
Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MICHELLE LUJAN GRISHAM,
Governor of New Mexico; and
KATHYLEEN KUNKEL, Secretary of the
New Mexico Department of Health,

Petitioners,

v.

S. Ct. No. S-1-SC-38396

THE HONORABLE RAYMOND L. ROMERO,

Respondent,

and

OUTLAW MEATS, LLC,
a New Mexico Limited Liability Company,
F-2 ENTERPRISES, INC. d/b/a TEXAS CLUB
GRILL & BAR, a New Mexico Corporation,
K-BOBS OF RATON, INC., a New Mexico Corporation,
K-BOBS OF LAS VEGAS, INC., a New Mexico Corporation,
B.M.B. FINANCIAL, LLC, d/b/a TRINITY HOTEL,
a New Mexico Limited Liability Company,
RED RIVER BREWING COMPANY, LLC,
a New Mexico Limited Liability Company,
NEW MEXICO RESTAURANT ASSOCIATION,

Real Parties in Interest.

**EMERGENCY VERIFIED PETITION FOR SUPERINTENDING
CONTROL AND REQUEST FOR STAY OF TEMPORARY
RESTRAINING ORDER AGAINST ENFORCEMENT OF DIRECTIVES
CONTAINED WITHIN THE PUBLIC HEALTH ORDER**

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Petitioners Governor of New Mexico Michelle Lujan Grisham and New Mexico Secretary of Health Kathyleen Kunkel, pursuant to Article VI, Sections 3 and 20 of the New Mexico Constitution and Rule 12-504 NMRA hereby petition this Court to immediately exercise its power of superintending control to stay a temporary restraining order (“TRO”) issued by the district court today (July 20, 2020) that effectively invalidates portions of the existing Public Health Order (“PHO”), which was issued by the Department of Health (“DOH”) in response to the COVID-19 pandemic. Petitioners further ask this Court to resolve the controlling legal issues in this case: (1) whether the Secretary of Health has statutory authority to restrict or close businesses when necessary for the protection of public health; and (2) whether the temporary closure of indoor dining at restaurants and breweries was arbitrary and capricious.

INTRODUCTION

Petitioners ask this Court to grant an extraordinary writ and definitively resolve issues of statewide legal importance that have the potential to significantly affect how (and whether) the State can enforce public health restrictions during the current public health emergency. There is urgency to this request as the District Court in this matter, without affording Petitioners the opportunity for a hearing, has issued a TRO invalidating portions of the existing statewide PHO that place limitation on occupancy restrictions at restaurants. The Court’s immediate

intercession here is necessary to provide guidance as to the State’s ability to enact and enforce emergency health measures. To this end, Petitioners respectfully ask this Court to exercise its power of superintending control and hold that: (1) the TRO issued by the district court is stayed until this Court has ruled on the matters addressed in this Petition; (2) the Secretary of Health is statutorily authorized to restrict or close businesses to protect public health; and (3) DOH did not act arbitrarily and capriciously in temporarily closing indoor dining in restaurants and breweries.

BACKGROUND

A. The COVID-19 pandemic.

Since its emergence only a few months ago, the novel coronavirus disease 2019 (“COVID-19”) has spread exponentially across the globe, throughout the United States, and here in New Mexico. The confirmed number of infections in the United States provides a good illustration of this. As of February 11, 2020, the United States Centers for Disease Control and Prevention (“CDC”) recorded 12 confirmed cases in the United States.¹ Now, a little more than five months after those first 12 cases, the CDC counts more than 3.6 million confirmed cases and more

¹ The confirmed cases and deaths reported by the CDC are updated daily on the CDC’s website at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

than 138,000 deaths in the United States. Globally, as of July 19, 2020, the number of confirmed cases has risen to nearly 14 million, with almost 600,000 related deaths.² Approximately four months since the first confirmed cases of COVID-19 in New Mexico, there are now 16,971 confirmed cases here and 571 related deaths.³ COVID-19's rapid spread is attributable to certain characteristics of the virus that causes it and the ease with which that virus is transmitted.

