

DISTRICT COURT, DENVER COUNTY, COLORADO Address: 1437 Bannock Street Denver, CO 80202	DATE FILED: August 31, 2020 10:02 PM FILING ID: 949296742ED79 CASE NUMBER: 2020CV33013
<hr/> PATRICK NEVILLE, and MICHELLE MALKIN Plaintiffs, v. JARED POLIS , in only his official capacity as Governor of the State of Colorado, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, JILL HUNSAKER RYAN , in only her official capacity as Executive Director of Colorado Department of Public Health and Environment, EL PASO COUNTY PUBLIC HEALTH, SUSAN WHEELAN , in only her official capacity as Executive Director of El Paso County Public Health, DENVER DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, ROBERT M. MCDONALD , in only his official capacity as Executive Director of Denver Department of Public Health and Environment, Defendants.	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
ATTORNEY FOR PLAINTIFFS: Law Offices of Randy B. Corporon, P.C. Randy B. Corporon, #29861 2821 S. Parker Road, Suite 555 Aurora, CO 80014 Telephone: 303-749-0062 Fax Number: 720-836-4201	Case Number: Division:
VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF	

Patrick Neville and Michelle Malkin (collectively, “Plaintiffs”), by and through undersigned counsel, states, alleges, and complains against:

- (1) Jared Polis, in only his official capacity as Governor of the State of Colorado (“Defendant Polis”);

- (2) Colorado Department of Public Health and Environment (“Defendant CDPHE”);
- (3) Jill Hunsaker Ryan, in only her official capacity as Executive Director of Colorado Department of Public Health and Environment (“Defendant Ryan”);
- (4) El Paso County Public Health (“Defendant EPCPH”); and
- (5) Susan Wheelan, in only her official capacity as Executive Director of El Paso County Public Health (“Defendant Wheelan”);
- (6) Denver Department of Public Health and Environment (“Defendant DDPHE”);
- (7) Robert M. McDonald, in only his official capacity as Executive Director of Denver Department of Public Health and Environment (“Defendant McDonald”);

for clarity and brevity, collectively “Defendants.”

Overview of the Complaint.

1. In order to obtain specific enforcement of the explicit requirements of Article III and Article V (including, but not limited to, Article V, Section 17) of the Colorado Constitution to which each Plaintiff is entitled under Article II, Section 6 of the Colorado Constitution, Plaintiffs bring this action in which they challenge as unconstitutional various state actions by state actors including, but not limited to:

Defendant Polis, acting by and through one or more Executive Orders (“EOs”);

Defendant Ryan, acting by and through one or more of Defendant CDPHE’s Public Health Orders (“PHOs”);

Defendant Wheelan, acting by and through either: (a) one or more of Defendant CDPHE’s PHOs; or (b) one or more of Defendant EPCPH’s PHOs issued by Defendant Wheelan;

and

Defendant McDonald, acting by and through either: (a) one or more of Defendant CDPHE's PHOs; or (b) one or more of Defendant DDPHE's PHOs issued by Defendant McDonald.

Plaintiffs challenge the Colorado Disaster Emergency Act as unconstitutional.

2. For the reasons more particularly described in this Complaint, Plaintiffs challenge 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), as unconstitutional, both facially and "as applied," because the statutes 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.

Plaintiffs challenge various Executive Orders as unconstitutional.

3. For the reasons more particularly described in this Complaint, Plaintiffs challenge each of the EOs listed below, and, in particular, Defendant Polis' July 16, 2020, Executive Order D 2020 138, as unconstitutional, both facially and "as applied," because the Executive 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.

Plaintiffs challenge various CDPHE Public Health Orders as unconstitutional.

4. For the reasons more particularly described in this Complaint, Plaintiffs challenge each of the CDPHE Public Health Orders listed below, and, in particular, Defendant CDPHE's Ninth Amended Public Health Order 20-28, as unconstitutional, both facially and "as applied," 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.

Plaintiffs challenge various EPCPH Public Health Orders as unconstitutional.

5. For the reasons more particularly described in this Complaint, Plaintiffs challenge the EPCPH Public Health Orders listed below, and, in particular, Defendant EPCPH's Order 20-02, as unconstitutional, both facially and "as applied," because Defendant EPCPH'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.

Plaintiffs challenge various DDPHE Public Health Orders as unconstitutional.

6. For the reasons more particularly described in this Complaint, Plaintiffs challenge the DDPHE Public Health Orders listed below, and, in particular, Defendant DDPHE's "Face Covering Order," as unconstitutional, both facially and "as applied," because Defendant EPCPH'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.

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

7. The state actions by state actors about which Plaintiffs complain are based upon certain EOs issued by Defendant Polis and certain PHOs issued by Defendant CDPHE. 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 EPCPH’s Public Health Order, EPCPH Order 2020-02.

8. The state actions by EPCPH state actors about which Plaintiffs complain are based, in part, upon EPCPH PHO 2020-02, a PHO issued on April 27, 2020, by Defendant Wheelan for Defendant EPCPH. On information and belief, EPCPH PHO 2020-02 and the other EPCPH PHOs are published by Defendant EPCPH at this link:

<https://www.elpasocountyhealth.org/sites/default/files/EPCPHO%202020-02%20-%20signed.pdf>

Link to Defendant DDPHE’s Public Health Order, the “Face Covering Order.”

9. The state actions by DDPHE state actors about which Plaintiffs complain are based, in part, upon the “Face Covering Order,” a PHO issued on May 14, 2020, by Defendant McDonald for Defendant DDPHE. On information and belief, DDPHE’s “Face Covering Order” and the other DDPHE PHOs are published by Defendant DDPHE at this link:

<https://www.denvergov.org/content/dam/denvergov/Portals/covid19/documents/public-orders/DDPHE-Face-Covering-Order-5-5-20.pdf>

A list of the “Subject Orders” challenged as unconstitutional in this Complaint.

10. The EOs issued by Defendant Polis, the CDPHE PHOs issued by Defendant Ryan, the EPCPH PHOs issued by Defendant Whelan, and the DDPHE PHOs issued by Defendant McDonald, about which Plaintiffs complain in this action, are more particularly described elsewhere in this Complaint, but are here listed chronologically 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. Executive Order D 2020 039, issued April 17, 2020;
- K. CDPHE Amended Public Health Order 20-20, issued April 20, 2020;
- L. Executive Order D 2020 044, issued April 26, 2020;
- M. CDPHE Public Health Order 20-28, issued April 26, 2020;
- N. **EPCPH PHO 2020-02**, issued April 27, 2020
(the Target EPCPH PHO);
- O. CDPHE Amended Public Health Order 20-28, issued May 4, 2020;
- P. CDPHE Second Amended Public Health Order 20-28, issued May 8, 2020;
- Q. CDPHE Third Amended Public Health Order 20-28, issued May 14, 2020;
- R. **DDPHE’s “Face Covering Order,”** issued May 14, 2020 **(the Target DPHE PHO)**;
- S. Executive Order D 2020 067, issued May 16, 2020;
- T. CDPHE Fourth Amended Public Health Order 20-28, issued May 26, 2020;
- U. Executive Order D 2020 91, issued June 1, 2020;

