law. Each Plaintiff seeks relief under 42 U.S.C. §1983 from the unlawful conduct of Defendant JCPH and their unconstitutional Public Health Orders.

507. As set forth in this Complaint, Defendant Johnson, acting as a state actor under color of state law, has deprived each Plaintiff of their constitutional rights and fundamental civil rights, liberty interests, and property rights and other rights, privileges, and immunities secured by the Colorado Constitution and Colorado state law and the United States Constitution and federal law. Each Plaintiff seeks relief under 42 U.S.C. §1983 from the unlawful conduct of Defendant Johnson and his unconstitutional JCPH Public Health Orders.

508. 42 U.S.C. §1988(b) provides, “[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...”.

509. Pursuant to 42 U.S.C. §§ 1983 and 1988, each Plaintiff is entitled to reasonable attorney’s fees, costs and expenses for prosecuting these claims.

510. Pursuant to 42 U.S.C. §§ 1983 and 1988, each Plaintiff requests reasonable attorney’s fees, costs and expenses for prosecuting these claims.

CONCLUSION

511. In *Ritchie v. Polis* the Colorado Supreme Court considered whether Governor Polis could, by Executive Order, suspend the operation of Article V, section 1(6) of the Colorado Constitution, and concluded “that the Colorado Disaster Emergency Act, §§ 24-33.5-701 to -716, C.R.S. (2019), does not authorize the Governor to suspend a constitutional requirement.” *Ritchie v. Polis, en banc, per curiam* opinion, July 1, 2020, 467 P.3d 339, 341.

512. “The Colorado Disaster Emergency Act authorizes the suspension of certain statutes, rules, and regulations, but not of constitutional provisions. *See* § 24-33.5-704(7)(a), C.R.S. (2019).” *Ritchie v. Polis, id.* ¶18, at 345.

513. A constitutional “... requirement cannot be suspended by executive order, even during a pandemic.” *Ritchie v. Polis, id.* ¶19, at 345.

514. The essence of the Bandimeres’ Complaint is that the chief executive by executive order is purportedly making new laws and implementing new public policies which wholly usurp the power of the legislative department to make the laws, a power which has been delegated by the People through their Colorado Constitution exclusively to the legislative department. Colorado Constitution Art. III and Art. V.

515. In 1901 (25 years after the Colorado Constitution became effective in 1876), in *People ex rel. Alexander v. District Court*, the Colorado Supreme Court *en banc* decided the case based upon the separation of powers doctrine. *People ex rel. Alexander v. District Court*, 29 Colo. 182, 68 P. 242, 250.

516. In the 1958 case of *Colorado State Bd. of Med. Examiners v. Dist. Court In & For El Paso Cty.*, the Colorado Supreme Court *en banc* again decided the case based upon the separation of powers doctrine and, as a prelude to so doing, quoted with approval the special concurring opinion of Mr. Justice Gabbert in *People ex rel. Alexander v. District Court* as follows:

When the question arises whether one department is encroaching upon the authority of another, the courts must become the final arbiters. When this question is between the judicial and either of the other departments, the judiciary must be just as careful in marking the line between their authority and either of the others as if the contest was one of power and authority between the other departments. By the constitution of the state our government is divided into three co-ordinate branches,—legislative, executive, and judicial. The constitution is the paramount law. Each department derives its authority from that source. The power of each is limited and defined. Each is clothed with specific powers. The result of this distribution of power is that each stands on an equal plane; neither is superior to the other, and each, acting within its proper sphere, is supreme. Hence, neither can directly call the other to account for actions within its province, nor can one directly interfere with the other in the performance of functions delegated by the constitution. Any other rule would be an assumption that the authority of one was superior to the other, or that the departments were not of equal dignity. *Frost v. Thomas*, 26 Colo. 222, 56 P. 899; *People [ex rel. Tucker] v. Rucker*, 5 Colo. 455; *In re Fire and Excise Com'rs*, 19 Colo. 482, 36 P. 234; *Guebelle v. Epley*, 1 Colo.App. 199, 28 P. 89; *People [ex rel. Engley] v. Martin*, 19 Colo. 565, 36 P. 543, 24 L.R.A. 201; *Lewis v. [Denver City] Water-Works Co.*, 19 Colo. 236, 34 P. 993; *People [ex rel. Sutherland] v. Governor*, 29 Mich. 320. To this doctrine each department must yield implicit obedience; otherwise, the constitutional authority of the respective branches of the government would be obliterated, and we would be confronted with the antagonisms and complications resulting from one department assuming to directly control the other with respect to acts within its province. It is only by a rigid adherence to these principles that the powers of each can be fully protected, or prevented from being assumed by, or concentrated in, one, and each limited to the legitimate functions which the people, by the

constitution, have intrusted to the different departments of government. The duty of the executive department is to carry the laws into effect.

Colorado State Bd. of Med. Examiners v. Dist. Court In & For El Paso Cty., 138 Colo. 227, 231–34, 331 P.2d 502, 505–06 (1958).

517. From 1901 in *People ex rel. Alexander v. District Court*, to 1958 in *Colorado State Bd. of Med. Examiners v. Dist. Court*, to 2020 in *Ritchie v. Polis*, the Colorado Supreme Court - when called upon to do so - has enforced the primacy of the Colorado Constitution.

518. Each Plaintiff seeks judicial enforcement of the letter and the spirit of Article III of the Colorado Constitution.

The powers of the government of this state are divided into three distinct departments, -- the Legislative, Executive and Judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this Constitution expressly directed or permitted.

Colo. Const. Art. III.

RELIEF REQUESTED

WHEREFORE, each Plaintiff respectfully prays that this Court enter an order:

- A. with findings of fact and conclusions of law in respect of judgment in favor of Plaintiff and against Defendant on each Claim stated above;
- B. striking down as unconstitutional the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*;
- C. striking down as unconstitutional C.R.S. § 24-33.5-704(2) of the Colorado Disaster Emergency Act;
- D. striking down as unconstitutional C.R.S. § 24-33.5-704(7)(a) of the Colorado Disaster Emergency Act;

VERIFICATION

I declare under penalty of perjury under the law of Colorado that the foregoing is true and correct.

Executed in Jefferson County, Colorado on the date stated below.

/s/ John C. Bandimere, Jr. September 3, 2020
John C. Bandimere, Jr. Date
Plaintiff

/s/ Lorraine Bandimere September 3, 2020
Lorraine Bandimere Date
Plaintiff

APPENDIX and EXHIBIT LINKS a L n B

A nd A Ta n n

E E d D

E DPHE E A nd d PH

200903 Exhibit 3 JCPH PHO 20-007 7-20-20

7. 200903 Exhibit 4 OLLS Memo Govs Executive Order on Human Settlement 4-30-1980

. 200903 Exhibit 5 OLLS Memo Scope of Govs Power to Issue Executive Orders 9-7-2018

7. 200903 Exhibit 6 OLLS Memo Govs Constitutional and Statutory Emergency Powers 3-10-2020

. 200903 Exhibit 7 Gra hic o EOs and P Os