COVID-19 is a respiratory illness that causes severe complications in some patients, including pneumonia in both lungs, organ failure, and death. Like most respiratory illnesses, COVID-19 spreads easily through close person-to-person contact. Although it has not yet been measured precisely, a significant portion of COVID-19 cases result in mild symptoms or no symptoms.⁴ Additionally, even in cases that are symptomatic, the average time from exposure to symptom onset is five to six days, with symptoms sometimes not appearing until as long as thirteen days

² World Health Organization, "Coronavirus disease 2019 (COVID-19) Situation Report–181," available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200719-covid-19-sitrep-181.pdf?sfvrsn=82352496_2.

³ These numbers are provided as of July 19, 2020 and are updated daily by the New Mexico Department of Health and available at <https://cv.nmhealth.org/>.

⁴ Nathan W. Furukawa et al., "Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic," *Emerging Infections Diseases*, Vol. 26, Num. 7 (July 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article.

after infection.⁵ This means that individuals who have been infected and have the potential to infect others usually do not know they are infected for at least several days (and may never know, if they remain asymptomatic).

The ease and rapidity with which COVID-19 spreads and its severe and sometimes fatal symptoms in a certain percentage of the population create a potential for mass deaths and a severely overloaded health care system. Because many individuals who have COVID-19 do not know they have been infected, the only effective way to combat the spread of COVID-19 and to mitigate its impacts is to limit person-to-person contact and to large gatherings to the greatest extent possible. Although social distancing guidelines generally advise people to stay six or more feet apart, even that degree of distancing does not guarantee that an individual will not contract COVID-19. This means that every foray by a person into a public space with other people carries some risk of transmission, particularly in indoor environments. Affidavit of Dr. David R. Scrase, attached as Exhibit 1, ¶ 8. For instance, a recent study has shown that the act of speaking can emit thousands of potentially infectious droplets which can linger in an enclosed space for between 8 and 14 minutes and greatly increase the risk of transmission within that space. Id.

⁵ Harvard Medical School, “COVID-19 basics: Symptoms, spread and other essential information about the new coronavirus and COVID-19, available at <https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics>.

While social distancing and avoiding crowded indoor spaces are important tools in combating COVID-19, the use of face coverings and/or masks by all individuals in public places has also emerged as an important element in slowing the virus's spread. In a recent editorial, the CDC Director endorsed state and local policies requiring face coverings in public. *Id.*, ¶ 13. The CDC's editorial noted that infection rates among health care workers with direct and indirect contact with positive cases at the largest health care system in Massachusetts declined steadily after universal masking policies were put in place. *Id.* As another example, two infected hairstylists in Springfield, Missouri—where masks are required for workers and customers in salons—had close contact with more than a hundred customers and none of those customers subsequently reported symptoms or tested positive for COVID-19. *Id.* As just one more example, a recent study published in Health Affairs concluded that mask mandates in states led to a slowdown in growth rate of new cases: daily growth rates dropped by 0.9% compared to the five days prior to the mandate and dropped by 2% after three weeks. *Id.*, ¶ 14.

B. New Mexico's Emergency Public Health Orders.

Recognizing that COVID-19 may spread exponentially through close contacts and public spaces, the New Mexico Secretary of Health (“the Secretary”) has entered a series of PHOs encouraging New Mexicans to stay in their homes to the greatest extent possible and to practice all possible precautions when they are required to

enter public spaces. See Exhibits 2-5 (relevant PHOs). The PHOs prohibit most public and private gatherings of any significant size and curtail or even prohibit the operations of many businesses.

By way of example, the most recent PHO, issued on July 13 (“July 13 Order”) contains the same core directive as other recent PHOs: **“all New Mexicans should be staying in their homes for all but the most essential activities and services.”** Exhibit 5 at 1 (emphasis in original). To this end, the July 13 Order prohibits “mass gatherings,” which are defined as “any public gathering, private gathering, organized event, ceremony, parade, or other grouping that brings together five (5) or more individuals in a single room or connected space, confined outdoor space or an open outdoor space.” Id. at 5.