- V. CDPHE Fifth Amended Public Health Order 20-28, issued June 2, 2020;
- W. Executive Order D 2020 092, issued June 4, 2020;
- X. CDPHE Sixth Amended Public Health Order 20-28, issued June 5, 2020;
- Y. CDPHE Seventh Amended Public Health Order 20-28, issued June 18, 2020;
- Z. Executive Order D 2020 110, issued June 20, 2020;
- AA. Executive Order D 2020 123, issued June 30, 2020;
- BB. CDPHE Eighth Amended Public Health Order 20-28, issued June 30, 2020;
- CC. **Executive Order D 2020 138**, issued July 16, 2020,
(the Target EO);
- DD. Executive Order D 2020 142, issued July 21, 2020;
- EE. Executive Order D 2020 144, issued July 23, 2020; and
- FF. **CDPHE Ninth Amended Public Health Order 20-28**, issued July 30, 2020 (**the Target CDPHE PHO**);
- GG. Executive Order D 2020 164, issued August 14, 2020;
- HH. CDPHE Tenth Amended Public Health Order 20-28, issued August 21, 2020;

each, and all, as extended or amended or revised or replaced.¹

¹ Most, if not all, of the EOs and PHOs about which Petitioners complain in their Complaint and in this Petition have been repeatedly extended or amended or revised or replaced. Petitioners intend that each and every reference in their Complaint and in this Petition 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 cumbersome redundancy of verbiage, and for clarity and brevity, in their Complaint and in this Petition and all other pleadings of Petitioners, reference will be made to only a specific EO or PHO wherever

11. For the reasons more particularly described in this Complaint, Plaintiffs challenge each and all of the above referenced EOs and CDPHE PHOs and county or district PHOs (collectively, “the Subject 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.

“As applied” and “facial” constitutional challenges.

12. “When asserting an as-applied challenge, the party ‘contends that the statute would be unconstitutional under the circumstances in which the [party] has acted or proposes to act.’ *Sanger v. Dennis*, 148 P.3d 404, 410–11 (Colo.App.2006). ‘The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative.’ *Dev. Pathways v. Ritter*, 178 P.3d 524, 534 (Colo.2008) (quoting *Sanger*, 148 P.3d at 410). In contrast, a facial constitutional challenge is used when a party seeks ‘to render [a statute] utterly inoperative.’ *Id.* (quoting *Sanger*, 148 P.3d at 410).” *Colorado Ins. Guar. Ass’n v. Sunstate Equip. Co., LLC*, 2016 COA 64, 405 P.3d 320, 329.

A list of the “Target Orders” which are a subset of the “Subject Orders.”

13. In order to simplify this Complaint and streamline the litigation process, Plaintiffs have identified a subset only four (4) of the thirty-four (34) Subject Orders; for clarity and brevity, this subset of the Subject Orders is identified in this Complaint and Plaintiffs’ other pleadings as “the Target Orders.”

14. The Target Orders subset of the Subject Orders is comprised of: (1) one of the EOs issued

possible, but without the trailing inclusion of “... as extended or amended or revised or replaced.”

by Defendant Polis; (2) one of the CDPHE PHOs issued by Defendant Ryan; (3) one of the EPCPH PHOs issued by Defendant Whelan; (4) and one of the DDPHE PHOs issued by Defendant McDonald; these Target Orders are listed as follows:

Executive Order D 2020 138, issued July 16, 2020;

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

EPCPH PHO 2020-02, issued April 27, 2020; and

DDPHE's "Face Covering Order," issued May 14, 2020.

15. Plaintiffs will frame this Complaint and Plaintiffs' other pleadings by reference primarily to the "Target Orders" which, individually and collectively, are representative examples of the other Subject Orders.

Relief Requested by each Plaintiff. ²

16. 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:

² 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.

(as to the Colorado Disaster Emergency Act)

- (a) judicial review of the constitutionality of 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 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), 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;
- (c) a declaratory judgment that 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), does not comply with Article III of the Colorado Constitution which explicitly prohibits exercise of Article V legislative powers by the executive branch;
- (d) a declaratory judgment that 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), 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;
- (e) an injunction to restrain Defendant Polis from any action to enforce, administer, or in any other way take action based upon the challenged 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), and so deprive Plaintiffs of the rights, privileges and immunities secured

to them by the Constitution of the United States and the Constitution of the State of Colorado;

(as to Defendant Polis and the Executive Orders)

(f) judicial review of the constitutionality of certain Executive Orders issued by Defendant Polis in his official capacity as Governor of the State of Colorado;

(g) a declaratory judgment that each of Defendant Polis' Executive Orders 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 each of Defendant Polis' Executive Orders does not comply with Article III of the Colorado Constitution which explicitly prohibits exercise of Article V legislative powers by the executive branch;

(i) a declaratory judgment that each of Defendant Polis' Executive Orders 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) an injunction to restrain Defendant Polis from any action to enforce, administer, or in any other way take action based upon the challenged Executive Orders and so deprive Plaintiffs of the rights, privileges and immunities secured to them by the Constitution of the United States and the Constitution of the State of Colorado;

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

- (k) judicial review of the constitutionality of certain CDPHE Public Health Orders issued by Defendant Ryan in her official capacity as Executive Director of Colorado Department of Public Health and Environment;
- (l) a declaratory judgment that each of the CDPHE Public Health Orders 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;
- (m) a declaratory judgment that each of the CDPHE Public Health Orders does not comply with Article III of the Colorado Constitution which explicitly prohibits exercise of Article V legislative powers by the executive branch;
- (n) a declaratory judgment that each of the CDPHE Public Health Orders 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;
- (o) a declaratory judgment that each of the CDPHE Public Health Orders does not comply with the explicit requirements of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.*, and 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;

and

(vi) arbitrary or capricious;

(p) an injunction to restrain Defendant Ryan from any action to enforce, administer, or in any other way take action based upon the challenged CDPHE Public Health Orders and so deprive Plaintiffs of the rights, privileges and immunities secured to them by the Constitution of the United States and the Constitution of the State of Colorado;

(as to Defendant EPCPH, Defendant Wheelan, and the EPCPH PHOs)

(q) judicial review of the constitutionality of certain EPCPH Public Health Orders issued by Defendant Wheelan in her official capacity as Executive Director of El Paso County Public Health;

(r) a declaratory judgment that each of the EPCPH Public Health Orders 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;

(s) a declaratory judgment that each of the EPCPH Public Health Orders does not comply with Article III of the Colorado Constitution which explicitly prohibits exercise of Article V legislative powers by the executive branch;

(t) a declaratory judgment that each of the EPCPH Public Health Orders 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;

(u) a declaratory judgment that each of the EPCPH Public Health Orders does not comply with the explicit requirements of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.*, and 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;
- and
- (vi) arbitrary or capricious;

(v) an injunction to restrain Defendant Wheelan from any action to enforce, administer, or in any other way take action based upon the challenged CDPHE Public Health Orders and EPCPH Public Health Orders, and so deprive Plaintiffs of the rights, privileges and immunities secured to them by the Constitution of the United States and the Constitution of the State of Colorado;

(as to Defendant DDPHE, Defendant McDonald, and the DDPHE PHOs)

(w) judicial review of the constitutionality of certain DDPHE Public Health Orders issued by Defendant McDonald in his official capacity as Executive Director of El Paso County Public Health;

(x) a declaratory judgment that the DDPHE Public Health Orders 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;

(y) a declaratory judgment that the DDPHE Public Health Orders do not comply with Article III of the Colorado Constitution which explicitly prohibits exercise of Article V legislative powers by the executive branch;

(z) a declaratory judgment that the DDPHE Public Health Orders 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;

(aa) a declaratory judgment that each of the DDPHE Public Health Orders does not comply with the explicit requirements of the State Administrative Procedures Act. C.R.S. §§ 24-4-101, *et. seq.*, and 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;

and

(vi) arbitrary or capricious;

(bb) an injunction to restrain Defendant McDonald from any action to enforce, administer, or in any other way take action based upon the challenged CDPHE Public Health Orders and DDPHE Public Health Orders, and so deprive Plaintiffs of the rights, privileges and immunities secured to them by the Constitution of the United States and the Constitution of the State of Colorado.

Additional Relief Requested by each Plaintiff.

17. 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 violates each Plaintiff's 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); and
- (g) Article II, Section 10 of the Colorado Constitution (freedom of speech and right of association);

- (2) equitable and injunctive relief to enjoin the enforcement of each of the Subject 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, Patrick Neville.

18. Plaintiff, Patrick Neville ("Plaintiff Neville"), is a natural person, a resident of Douglas County in the State of Colorado, State Representative for Colorado's 45th District, and Minority Leader of the Colorado House of Representatives.

Plaintiff, Michelle Malkin.

19. Plaintiff, Michelle Malkin ("Plaintiff Malkin"), is a natural person, a resident of El Paso County in the State of Colorado, and a nationally recognized conservative blogger, syndicated columnist, best-selling author, and public speaker.

Defendant, Jared Polis.

20. 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").

21. As Governor, Mr. Polis is the head of the executive branch of government of the State of Colorado. Colo. Const. art. IV, § 2.

22. Defendant Polis issued the Executive Orders which are among the subjects of this action. 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.

23. Defendant, the Colorado Department of Public Health and Environment ("Defendant

CDPHE”) is a state agency in the executive branch of Colorado government.

24. 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, Executive Director of CDPHE.

25. 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.

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

27. Defendant Ryan issued the Public Health Orders which are among the subjects of this action.

28. 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, El Paso County Public Health.

29. El Paso County Public Health (“Defendant EPCPH”) is a county agency in the executive branch of Colorado government.

30. Defendant EPCPH 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, Executive Director of EPCPH.

31. Defendant, Susan Wheelan (“Defendant Wheelan”), is a natural person, a resident of the State of Colorado, and the current Executive Director of EPCPH.

32. As Executive Director of EPCPH, Defendant Wheelan is the head of a county agency in the executive branch of government of the State of Colorado.

33. Defendant Wheelan issued the Public Health Orders which are among the subjects of this action.

34. Defendant Wheelan is sued only in her official capacity as Executive Director of El Paso County Public Health, pursuant to *Ex Parte Young*, 209 U.S. 123, 152-154 (1908).

Defendant, Denver Department of Public Health and Environment.

35. Defendant, the Denver Department of Public Health and Environment (“Defendant DDPHE”) is a county agency in the executive branch of Colorado government.

36. Defendant DDPHE 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, Executive Director of DDPHE.

37. Defendant, Robert M. McDonald (“Defendant McDonald”), is a natural person, a resident of the State of Colorado, and the current Executive Director of DDPHE.

38. As Executive Director of DDPHE, Defendant McDonald is the head of a county agency in the executive branch of government of the State of Colorado.

39. Defendant McDonald issued the Public Health Orders which are among the subjects of this action.

40. Defendant McDonald is sued only in his official capacity as Executive Director of the Denver Department of Public Health and Environment, pursuant to *Ex Parte Young*, 209 U.S. 123, 152-154 (1908).

Jurisdiction and Venue.

41. This Court has personal jurisdiction over each of the parties Plaintiff because they are Colorado citizens and do business in the seat of their state government located in Denver County, Colorado. Colo. Const. art. VIII, § 2.

42. 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.

43. 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.

44. 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 certain EOs, each of which directed Defendant CDPHE to issue PHOs in accord with the dictates of the EO, and the CDPHE PHOs issued by Defendant Ryan as directed by Defendant Polis were enforced by the state actions of Defendant ECPH state actors including, but not limited to, Defendant Wheelan, and DDPHE state actors including, but not limited to Defendant McDonald.

45. 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 EOs issued by Defendant Polis, the CDPHE PHOs issued by Defendant Ryan, and the enforcement actions of Defendant ECPH including, but not limited to enforcement of Defendant CDPHE's Ninth Amended Public Health Order 20-28 and ECPH

PHO 2020-02 issued by Defendant Wheelan, and the enforcement actions of Defendant DDPHE including, but not limited to enforcement of Defendant CDPHE's Ninth Amended Public Health Order 20-28 and the DDPHE "Face Covering Order" issued by Defendant McDonald, 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.

46. Venue is proper in this Court under C.R.C.P. 98(b)(2) because each of Defendants Polis, Ryan, Wheelan, and McDonald is a public officer, and the claims brought against each of them are in virtue of the discharge of their duties as a public officer.

General Allegations.

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

The Declaration of Independence.

48. On July 4, 1776, the final text of the Declaration of Independence was approved by

Congress, after independence was formally declared on July 2, 1776.³

The United States Constitution.

49. On September 17, 1787, the Constitution of the United States was signed.⁴ The United States Constitution is the fundamental framework of America's system of government.

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

- A. recognized their own 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;

³ 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. It wasn't signed until August 2, 1776. ConstitutionFacts.com

⁴ 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

- 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 limit of government power;
- H. prescribed the system for electing representatives;
- I. established the process for the Constitution's ratification and amendment; and
- J. recognized and enumerated many rights and freedoms of the people.

51. On December 15, 1791, the first ten amendments to the Constitution were ratified and the "Bill of Rights" became part of the fundamental framework of America's system of government.

52. 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.

53. 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.

54. 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.

55. 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.

56. 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.

57. 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.

58. 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.

59. 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.

60. 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 *Claflin v. Houseman*, 93 U.S. 130, 23 L.Ed. 833 (1876).

61. 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.

62. 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.

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

64. 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 statehood of Colorado on August 1, 1876.⁵ <https://leg.colorado.gov/colorado-constitution>

65. 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.

⁵ 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

66. 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 own 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. described the purposes and duties of the government;
- F. defined the scope and limit 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.

67. 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.

68. 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.

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

69. The authors of the Colorado Constitution, i.e. the People, are the “authors” of their republican form self-government; as such, the People, i.e. the authors of the Colorado Constitution, 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.

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

71. 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.

72. 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.

73. 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.

74. 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 Branch.

75. 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 to the Legislative Branch.

76. 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 to the Judicial Branch.

77. 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.

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

79. 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.

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

81. 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 create rules.

82. 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.*

83. 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).
84. The 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).
85. As an additional safeguard against state agency abuse of discretion in making new or amended rules, provides:

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) in part.

The Colorado Disaster Emergency Act.

86. 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.

87. C.R.S. § 24-33.5-704(2) 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.” 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).