Numerous businesses and other facilities, including restaurants are exempt from mass gathering restrictions but remain subject to a variety of other restrictions in the July 13 Order. For instance, those businesses dubbed “essential” must operate in accordance with pertinent COVID-Safe Practices contained in “All Together New Mexico: COVID-Safe Practices for Individuals and Employers” (“CSPs”), as well as complying with any identified occupancy restrictions. Id. at 6. Restaurants⁶ are one such “essential” business subject to occupancy restrictions. Id. at 5. Restaurants

⁶ The use of “restaurant” in this brief is intended to refer to both restaurants and to breweries licensed under NMSA 1978, § 60-6A-26.1 (2019), as those businesses are presently subject to identical restrictions.

may provide delivery or carryout service and outdoor dine-in service at up to 50% of their outdoor fire code occupancy. Id. Outdoor dine-in service may only be provided to seated patrons, no more than six people may be seated at a single table, there must be at least six feet between tables, and bar or counter service is not permitted. Id. The July 13 Order prohibits indoor dine-in services. Id.

Other facilities and businesses are also permitted to open subject to significant occupancy and other restrictions under the July 13 Order. Most businesses that are not identified as “essential” are permitted to open subject to a 25% occupancy restriction. Id. at p. 7. Indoor shopping malls are also subject to a 25% occupancy restriction and may not operate a food court and must prevent loitering. Id. “Close contact businesses” such as gyms and salons are subject to a 25% occupancy restriction. Id. Gyms and similar exercise facilities are not permitted to conduct group fitness classes. Id. Houses of worship, such as churches, synagogues, and mosques, are limited to a 25% occupancy restriction for indoor services. Id. at 6.

The July 13 Order also closes a variety of businesses and facilities. Those businesses and places defined as “recreational facilities” are required to remain entirely closed. Id. at 6. That category includes, among other things, indoor movie theaters, museums, bowling alleys, concert venues, event venues, “and other places of indoor recreation or indoor entertainment.” Id. at 6. Bars are also required to remain closed, except to provide take-out or delivery services if they are licensed to

do so. Id. at 7. Casinos and horse racing facilities also remain closed to the general public. Id. at 8. Certain organized amateur sports are also temporary prohibited under the July 13 Order. Id.

The July 13 Order also requires all New Mexicans to wear “a mask or multilayer cloth face covering in public settings except when eating, drinking, or swimming,” unless a health care provider has instructed otherwise. Id. at 8. Individuals are only exempted from wearing face coverings in public for eating, drinking, and swimming because those activities would be exceedingly difficult with a mask. Restaurants are unique among those facilities and entities regulated by the July 13 Order (other than bars, which remain closed) in that eating and drinking are the primary activities of their customers. Because a person is likely to be eating or drinking for a significant time while in a restaurant, individuals dining at a restaurant are far less likely to be wearing masks at any given time than customers at any other business or venue, except for pools. Accordingly, restaurant customers are required to be outdoors and in size-limited groups with significant spacing between groups. The July 13 Order also imposes significant regulations on public pools, which are facilities where individuals swim without wearing masks (although individuals who are not swimming are still required to wear masks in those facilities). Pools are limited to 50% of their maximum occupancy and may only be used for lane swimming and swimming lessons of up to 2 students. Id. at 7. Communal play and

splash areas remain completely closed. Id. Swimming activities at public pools have been limited such that unmasked individuals are not gathered together in close proximity to each other.

C. A rise in recent cases has coincided with New Mexico reimposing restrictions on indoor dining

The PHEOs gradually eased restrictions on restaurants in May and June and then tightened them again in the July 13 Order. Between March 19 and May 27, restaurants were limited to take out and delivery services only. Exhibit 2 at 3. The May 27 Order permitted restaurants to provide dine-in services in outdoor seating areas with a 50% occupancy restriction. Exhibit 3 at 5. The June 1 Order and subsequent June PHOs permitted indoor dine-in services with a 50% occupancy restriction and under the same conditions that apply to outdoor dining. See Exhibit 4 at 5. The July 13 Order essentially reverted to the restrictions on restaurants from the May 27 Order.