88. 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); 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 Branch Response to COVID-19 in Colorado.

89. 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

90. 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>

91. 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

92. 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

93. 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

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

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

96. Despite being adjourned for more than half of March 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.*

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

Colorado Executive Branch Response to COVID-19 in Colorado.

98. 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.

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

Defendant Polis' Executive Orders.

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

101. On information and belief, as of **August 25, 2020**, at 11:00 a.m. Mountain time, Defendant Polis has issued 173 D 2020 series EOs, all but two of which were issued on or after March 11, 2020.

102. On information and belief, all of the Governor’s 173 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.

103. As expressly directed by Defendant Polis in certain EOs, Defendant Ryan issued CDPHE PHOs.

104. On information and belief, as of **August 25, 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 32.

105. 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>

County or District Public Health Orders.

106. As allowed or directed by some of the EOs and PHOs, some Colorado county or district public health agencies issued their own public health orders, effective within their respective county or district.

Defendant Wheelan’s EPCPH Public Health Orders.

107. On April 27, 2020, Defendant Wheelan issued “El Paso County Public Health Order 2020-02 for Compliance with Updated Public Health Orders 20-26 and 20-28 April 27, 2020” (“EPCPH PHO 2020-02”).

108. On information and belief, El Paso County Public Health has published EPCPH PHO 2020-02 on their website and a true and correct copy may be found at the following link:

<https://www.elpasocountyhealth.org/sites/default/files/EPCPHO%202020-02%20-%20signed.pdf>

Defendant McDonald’s DDPHE Public Health Orders.

109. On May 14, 2020, Defendant McDonald issued DDPHE’s “Face Covering Order” (purportedly effective on May 6, 2020).

110. On information and belief, Denver Department of Public Health and Environment has published their “Face Covering Order” on their website and a true and correct copy may be found at the following link:

<https://www.denvergov.org/content/dam/denvergov/Portals/covid19/documents/public-orders/DDPHE-Face-Covering-Order-5-5-20.pdf>

Early EOs were relatively limited.

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

112. 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.

113. But with each successive order from and after the initial Subject Orders, 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.

114. 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 and liberty interests in violation of the United States and Colorado Constitutions. This action challenges the constitutionality of the Subject Orders in the many ways they have implicated each Plaintiff's fundamental civil rights, liberty interests, and property rights.

115. Each Plaintiff's civil rights and liberty interests have been injured by EPCPH or DDPHE PHOs; those EPCPH and DDPHE PHOs stemmed from the CDPHE PHOs which stemmed from the taproot of the unconstitutional conduct that has directly and proximately injured Plaintiffs, Defendant Polis' Executive Orders.

Specific Allegations.

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

117. On **March 11, 2020**, the Governor began issuing Executive Orders ("EOs") in response to the emerging COVID-19 pandemic. Each of those EOs cited the same two sources of authority

to issue the EO, Article IV, Section 2 of the Colorado Constitution and C.R.S. § 24-33.5-701, *et seq.*, the Colorado Emergency Disaster Act.

118. Between **February 26, 2020** and **July 28, 2020**, Defendant Polis issued 151 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 have fundamentally reconfigured the way our society functions on a day-to-day basis.

119. 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.

120. Also noteworthy is the fact the pace of Defendant Polis in issuing Executive Orders has been swift, averaging more than 1 per day, as Defendant Polis has issued 173 EOs (Executive

Orders D 2020 003 through D 2020 173) in the span of 166 days from March 11, 2020 through August 25, 2020.

121. 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.

122. 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.

123. In order to have some modicum of appreciation for the ripple effects that Defendant Polis' Executive Orders have caused within Colorado government, one must consider the fact that most of the EOs direct numerous executive branch 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.

124. 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.

125. 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.

126. 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.

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

128. 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").

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

129. 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.

130. 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.

131. Codification of Defendant Polis' plan into law is a patently legislative function properly done by only the legislative branch in accord with Article V of the Colorado Constitution.

Codification of Defendant Polis' plan into law by the executive branch is clearly proscribed by Article III of the Colorado Constitution, notwithstanding § 24-33.5-704(2) of the Colorado Disaster Emergency Act which states:

(2) Under this part 7, 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).

132. EO 50 reveals Defendant Polis, not the General Assembly, purportedly legislating the 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 implement new law and public policy in a manner explicitly proscribed by Article III of the Colorado Constitution.

Executive Order D 2020 138.

133. Among the Executive Orders challenged by Plaintiffs in this action is Executive Order D 2020 138 ("EO 138"). Defendant Polis signed EO 138 on July 16, 2020, and it is currently in effect.⁶

⁶ The origin of EO 138 was on April 17, 2020, in EO 039, "Ordering Workers in Critical Businesses and Critical Government Functions to Wear Non-Medical Face Coverings," which was amended and extended on May 16, 2020 by EO 067, which was amended and extended on June 4, 2020 by EO 092, and then again amended and extended on June 20, 2020 by EO 110, and then again amended and extended on August 14, 2020 by EO 164; EO 138, as amended and extended, shall expire thirty (30) days from August 14, 2020, unless extended further by Executive Order. See EOs 039, 067, 092, 110, and 164.

134. A true and accurate copy of EO 138 is attached hereto as **Exhibit 1**.

Legal Authority to Issue EO 138.

135. EO 138 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 amending and extending Executive Orders D 2020 039, D 2020 067, D 2020 092, and D 2020 110 ordering individuals in Colorado to wear a medical or non-medical face covering due to the presence of coronavirus-2019 (COVID-19) in Colorado." EO 138 on page 1.

136. 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 branch. 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).

**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.**

137. 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.”

138. 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.”

139. 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 5**.

140. 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 6**.

The Colorado Constitution is no source of legal authority for EO 138.

141. In EO 138, 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.

142. 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.

143. 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 138, and Article III of the Colorado Constitution eliminates the possibility of wholesale delegation by the state legislature of legislative power to Defendant Polis.

144. Having made specific reference to only Article IV, Section 2 of the Colorado Constitution as an inapposite source of constitutional authority to issue EO 138, that Order 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 Defendant Polis' Executive Orders.

The Colorado Disaster Emergency Act is no source of legal authority for EO 138.

145. C.R.S. § 24-33.5-704(2) 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."

146. 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).

147. 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.

148. 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).

149. 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.

150. 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 branch.

151. And to emphatically express that it was the will of the People to contain the authority to legislate in only the legislative branch 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.

152. The “nondelegation doctrine” is expressed in the latter part of Article III, after the first part distributing the powers of the People into three different departments. Under the express prohibitions of the nondelegation doctrine expressed in Article III, the General Assembly may not delegate its Article V powers to the executive branch unless such delegation is expressly “directed or permitted” within the Colorado Constitution. Delegation of the legislature’s Article V legislative powers, largely proscribed in Article III, is authorized nowhere else in the Colorado Constitution.

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

153. 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.

154. In the absence from the Colorado Constitution of any legal authority to issue EO 138, whether or not the Governor has legal authority to issue EO 138 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 138. To put it another way, does 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?

155. 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 answer to that question is “no.”

156. 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 branch to the executive branch is precisely what is proscribed by Article V and Article III of the Colorado Constitution.

157. Due to the truly unprecedented nature of the wholesale delegation of legislative power embodied in 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 138.

Delegation of limited legislative authority to a state agency.

158. 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 would not survive a challenge based upon the unmistakable import of Article V and Article III of the Colorado Constitution.

159. In the case of legislative delegation to an administrative agency, the test for determining whether delegation of legislative power is too 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).

160. 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 whatsoever 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.

161. The CDEA purports to delegate legislative power without any internal statutory standards or safeguards within the CDEA itself and without any external administrative standards and

safeguards; under these circumstances, the CDEA purports to make the Governor a law unto himself, empowered to make new laws and implement unprecedented public policy with the stroke of a pen, and to extend those powers indefinitely with the stroke of his pin.

162. 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 V and 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.^{7, 8}

163. If allowed to stand, the Subject Orders will not only continue to violate each Plaintiff’s fundamental civil rights, liberty interests, and property rights under both the United States and

⁷ 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 of Plaintiffs hereby expressly reserves for adjudication in the Federal courts all federal questions and issues arising under the United States Constitution.

⁸ 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. 7 above.

Colorado Constitutions, but they will continue to needlessly inflict personal injury and other damages upon each Plaintiff.

164. 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 Subject Orders has been an impermissible unilateral executive decree of purportedly new law and public policy based upon only conclusory allegations with no meaningful statement of specific scientific basis, if any.

165. 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.

166. 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.

167. 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.

168. 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 EOs and PHOs.

169. 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.

170. 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.

171. 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.

172. 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 rules expressed in the United States Constitution and the Colorado Constitution?

173. The Governor's EOs reflect 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 Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, they did not include appropriate and sufficient standards and safeguards and administrative standards and safeguards (either alone, or in combination) to protect against unnecessary and uncontrolled executive exercise of discretionary power, and provided the governor the ability to extend those powers at will. Only a joint resolution of the highly partisan, democrat-controlled Legislature can stop him. This is an inadequate backstop on such extensive power.

174. 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.

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

176. 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).

177. 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).

178. 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 6 of this Complaint).

179. 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 138.

180. In the absence of any legal authority to issue EOs which purport to enact new laws, each of the challenged EOs usurps the powers of the Legislature, in that only the Legislature has the authority to enact legislation. Colo. Const. art. III and art. V.

181. 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*.

182. 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;
- (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;⁹ and
- (f) arbitrary or capricious.

C.R.S. § 25-1-515.

183. In the same way, the actions of Defendant EPCPH to enforce the Target EPCPH PHO are invalid because each of the EOs and PHOs upon which the enforcement action was based is *ultra vires* and *void ab initio* and Defendant EPCPH has no other legal authority upon which to base EPCPH PHOs and EPCPH enforcement actions.

⁹ 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.

184. Under these unprecedented circumstances, the conduct of EPCPH state actors to enforce the above referenced PHOs including, but not limited to, EPCPH PHO 2020-02, is *ultra vires* and void *ab initio* because it is:

- (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; and
- (f) arbitrary or capricious.

C.R.S. § 25-1-515.

185. Likewise, the actions of Defendant DDPHE to enforce the Target DDPHE PHO are invalid because each of the EOs and PHOs upon which the enforcement action is based is *ultra vires* and void *ab initio* and Defendant DDPHE has no other legal authority upon which to base DDPHE PHOs and DDPHE enforcement actions.

186. The conduct of DDPHE state actors to enforce the above referenced PHOs including, but not limited to, the DDPHE “Face Covering Order,” is *ultra vires* and void *ab initio* because it is:

- (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; and

(f) arbitrary or capricious.

C.R.S. § 25-1-515.

Defendants have issued PHOs without rulemaking as required by law.

187. State administrative agencies, including Defendants CDPHE, EPCPH, and DDPHE, are subject to rulemaking requirements under the State Administrative Procedure Act (“SAPA”).

C.R.S. § 24-1-103, *et seq.*

188. However, Defendants have repeatedly issued PHOs with none of the condition precedent rulemaking procedures required by the SAPA.

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

189. 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.

190. 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.”

191. On information and belief, a true and accurate copy of the above referenced

192. 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.¹⁰

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

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

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

195. 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.

196. 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

¹⁰ 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.

(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.”¹¹

197. 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.*

198. 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.*

199. 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.

200. 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.*

¹¹ CDPHE Notice of PHO 20-20 and CDPHE Amended Notice of PHO 20-20 have no page numbers.

201. 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.*

202. 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.

203. 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).**

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

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

206. PHO 20-22 cites no constitutional or statutory authority for its existence, and there is no recitation of authority near the beginning of PHO 20-22 as in most of the subsequent PHOs. 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)(I), C.R.S.”¹²

207. 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 compliance with the rulemaking requirements under the SAPA. C.R.S. § 24-1-101, *et seq.*

208. Neither of the two statutes referenced in PHO 20-22, Colo. Rev. Stat. § 25-1-101(1)(a) and § 25-1-101(1)(a)(I), 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.*

209. The last paragraph of PHO 20-22 (on page 6) 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, on page 6.

210. Neither of the two statutes referenced in PHO 20-22, Colo. Rev. Stat. § 25-1-101(1)(a) and § 25-1-101(1)(a)(I), 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.*

¹² CDPHE Notice of PHO 20-22 and CDPHE Updated Notice of PHO 20-22 have no page numbers.

211. 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.*

212. Plaintiffs reallege the immediately preceding eight 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).**

213. **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**”).

214. 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.

215. 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 Ninth Amended PHO 20-28).**

216. 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**”).

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

218. 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.

219. 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”).

220. 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. §, ¹³ *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-

¹³ Missing citation repeated as in Defendant Polis’ Executive Order D 2020 013.

19) in the State.” EO 13 on page 1.

221. 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.*

222. 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.*

223. 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).¹⁴

224. Defendant Ryan in her capacity as Executive Director of Defendant CDPHE has no

¹⁴ 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.

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.*

225. 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.*

226. Plaintiffs reallege the immediately preceding eight paragraphs as to the CDPHE PHO 20-24 issued on March 22, 2020, which was then extended or amended or replaced by the Second Updated Public Health Order 20-24 issued on March 27, 2020, which was then extended or amended or replaced by 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).**

227. On **March 25, 2020**, Defendant Polis issued Executive Order D 2020 017 “Ordering Coloradans to Stay at Home Due to the Presence of COVID-19 in the State” (“**EO 17**”).

228. 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.

229. 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).**

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

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

232. 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.

233. 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”).

234. 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.

235. 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.*

236. 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.*

237. 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 12.¹⁵

238. 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.*

239. 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).**

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

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

242. 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 page 1.

243. 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

¹⁵ 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.

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").

244. 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.

245. 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.*

246. 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.*

247. The third from last paragraph of the Third Updated PHO 20-24 (on page 12 of 13) states the criminal penalties for non-compliance with the Third 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.

Third Updated PHO 20-24, in paragraph V., on page 12 of 13.¹⁶

248. 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.*

249. 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.”**

¹⁶ 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.

250. 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**”).

251. 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.”

The Stay at Home Order.

252. 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.”

253. 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.

254. 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.

255. 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.**

256. 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.

257. 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.

258. 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.

259. 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.”

260. 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.*

261. 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.*

262. 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.

263. 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.*

264. 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).