The July 13 Order also imposes more stringent masking or face covering requirements. Prior PHOs that mandated masks or face coverings provided a blanket exemption for “exercising.” See, e.g., Exhibit 4 at 7. The July 13 Order narrows this exemption to include only swimming. Exhibit 5 at 8. The July 13 Order also reduces occupancy restrictions on indoor gyms from 50% to 25% and temporarily prohibits amateur contact sports. Compare Exhibit 4 at 7 with Exhibit 5 at 6-7; see Exhibit 5 at 8. Those measures all reduce the possibility that individuals will need

to remove their face coverings near others to aid breathing during exercise, including in indoor settings like gyms. Likewise, the July 13 Order's restriction of dine-in services in restaurants eliminates a setting where groups of people are gathered indoors and need to remove their face coverings for extended periods of time. The re-imposed limitations on restaurants in New Mexico are consistent with a number of other states that have also recently recognized the added risks of indoor dining and have paused easing restrictions or re-imposed restrictions on that activity.⁷

The added restrictions in the July 13 Order coincide with troubling infection trends statewide and nationwide and with increasing evidence linking indoor dining at restaurants to a higher risk of infection. New Mexico's 5-day moving average of cases rose significantly in the middle of June, exceeded the state's previous highest point on July 2, 2020, and has continued upwards.⁸ Nationally, the number of new

⁷ Some examples include Texas and California. **Texas:** Executive Order GA 28 (June 26, 2020), available at https://gov.texas.gov/uploads/files/press/EO-GA-28_targeted_response_to_reopening_COVID-19.pdf (reducing dine-in services from 75% occupancy to 50% occupancy); **California:** Noah Higgins-Dunn, "California closes indoor restaurants, movie theaters and all bars statewide as coronavirus cases rise," CNBC (July 13, 2020), available at <https://www.cnbc.com/2020/07/13/california-to-close-indoor-restaurants-movie-theaters-and-bars-statewide-as-coronavirus-cases-rise.html> (discussing recent statewide closure of indoor dining in California).

⁸ The Albuquerque Journal publishes a running chart showing New Mexico's 5-day moving average, among other statistics, based on data from the New Mexico Department of Health. This information is available at <https://www.abqjournal.com/coronavirus>.

cases per day also began to climb in the middle of June and has continued rising dramatically through July—for instance, there were 14,790 new cases in the United State on June 1, 2020 compared with 74,710 on July 17, 2020.⁹ Here in New Mexico, instances of COVID-19 cases among restaurant staff rose dramatically beginning approximately two weeks after the resumption of indoor dining at restaurants and has continued on an upward trend, as illustrated by the number of rapid responses by the New Mexico Environment Department (“NMED”) to positive cases among restaurant employees. Affidavit of Robert Genoway, attached as Exhibit 6, ¶¶ 6-9. The Department of Health (“DOH”) provides daily reports to NMED of positive cases where an employer has been identified so that NMED can provide a rapid response to ensure that the employer takes protective measures and warns potentially impacted staff. *Id.*, ¶¶ 2-4. For the first two weeks of June, NMED had only 5 rapid responses to restaurants. *Id.*, ¶ 7. For the next two weeks, the NMED reported 16 rapid responses to restaurants. *Id.* The final two weeks of indoor dining in New Mexico required 49 rapid responses to restaurants. *Id.* This growth in cases was not solely attributable to rising cases statewide during that time because the percentage of rapid responses to restaurants has grown and stayed at a high rate since two weeks after indoor dining returned: during the first two weeks of

⁹ The CDC tracks the number of new cases per day in the United States and updates the numbers daily. These numbers are available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

June, 5 of 55 rapid responses (~9.1%) were to restaurants; during the second two weeks, 16 of 102 (~15.7%); during the final two weeks of indoor dining, 49 of 340 (~14.5%). Id., ¶ 9. There have also been significant compliance concerns with restaurants: approximately 20% of the reports of non-compliance to the New Mexico Department of Safety have involved restaurants. Id., ¶¶ 10-11.

These data points are also supported by more recent guidance cautioning of significant risks from indoor dining. For instance, the WHO has recently noted “outbreak reports related to indoor crowded spaces,” which suggest the possibility of aerosol transmission of the virus, including outbreaks in restaurants. Exhibit 1, ¶ 9. Another study details how one infected and presymptomatic individual likely transmitted the virus to nine other people at three different tables during an indoor lunch at a restaurant in China. Id. The outbreak was apparently caused by the path of the air conditioning. Id. As another example, a restaurant and brewery in East Lansing, Michigan accounted for 158 total confirmed cases (27 of which were people who did not visit the bar, but contacted someone who did) over a period of eight days in June despite being limited to 45% indoor capacity and placing tables six feet apart. Id., ¶ 10. Finally, a recent study conducted by JP Morgan, which found that the level of spending in restaurants was a strong predictor of increased

COVID-19 cases three weeks later.¹⁰ The analyst who performed the study noted that in-person restaurant spending was “particularly predictive” of rising case numbers. These case studies provide additional confirmation of the relatively higher transmission risks associated with indoor dining as compared to more transitory indoor interactions and settings.