265. 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.*

266. Plaintiffs reallege the immediately preceding eight 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.

**Target Order Number Three,
EPCPH Public Health Order 2020-02.**

267. On **April 27, 2020**, EPCPH issued a Public Health Order, EPCPH PHO 2020-02, entitled "El Paso County Public Health PHO 2020-02 for Compliance with Colorado Department of Public Health and Environment Updated Public Health Orders 20-26 and 20-28."¹⁷

Suspension of the General Assembly continues.

268. 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.

**Target Order Number Four,
DDPHE "Face Covering Order."**

269. On **May 14, 2020**, DDPHE issued a Public Health Order, without any identifying number or title, but designated in the body of the document as "**Face Covering Order.**"

¹⁷ On information and belief, the complete history of CDPHE Public Health Order 20-28 is described in detail elsewhere in this Complaint. It appears that the reference in EPCPH PHO 2020-02 to "Updated CDPHE Updated Public Health Orders 20-26 ..." was to "CDPHE PHO 20-26 Face Coverings for Critical Businesses," which was issued by Defendant Ryan on April 22, 2020. At the beginning of that PHO, it recites as authority: "I issue this Public Health Order (PHO or Order) pursuant to the Governor's directive in Executive Order D2020 0139 ..." Near the end of that PHO, in paragraph III. on page 3, it states the criminal enforcement penalties 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."

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

270. 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.

271. 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.

272. 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.*

273. 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.**

274. 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.

275. 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.

276. 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.

277. 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.”

278. 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.*

279. 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.*

280. 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.

281. 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.*

282. 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.

283. 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); and

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).

284. 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.*

285. Plaintiffs reallege the immediately preceding nine 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;

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

**Executive Order D 2020 123,
“Amending and Extending Executive Order D 2020 091 Safer at Home and in the Vast,
Great Outdoors.”**

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

287. 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.

288. 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.

The Supreme Court of Colorado issues the opinion in *Ritchie v. Polis*.

289. On **July 1, 2020**, the Colorado Supreme Court announced their opinion in *Richie v. Polis*, No. 20SC453, finding that Governor exceeded his lawful authority by an Executive Order purporting to suspend certain statutes relating to elections.

**Target Order Number One,
Executive Order D 2020 138,
“Amending and Extending
Executive Orders D 2020 039, D 2020 067, D 2020 092, and D 2020 110
Ordering Individuals in Colorado to Wear Non-Medical Face Coverings.”**

290. On **July 16, 2020**, Defendant Polis issued Executive Order D 2020 138, “Amending and Extending Executive Orders D 2020 039, D 2020 067, D 2020 092, and D 2020 110 Ordering Individuals in Colorado to Wear Non-Medical Face Coverings” (“**EO 138**”).

291. EO 138 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 amending and extending Executive Orders D 2020 039, D 2020 067, D 2020 092, and D 2020 110 ordering individuals in Colorado to wear a medical or non-medical face covering due to the presence of coronavirus-2019 (COVID-19) in Colorado." EO 138 on page 1.

292. In EO 138 Defendant Polis amended *inter alia* fourteen provisions in EO 110 and concluded: “Executive Order D 2020 039, as extended by Executive Order D 2020 67, and as

amended and extended by Executive Orders D 2020 092 and D 2020 110, and this Executive Order, shall expire thirty (30) days from July 16, 2020, unless extended further by Executive Order. In all other respects, Executive Order D 2020 067, D 2020 092, and D 2020 110, shall remain in full force and effect as originally promulgated.” EO 138 on page 4.

**Target Order Number Two,
Ninth Amended Public Health Order 20-28.**

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

“I issue this Amended 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 and Executive Order D 2020 142....” Ninth Amended PHO 20-28 on page 1.

294. The Ninth Amended Public Health Order 20-28 provides:

“B. Individuals are urged to wear non-medical cloth face coverings that cover the nose and mouth whenever in public as required by **Executive Order D 2020 091** as amended by **Executive Order D 2020 123** and **Executive Order D 2020 142**.

Additionally, pursuant to **Executive Order D 2020 138**, all individuals must wear face coverings in public indoor spaces, as that term is defined in the **Executive Order 2020 138**, unless the individual is 10 years of age or younger, cannot medically tolerate a face covering, or is performing one of the enumerated activities in Section II.M of **Executive Order 2020 138**.” (Emphasis as in the original.) Ninth Amended PHO 20-28, at page 2 in

¶ I.B.

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

295. 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:

he could have presented the substance of any given executive order to the General Assembly with the request that that substance be put into the form of a bill which the legislature could enact into law (or not) as explicitly required by Article V, Section 17 of the Colorado Constitution.

296. 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 during a Special Session of the Legislature.

297. During those time periods when the legislature was not in session in 2020, Defendant Polis 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:

he 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.

298. 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.

299. 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.

300. If Defendant Polis had called a special session and offered the substance of his EOs 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.

301. 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 required by Article IV, section 2 of the Colorado Constitution.

302. In so doing, Defendant Polis would have honored three of the most fundamental precepts of Colorado Constitutional law: (1) that the legislative branch makes the laws in accord with Article V, Section 17 of the Colorado Constitution; and (2) that the executive branch executes the laws in accord with Article IV, Section 2 of the Colorado Constitution; and (3) that the executive branch will not usurp the legislative functions of the legislative branch 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 138.

**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.**

303. Defendant Polis 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:

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

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

305. 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.)

306. 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.)

307. Applying the definitions above to the content of PHO 20-28 reveals that despite the fact that it is entitled as “Order,” in fact it contains a number of different "rules" wearing the erroneous and misleading collective label, "Order."

308. Erroneously identifying the rules in EOs and PHOs as “Orders” when that term of art is a patent falsehood contributes to confusion about what exactly the EOs and PHOs are, whether or not they have any binding legal effect, and whether or not they are enforceable by criminal penalties as stated in some of the Subject Orders.

309. More importantly, erroneously characterizing the rules in EOs and PHOs as “Orders” obscures the fact that the Defendant had no constitutional or statutory authority to issue any of the Subject Orders without the rulemaking process prescribed by the SAPA.

**Option Four
for Defendant Polis’ to have new laws and public policies implemented
and comply with the Colorado Constitution –
Direct CDPHE to issue Emergency Rules as prescribed by SAPA.**

310. Defendant Polis has 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:

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

311. On information and belief, none of the rules in PHO 20-28 were published in the Colorado Register March 10 - May 25, 2020, so the issuance of PHO 20-28 did not comply with the procedural requirements of C.R.S. § 24-4-103(6)(a).

312. If Defendant CDPHE had chosen to deal with COVID-19 as an "epidemic disease" or "communicable disease" pursuant to C.R.S. § 25-1.5-102, then they were required by C.R.S. § 25-1.5-102 (l)(a)(II) to go through rulemaking as follows:

(1) The department has, in addition to all other powers and duties imposed upon it by law, the powers and duties provided in this section as follows:

(a)(I) To investigate and control the causes of epidemic and communicable diseases affecting the public health.

(II) For the purposes of this paragraph (a), **the board shall determine, by rule and regulation, those epidemic and communicable diseases and conditions that are dangerous to the public health.** The board is authorized to require reports relating to such designated diseases in accordance with the provisions of section 25-1-122 and to

have access to medical records relating to such designated diseases in accordance with the provisions of section 25-1-122. (Emphasis added.)

313. On information and belief, no such determination through rulemaking in compliance with C.R.S. § 25-1-102 (I)(a)(II) was noticed in the Colorado Register March 10 - May 25, 2020.

314. Defendants issued the Subject Orders without regular rulemaking or emergency rulemaking required by the SAPA, and without any other legally sufficient constitutional or statutory authority.

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

315. The Subject Orders deprive each Plaintiff of due process because the Subject Orders generally, and in particular EO 138, the Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order,” are not narrowly tailored as required by Article II, Section 25 of the Colorado Constitution. Colo. Const. art II, § 25.

316. For state actors to restrict the fundamental civil rights, liberty interests, and property rights of each Plaintiff on the basis of the unconstitutionally overbroad Subject 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.

317. The use of force by state actors to coerce Plaintiffs into compliance with the Subject 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.

318. In addition, the Subject 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)).

319. 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 state actor.**

320. As a direct result of the Subject Orders generally, and in particular EO 138, the Ninth Amended PHO 20-28, EPCPH Order 2020-02, and the DDPHE “Face Covering Order,” each Plaintiff has suffered a grievous loss of their fundamental civil rights, liberty interests, and property rights.

321. Plaintiffs seek immediate judicial relief from the Subject Orders generally, and in particular EO 138, the Ninth Amended PHO 20-28, EPCPH Order 2020-02, and the DDPHE “Face Covering Order,” so as to restore their constitutional rights unjustly taken by the state actions described in this Complaint.

322. 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).

323. 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 FOR RELIEF
(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.

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

325. Each Plaintiff is a person aggrieved or affected by EO 138 issued by Defendant Polis.

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

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

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

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

330. Each Plaintiff is a person aggrieved or affected by the EPCPH PHO 2020-02 issued by Defendant Wheelan.

331. Each Plaintiff is a person aggrieved or affected by the DDPHE “Face Covering Order” issued by Defendant McDonald.

332. A real and actual controversy exists between each Plaintiff, on the one hand, and each Defendant, on the other hand, concerning the constitutionality of the Subject Orders generally, and specifically, EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order.”

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

334. 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.

335. 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.

336. 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).

337. 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.

338. 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).

339. 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.

340. 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.

341. 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).

342. 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).

343. 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.

344. 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.

345. 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.

346. 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.

347. 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.

348. 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 Subject 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.

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

350. 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.

351. 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 Emergency Disaster 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.

352. 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.

353. This Court should enter findings of fact and conclusions of law that, to the extent C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) purports to empower the Governor to issue, amend, or rescind executive orders, proclamations, and regulations which have the force and effect of law, the legislative branch cannot delegate their legislative authority to the executive branch 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, C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) is a constitutionally impermissible attempt by the legislative branch to delegate their legislative authority to the executive branch 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.

354. This Court should enter findings of fact and conclusions of law that each of EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order,” 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 Subject 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

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

356. When Defendant Polis issued EO 138, 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 138 a constitutionally impermissible executive decree which violated not only Article III and Article V, Section 17, but also Article IV, section 2, because EO 138 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).

357. 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 138, 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.

358. 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 Emergency Disaster 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.

359. 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 Emergency Disaster Act, to issue EO 138, and that EO 138 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.

360. 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 grant 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.

361. This Court should enter findings of fact and conclusions of law that, to the extent C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) purports to empower the Governor to issue, amend, or rescind executive orders, proclamations, and regulations which have the force and effect of law, Article III and Article V, Section 17 of the Colorado Constitution unequivocally prohibit the legislative branch from delegating their legislative authority to the executive branch by C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a); consequently, C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) is a constitutionally impermissible attempt by the legislative branch to delegate their legislative authority to the executive branch 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 Subject 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.**

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

363. 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 138 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.

364. This Court should enter findings of fact and conclusions of law that EO 138, 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 138 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.

365. This Court should enter findings of fact and conclusions of law that each of EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order,” 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.

366. This Court should enter findings of fact and conclusions of law that each of EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order,” 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.

367. 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 138, and that each of EO 138, the Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order,” 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.

368. This Court should enter findings of fact and conclusions of law that each of EO 138, the Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order,” 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.

369. As specifically directed by Defendant Polis in EO D2020 017 and subsequent Executive Orders including, but not limited to, EO 138, Defendant CDPHE has issued PHO 20-28 and related amendments thereto including, but not limited to CDPHE’s Ninth Amended PHO 20-28, which Defendant EPCPH has used, along with EPCPH PHO 2020-02, and which Defendant DDPHE has used, along with the DDPHE “Face Covering Order,” to force each Plaintiff to substantially alter their personal conduct or suffer civil and criminal liability for non-compliance.

370. The Target Statutes and 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.

371. 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.

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

373. 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.

374. 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.

375. 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 Subject 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.**

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

377. 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).

378. “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.

379. 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).

380. 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.

381. 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)).

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

383. 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 Subject Orders.

384. 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 Subject Orders and restraining each Defendant’s enforcement of the Subject Orders.

385. 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 Subject Orders do not comply with the requirements of the Colorado Constitution in Article II, Section 3 (inalienable rights); 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.

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

387. 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.

388. 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 JCPH enforcement of the Subject Orders.

389. 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).

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

391. Free speech protection afforded by the Colorado Constitution is of greater scope than that guaranteed by the First Amendment. Therefore, 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.

392. The Subject Orders have had a chilling effect upon each Plaintiff, in that each Plaintiff objects to being coerced by unconstitutional government dictate into wearing a face covering, yet the failure to wear a face covering in public results in - at a minimum - palpable stigma from, and ostracization by, others, and the loss of the opportunity to freely engage in otherwise lawful travel and commerce, as most business establishments will not serve those who do not wear a face covering, unless the basis for an exemption from wearing a face covering is first explained as an excuse so that service may be had.

393. In a worst case scenario, each Plaintiff risks personal assault and serious bodily injury from someone “triggered” by Plaintiff’s lack of a face covering in public, despite the fact that there may be a legitimate reason for Plaintiff to be exempt from the requirement to wear a face covering in public. Published news sources have multiple anecdotal accounts of confrontations between those who wear a face covering and those who do not, e.g. on or about July 27, 2020, an irate San Diego woman who confronted, and then maced, a couple eating their lunch without wearing masks, while in a dog park watching their canine pup.

<https://www.youtube.com/watch?v=rdrEaApLJMs>

394. 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). In the personal experience of each Plaintiff, not wearing a face covering or having to explain a medical or other reason for not doing so constitutes both a specific present objective harm and a threat of specific future harm.

395. The state actors forcing Plaintiffs to comply with the Subject Orders have no compelling state interest in prohibiting freedom of association among Plaintiffs and their friends, family, and others who freely choose to accept the risk of COVID-19 infection which is inescapable in any contact with any other people, whether wearing a face covering or not.

396. To the extent the state under strict scrutiny can articulate and defend a compelling state interest which justifies implicating Plaintiffs' 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 or unconstitutionally vague.

397. Each Plaintiff's right to freely associate with family, friends and members of the community - with or without wearing a face covering - is a form of protected expression violated by the Subject Orders, which certainly are not narrowly tailored and are in fact unconstitutionally overbroad and vague.