D. The lawsuit filed by the Real Parties in Interest.

Against this factual backdrop, Real Parties in Interest in this matter seek to enjoin (and have been granted a TRO) the State of New Mexico from enforcing the provisions of the July 13 Order that prohibit restaurants from providing indoor dine-in services at 50% occupancy under the conditions set forth in prior PHOs. Verified Application for Temporary Restraining Order and Preliminary and Permanent Injunction in Case No. D-503-CV-2020-00506, attached as Exhibit 7, at 21. Real Parties in Interest advance two legal theories to support their request to enjoin these statewide emergency public health measures and effectively set emergency public health policies for the State. First, they erroneously assert that the Secretary of Health has exceeded her statutory authority by requiring restaurants to temporarily close for the protection of public health. *Id.* at 13-18. They stake this claim on the

¹⁰ See Amelia Lucas, “This chart shows the link between restaurant spending and new cases of coronavirus,” CNBC (June 26, 2020), available at <https://www.cnbc.com/2020/06/26/this-chart-shows-the-link-between-restaurant-spending-and-new-coronavirus-cases.html> (detailing study and analyst’s claims regarding in-person dining).

inaccurate premise that DOH may only close businesses through an exercise of its quarantine powers (which relate only to the physical isolation of individuals, not business closures) rather than DOH’s explicit authority to close public places and forbid gatherings of people to protect public health. Id. Second, they incorrectly argue that distinctions between indoor dining and other activities are arbitrary and capricious. Id. at 11-13. In addition to turning on its head the typically wide latitude afforded to policymakers during a public health emergency, this contention relies on a single chart produced by the New Mexico Department of Health and conveniently elides data and commonsense explanations as to why risks are more difficult to mitigate in indoor dining settings versus other indoor settings. Id. Reasoning that Petitioners (in this matter) failed to respond within five days and that irreparable injury would befall Real Parties in Interest, the district court enjoined the State from enforcing any public health restrictions against restaurants. Temporary Restraining Order in Case No. D-503-CV-2020-00506, attached as Exhibit 8. It also scheduled a hearing for preliminary injunction, which is set for July 30, 2020. Id.

ARGUMENT

A. The Court should issue a writ of superintending control.

Article VI, Section 3 of the New Mexico Constitution grants this Court “superintending control over all inferior courts” and the authority to issue “writs necessary or proper for the complete exercise of its jurisdiction and to hear and

determine the same.” This Court has long recognized that the power of superintending control permits it “to control the course of ordinary litigation in inferior courts”. State ex rel. Torrez v. Whitaker, 2018-NMSC-005, ¶ 30, 410 P.3d 201 (quoting State v. Roy, 1936-NMSC-048, ¶ 89, 40 N.M. 397, 60 P.2d 646). While the Court has recognized that its jurisdiction under this power is “bounded only by the exigencies which call for its exercise,” Roy, 1936-NMSC-048, ¶ 94, a writ of superintending control is most often issued where the public interest would be served through expeditious resolution of a legal question or where it is appropriate to provide guidance to lower courts on the application of the law. State ex rel. Torrez, 2018-NMSC-005, ¶¶ 30-31; State ex rel. Schwartz v. Kennedy, 1995-NMSC-069, ¶ 8, 120 N.M. 619, 904 P.2d 1044.

Consistent with these general principles, the Court has previously granted a writ of superintending control to address a legal issue at the soonest possible moment where a case presented a matter of first impression “with serious public safety implications.” State ex rel. Torrez, 2018-NMSC-005, ¶ 31. That is the case here as the Real Parties in Interest seek to invalidate the operative PHEO claiming that the directives stated therein are “ultra vires and not enforceable”. See App. at 13-14. Further, Real Parties in Interest raise separation of powers issues and asserts that the PHEO mandates “usurp the authority granted to the judicial branch . . . under the Public Health Act” and violate the separation of powers between the legislative and

executive branches. *Id.* at 13. Perhaps most significantly, the district court has already granted a TRO, thereby invalidating existing public safety directives attendant to operation of restaurants. Should this order be permitted to stand, the State will be stripped of the ability to meaningfully respond to the pending health emergency. For these reasons, expeditious review of the issues raised in Real Parties in Interest’s request for injunctive relief is warranted.

B. The Public Health Act expressly grants DOH authority to close public spaces and prohibit mass gatherings.

The Public Health Act, NMSA 1978, §§ 24-1-1 to -40 (1973, as amended through 2019) (“the PHA” or “the Act”) is a comprehensive statutory framework that provides DOH with broad authority to address a myriad of public health issues. To that end, the Act empowers DOH to “control and abate the causes of disease, especially epidemics[;]” to “respond to public health emergencies;” to “maintain and enforce rules for the control of conditions of public health importance;” and “do all other things necessary to carry out its duties”. § 24-1-3(C), (E), (F), (Q), (Z). DOH is further vested with express authority to regulate public spaces and public gatherings when necessary to promote public health. Section 24-1-3(E) of the PHA provides that DOH may “**close any public place and forbid gatherings of people when necessary for the protection of the public health**”. NMSA 1978, § 24-1-3(E) (emphasis added).

When interpreting and implementing the statutory directive set out in § 24-1-3(E), DOH enjoys “a heightened degree of deference” given that the statute “implicate[s] special agency expertise” and “the determination of fundamental policies within the scope of the agency’s statutory function.” Morningstar Water Users Ass’n v. N.M. PUC, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28. See also N.M. Mining Ass’n v. N.M. Mining Comm’n, 1996-NMCA-98, ¶ 15, 122 N.M. 332, 924 P.2d 741 (“Rules adopted by an administrative agency will be upheld if they are in harmony with the agency’s express statutory authority or spring from those powers or may be fairly implied therefrom.”). And where the public health is at issue, the State’s regulatory authority is at its apex. Mitchell v. City of Roswell, 1941-NMSC-007, ¶ 13, 45 N.M. 92, 111 P.2d 41 (“It is the policy of the courts to uphold regulations intended to protect the public health, unless it is plain that they have no real relation to the object for which ostensibly they were enacted, and prima facie they are reasonable.”).

This Court has previously endorsed DOH’s statutory authority to close or restrict businesses by issuing a writ mandating compliance with those requirements in State of New Mexico v. Hicks, Case No. S-1-SC-38279. There, the Court issued a writ prohibiting the Mayor from “(1) operating city facilities in a manner that violates public health emergency orders issued by the Secretary of the New Mexico Department of Health and (2) issuing directives and orders that contradict the public

health emergency orders issued by the Secretary of the New Mexico Department of Health.” Id.

Real Parties in Interest provide no discussion of § 24-1-3(E) or the Hicks decision and they make no attempt to address why these legal authorities are not controlling. They simply ignore the issue. Instead, Real Parties in Interest attempt to transmogrify a straightforward matter of statutory interpretation into a case about the quarantine procedures provided for in § 24-1-15 of the PHA. See generally, App. at 13-18. Those statutory provisions are inapposite.¹¹ They address the specific instance where the Secretary “has knowledge that a person is infected with or reasonably believes that a person is infected with or exposed to a threatening communicable disease and the person has refused voluntary treatment, testing, evaluation, detention or observation”. § 24-1-15(A). In those circumstances, the Secretary may seek a court order isolating or quarantining the person “until the person is no longer a threat to the public health or until the person voluntarily complies with treatment and contagion precautions.” Id. While Section 24-1-15

¹¹ Further illustrating this point are those sections of § 24-1-15 that address workplace protections, prohibit the forced administration of medication, and ensure humane conditions for those who are quarantined. See e.g., § 24-1-15(J) (limiting “confinement to the affected person’s private home, if practicable, or if not practicable, to a private or public premises”); § 24-1-15(H) (prohibiting the forced administration of medication); § 24-1-15(N) (“During the period of isolation or quarantine, an employer shall not discharge from employment a person who is placed in isolation or quarantine pursuant to this section.”).

addresses the process for quarantining individuals, it does not circumscribe or otherwise limit DOH's authority to close public places or regulate mass gatherings in Section 24-1-3(E). Real Parties in Interest's attempt to link these two separate provisions is erroneous.