398. As a direct and proximate result of the Subject Orders, Plaintiffs no longer enjoy the liberty to exercise their 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.

399. So long as Defendants enforce the Subject Orders (and any subsequent Orders which may replace the Subject 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.

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

401. Defendants' violations of the Colorado Constitution by and through the Subject Orders have caused proximate and legal harms to each Plaintiff.

402. 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 Subject Orders.

403. 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 Subject Orders and restraining each Defendant's enforcement of the Subject Orders.

404. 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.

SEVENTH 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.**

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

406. Each Plaintiff is a “*person*” whose “*rights, status, or other legal relations*” are affected by the Subject Orders. Each Plaintiff is entitled to have this Court construe the meaning and determine the validity or invalidity of each of the Subject 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.

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

408. 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 Subject Orders

409. 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.

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

EIGHTH CLAIM

(Each Plaintiff as against each Defendant)

**(Each Plaintiff is entitled to Injunctive Relief
pursuant to Colorado Revised Statutes §13-51-101, *et seq.*,
and Colorado Rule of Civil Procedure 65.**

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

412. Defendants' actions and their Subject Orders have caused each Plaintiff to incur immediate and irreparable injury for which there is no adequate remedy at law.

413. Defendants' violations of the Colorado Constitution by and through the Subject Orders have caused proximate and legal harms to each Plaintiff.

414. Defendants have committed Constitutional and other violations as cited above, and those violations continue unabated.

415. 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 and until the Court adjudicates, pursuant to Colorado Revised Statutes §13-51-101, *et seq.* and Colorado Rule of Civil Procedure 65, each Plaintiff's right to injunctive relief from each of the Subject Orders.

416. Each Plaintiff requests that the Court adjudicate, pursuant to Colorado Revised Statutes §13-51-101 *et seq.* and Colorado Rule of Civil Procedure 65, each Plaintiff's right to injunctive relief from each of the Subject Orders, beginning with the Target Orders.

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

418. Injunctive relief is necessary in this case pursuant to Colorado Revised Statutes §13-51-101, *et seq.* and Colorado Rule of Civil Procedure 65.

419. 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 Subject Orders which have unjustly caused irreparable

injury to each Plaintiff's fundamental civil rights, liberty interests, and property rights asserted here.

420. The issuance of a temporary injunction is necessary in this case. The actions of each Defendant and their Subject 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.

421. 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 the state actor Defendants 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.

422. Likewise, the balance of equities 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. 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 the state actor Defendants 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.

423. 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 enforcement of each of the Subject Orders, individually and collectively, beginning with the Target Orders, i.e. EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order;”

after a hearing on the merits of this case - an Order granting a permanent injunction against enforcement of each of the Subject Orders, individually and collectively, beginning with the Target Orders, i.e. each of EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order;”

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

424. Each Plaintiff has no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless each Defendant is enjoined from enforcing the Subject Orders, individually and collectively, beginning with the Target Orders, i.e. EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order.”

425. 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 Subject Orders, individually and collectively, beginning with the Target Orders, i.e. EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order,” and restraining each Defendant’s enforcement of the said Orders.

NINTH CLAIM
(Each Plaintiff as against each Defendant)

Defendant’s actions under color of state law violate
Plaintiffs’ fundamental civil rights, liberty interests, and property rights,
and 42 U.S.C. §§ 1983,
and each Plaintiff is entitled to attorney’s fees under 42 U.S.C. § 1988.

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

427. 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.

428. 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....”

429. “ ‘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).

430. Defendant Polis, acting as a state actor under color of state law, has deprived each Plaintiff of constitutional rights as set forth in this Complaint. Each Plaintiff seeks relief under 42 U.S.C. §1983 from the unconstitutional conduct of Defendant Polis and his unconstitutional Executive Orders.

431. Defendant Ryan, acting as a state actor under color of state law, has deprived each Plaintiff of constitutional rights as set forth in this Complaint. Each Plaintiff seeks relief under 42 U.S.C. §1983 from the unconstitutional conduct of Defendant Ryan and her unconstitutional CDPHE Orders.

432. Defendant Wheelan, acting as a state actor under color of state law, has deprived each Plaintiff of constitutional rights as set forth in this Complaint. Each Plaintiff seeks relief under 42 U.S.C. §1983 from the unconstitutional conduct of Defendant Ryan and her unconstitutional CDPHE Orders.

433. Defendant McDonald, acting as a state actor under color of state law, has deprived each Plaintiff of constitutional rights as set forth in this Complaint. Each Plaintiff seeks relief under 42 U.S.C. §1983 from the unconstitutional conduct of Defendant McDonald and his unconstitutional CDPHE Orders.

434. 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....”

435. 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.

436. Pursuant to 42 U.S.C. §§ 1983 and 1988, each Plaintiff requests reasonable attorney’s fees, costs and expenses for prosecuting these claims.

437. Each Plaintiff has no adequate remedy at law and will continue to suffer serious and irreparable harm to their constitutional rights unless each Defendant is enjoined from enforcing each of the Subject Orders, individually and collectively, beginning with the Target Orders, i.e. EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order.”

438. 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 each of the Subject Orders, individually and collectively, beginning with the Target Orders, i.e. EO 138, 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 Ninth Amended PHO 20-28, EPCPH PHO 2020-02, and the DDPHE “Face Covering Order,” and restraining each Defendant’s enforcement of the said Orders.

CONCLUSION

439. 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, 2020 CO, 467 P.3d 339.

440. “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.

441. A constitutional “... requirement cannot be suspended by executive order, even during a pandemic.” *Ritchie v. Polis, id.* ¶19.

442. The essence of each Plaintiff’s Complaint is that the executive by executive order is purportedly making laws usurping the power of the legislative branch to make the laws, a power which has been delegated by the People through their Colorado Constitution exclusively to the legislative branch. Colorado Constitution Art. III and Art. V.

443. 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.

444. 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).

445. From 1901 in *People ex rel. Alexander v. District Court*, to 1958 in *Colorado State Bd. of Med. Examiners v. Dist. Court*, into 2020 in *Ritchie v. Polis*, the Colorado Supreme Court - when called upon to do so - has enforced the separation of powers doctrine and its corollary, the nondelegation doctrine, as articulated by the People in 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.

446. Each Plaintiff seeks judicial enforcement of the letter and the spirit of Article III and Article V of the Colorado Constitution.

RELIEF REQUESTED

WHEREFORE, each Plaintiff respectfully prays that this Court enter an order:

- A. with findings of fact and conclusions of law in favor of Plaintiff and against Defendant on each of the Claims stated above;
- B. striking down the Subject Orders as unconstitutional, in particular Executive Order D 2020 138;
- C. striking down as unconstitutional the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*;
- D. striking down as unconstitutional C.R.S. § 24-33.5-704(2) of the Colorado Disaster Emergency Act;
- E. striking down as unconstitutional C.R.S. § 24-33.5-704(7)(a) of the Colorado Disaster Emergency Act;
- F. striking down the Subject Orders as unconstitutional, in particular the Ninth Amended Public Health Order 20-28;
- G. striking down the Subject Orders as unconstitutional, in particular EPCPH PHO 2020-02;