C. The July 13 Order's restrictions on indoor dining are not arbitrary and capricious.

Taken together, New Mexico statutes and this Court's prior decisions give rise to several principles that serve as a guide for assessing the scope of DOH's authority in regulating public spaces.

First, DOH is afforded wide latitude when exercising its statutory powers to protect public health. As this Court has explained, "agencies and individuals with important responsibilities must have considerable discretion in order to fulfill their responsibilities effectively." Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶ 25, 133 N.M. 97, 61 P.3d 806 (citations omitted) (rejecting the argument that the New Mexico Mining Commission acted outside the scope of the Mining Act and indicating that a heightened degree of deference attaches to legal questions that implicate agency expertise). Accordingly, "[i]t is the policy of the courts to uphold regulations intended to protect the public health, unless it is plain that they have no real relation to the object for which ostensibly they were enacted, and prima facie they are reasonable." State ex rel. Hughes v. Cleveland, 1943-NMSC-029, ¶ 18, 47 N.M. 230, 141 P.2d 192. Only agency action that is

“willful and unreasoning” and done “without consideration and in disregard of facts and circumstances” can be deemed “arbitrary and capricious”. Old Abe Co. v. N.M. Mining Comm’n, 1995-NMCA-134, ¶ 10, 121 N.M. 83, 908 P.2d 776 (internal quotation marks and citation omitted).

Second, courts should exercise restraint when asked to invalidate reasonable agency actions addressing public health emergencies. More than a century ago, in Jacobson v. Massachusetts, the United States Supreme Court established that “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” 197 U.S. 11, 27 (1905) (upholding the constitutionality of a compulsory smallpox vaccination). This legal maxim reflects the commonsense notion that the promotion of public health and safety may require temporary disruptions of business activities; an assessment of governmental action during the pendency of a health emergency must be viewed in the context of public safety. See e.g. Legacy Church, Inc. v. Kunkel, No. CIV 20-0327 JB\SCY, 2020 U.S. Dist. LEXIS 68415 (D.N.M. Apr. 17, 2020) (ruling that restrictions prohibiting mass gatherings at churches did not violate the free exercise clause or freedom of assembly in light of the public health concerns raised by the COVID-19 pandemic). See also Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (“The right to practice religion freely

does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”).

The Jacobson holding endures and serves as a polestar for courts in addressing claims that state government has overstepped its authority during times of crisis. It is consistent with longstanding authority from this Court that health regulations will be upheld “unless it is plain that they have no real relation to the object for which ostensibly they were enacted, and prima facie they are reasonable.” Mitchell, 1941-NMSC-007, ¶ 13. And, as explained above, this Court has already issued an opinion consistent with the legal principles articulated in Jacobson. State of New Mexico v. Hicks, Case No. S-1-SC-38279.

Other courts have followed the Jacobson reasoning and upheld regulations and policies promulgated during the pendency of the COVID-19 pandemic. For example, in South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (“South Bay”), a church sought an injunction against California claiming that “numerical restrictions on public gatherings”, which were enacted “to address this extraordinary health emergency”. Id. at 1614. The church asserted that non-secular businesses were treated more favorably because they were not subject to the same

occupancy caps as other secular businesses.¹² Id. In his concurring opinion, Justice Roberts provided insight into the Court’s analysis of the claim.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

Id. at 1614 (internal quotations, citations, and brackets omitted). For these reasons, the Court denied the church’s request for injunctive relief and upheld California’s occupancy restrictions on houses of worship.

In accord with this Court’s decision in Hicks, and the United States Supreme Court decision in South Bay, Judge James O. Browning recently denied a request for injunctive relief that sought invalidate the provisions of the PHEO limiting operations at houses of worship in Legacy Church v. Kunkel, 2020 U.S. Dist. LEXIS 122542, at *225-26 (D.N.M. July 13, 2020) (unpublished). Relying on the South

¹² Secular businesses that were not subject to the same 25% occupancy cap imposed on churches included “factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.” S. Bay United Pentecostal Church, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting).

Bay decision, Judge Browning reiterated Justice Roberts’s observations that laws regarding health and safety are principally entrusted to state policymakers, whose actions are judged under a “broad strike zone.” Id., at *259-60. Because Judge Browning could not conclude that “differential treatment of restaurants, gyms, and religious gathering has no real or substantial relation to protecting public health”, he found that “[t]he State may thus reasonably conclude that indoor mass gatherings, regardless of their expressive content, endanger the public health in a greater degree than certain secular conduct and so subject indoor mass gatherings to greater restrictions.” Id. at *376-377. The court then dismissed Legacy Church’s claims because it could not sustain a claim that Secretary Kunkel has acted in an “arbitrary, unreasonable manner.” Id. at *377 (internal quotation marks and citation omitted).

With those general principles in mind, the July 13 Order’s restrictions on indoor dining bear a direct relationship to the protection of public health and are reasonable on their face. The July 13 Order was intended to reduce instances of individuals coming into relatively close and prolonged contact without the use of face coverings, in recognition of an emerging consensus regarding the importance of face coverings to prevent the spread of COVID-19. Supra, at pp. 5, 8-9. Preliminary data suggests that the reopening of indoor dining—even at a limited capacity—has generally correlated with a rise in cases among the general population and restaurant workers. Supra, at pp. 9-10. This data aligns with early scientific

consensus identifying indoor dining as a higher risk activity. Supra, at pp. 4-5, 12-13. These facts provide ample basis to justify DOH's efforts to protect public health during a global pandemic through the exercise of its statutory authority to close public places and forbid gatherings as necessary to protect public health.

Real Parties in Interest's refusal to DOH's broad latitude in shaping public health policy is telling. The truth of the matter is that they simply disagree with the State's response to the COVID-19 pandemic. That the New Mexico Restaurant Association or their members would respond to the COVID-19 pandemic in a different manner than health experts at DOH does not invalidate the State's response or call for judicial intervention. See In re Abbott, 954 F.3d 772, 792 (5th Cir. 2020) (“[I]f the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities. It is no part of the function of a court . . . to determine which one of the two modes is likely to be the most effective for the protection of the public against disease.”) (internal brackets omitted) (citation omitted).

D. The Court should stay the effect of the TRO issued in Case No. D-503-CV-2020-00506.

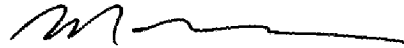
For the same reasons that an emergency exercise of superintending control is appropriate—to prevent confusion or conflicting decisions as to the legality of the State's emergency response measures prior to this Court's definitive guidance—Petitioners respectfully ask that the Court order all proceedings stayed in Case No.

D-503-CV-2020-00506 during the pendency of this Petition. See Rule 12-504(D)(2)(a) NMRA (stay proper where “irreparable injury, loss, or damage will result to the petitioner before the respondent . . . can be heard in opposition.”). Further, Petitioners ask that the Court stay the district court’s issuance of a TRO and continue DOH mandates regarding occupancy restrictions at restaurants until a decision in this matter is made. Petitioners will notify Respondent and Real Parties in Interest of this Petition at the time of filing and serve the Petition promptly.

CONCLUSION

The Court should take this opportunity to uphold DOH’s efforts to mitigate the spread of COVID-19 in New Mexico and to conclusively resolve the scope of the State’s authority to act during a once-in-a-lifetime health crisis. Petitioners respectfully request that the Court grant this Petition and expeditiously resolve the legal issues addressed herein. Petitioners also ask that the Court issue a stay of the TRO and all other proceedings in Case No. D-503-CV-2020-00506 during the pendency of this matter.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure, specifically Rule 12-504(G)(3) NMRA. The body of this brief employs 14-point Times New Roman font and contains 5,996 words, counted using Microsoft Office Word.

Respectfully submitted,



Matthew L. Garcia,

VERIFICATION

I, Matthew L. Garcia, counsel for Petitioners, being duly sworn upon my oath, state that I have read this Emergency Verified Petition for Superintending Control and Request for Stay, and that the factual statements it contains are true and correct to the best of my knowledge, information, and belief.

Date: July 20, 2020

Respectfully submitted,



Matthew L. Garcia,

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2020, a true and correct copy of the foregoing Emergency Verified Petition for Superintending Control and Request for Stay was served by email and U.S. Mail to Respondent and Real Parties in Interest:

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Respectfully submitted,

A handwritten signature in black ink, appearing to be 'M. Garcia', with a long horizontal flourish extending to the right.

Matthew L. Garcia