

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to Article VI, Section 3 of the
Constitution of the State of Colorado

In re Patrick NEVILLE and Michelle MALKIN,
Petitioners,

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,
Respondents.

▲ COURT USE ONLY ▲

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Supreme Court Case Number:

**PETITIONERS’
ORIGINAL PETITION FOR RULE TO SHOW CAUSE**

Petitioners, by and through undersigned counsel, hereby respectfully submit their *Petitioners' Original Petition for a Rule to Show Cause* pursuant to Article VI, Section 3 of the Constitution of the State of Colorado and Colorado Appellate Rule 21, and in support thereof, state as follows:

Petitioners hereby request a Rule to Show Cause.

1. The Colorado Supreme Court is empowered by the Colorado Constitution to issue writs of habeas corpus, mandamus, quo warranto, injunction, and other original and remedial writs. Colo. Const. art. VI, § 3.
2. By rule, the Supreme Court is also authorized to grant relief in the nature of prohibition. C.A.R. 21.
3. A decision by the Supreme Court to exercise original jurisdiction pursuant to C.A.R. 21 is discretionary, and denial of a petition under that rule does not indicate that Court considered the merits of petitioner's argument. *Bell v. Simpson*, 1996, 918 P.2d 1123.
4. Petitioners hereby move this Honorable Court to enter a Rule to Show Cause why each and all Respondents, whether acting jointly or severally or in concert with others, should not be enjoined and restrained from amending, extending, re-issuing, enforcing, or otherwise acting upon the authority of certain “orders,” individually or collectively, as defined in this Petition.

No case or court below.

5. After careful consideration and extensive preparation, Petitioners have filed this action in the first instance in the Supreme Court of Colorado; there is no case or court below and the status of the parties in the case at bar is either “Petitioner” (or collectively, “Petitioners”) on the one hand, and “Respondent” (or collectively, “Respondents”) on the other hand.

In the event this Petition is denied, Petitioners are ready to commence litigation elsewhere, and the filing of their Complaint is imminent.

6. Petitioners are ready, willing, and able to litigate the issues raised in this Petition in either the state District Court in Denver, or the United States District Court for the District of Colorado, or both.

7. To that end, Petitioners have engaged undersigned counsel and prepared a Complaint which is attached to this Petition as **Exhibit 0**, along with a Table of Contents of the Complaint which is attached to this Petition as **Exhibit 00**. Eight exhibits are attached to Petitioners’ Complaint (numbered the same for both the Complaint and this Petition to avoid redundancy of exhibits) as follows:

Exhibit 0 Complaint

Exhibit 00 Complaint Table of Contents

Exhibit 1 Executive Order 138

- Exhibit 2 Colorado Department of Public Health and Environment
Ninth Amended Public Health Order 20-28
- Exhibit 3 El Paso County Public Health Order 2020-02
- Exhibit 4 Denver Department of Public Health and Environment
“Face Covering Order”
- Exhibit 5 Office of Legislative Legal Services Memorandum
dated April 8, 1980
- Exhibit 6 Office of Legislative Legal Services Memorandum
dated September 7, 2018
- Exhibit 7 Office of Legislative Legal Services Memorandum
dated March 10, 2020
- Exhibit 8 Graphic

8. The above described documents are all of the supporting documents required for illumination of the undisputed facts and issues of law. No material issues of fact are expected to be disputed by Respondents, and Petitioners submit that all dispositive matters are issues of law only.

9. The nomenclature of the parties in Petitioners’ Complaint differs from this Petition in that each Petitioner is denominated as “Plaintiff” (or collectively, “Plaintiffs”) and each Respondent is denominated as “Defendant” (or collectively, “Defendants”).

10. For clarity when reference in the case at bar is made to the parties in the Complaint, Petitioners will utilize the terms “Petitioner(s)” and “Respondent(s)” to

identify not only the parties in this Petition, but also the parties in Petitioners' Complaint.

Only original jurisdiction in the Supreme Court will provide timely, meaningful judicial review.

11. By and through either their Complaint or this Petition, Petitioners are thoroughly prepared to present for judicial review numerous issues of first impression that are of significant public importance. Petitioners respectfully submit that only judicial review by this Honorable Court will result in final adjudication in a timely manner.

12. This Petition is presented to this Honorable Court because never in the history of Colorado has the constitutional framework of divided powers been abrogated as described with specificity in Petitioners' Complaint. Colo. Const. Article III, IV, V, and VI.

13. The Court's attention is directed to the Table of Contents of Petitioners' Complaint attached to this Petition as Exhibit 00. Scanning through the Table of Contents of Petitioners' Complaint will not only reveal the flow of Petitioners' allegations, arguments, authorities, and claims in Petitioners' Complaint, but also that Petitioners' Complaint addresses numerous issues of first impression that are of extraordinarily significant public importance; such significance is because: (a) the issues are of constitutional proportions; and (b) the judicial disposition of those

issues of first impression will have a direct, immediate, and profound impact upon the People of Colorado which will last for generations to come.

14. In light of the constitutional issues involved, their extraordinarily significant public importance, and the consequences for all of the People of Colorado, the exercise of original jurisdiction by the Supreme Court of Colorado is necessary, proper, and wholly appropriate to these circumstances. Indeed, it is just such a case as this for which the original jurisdiction of the Supreme Court of Colorado was designed by the People. Colo. Const. art. VI, § 3. C.A.R. 21.

**The Petitioners and proposed Respondents,
the persons or entities against whom relief is sought.**

15. The two Petitioners more specifically identified below seek relief from a total of seven persons or entities more specifically identified below as Respondents.

Petitioner, Patrick Neville.

16. Petitioner, Patrick Neville (“Petitioner 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.

Petitioner, Michelle Malkin.

17. Petitioner, Michelle Malkin (“Petitioner 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.

Respondent, Jared Polis.

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

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

20. Respondent Polis issued the Executive Orders which are among the subjects of this action. Respondent 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).

Respondent, Colorado Department of Public Health and Environment.

21. Respondent, the Colorado Department of Public Health and Environment (“Respondent CDPHE”) is a state agency in the executive branch of Colorado government.

22. Respondent 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.

Respondent, Executive Director of CDPHE.

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

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

25. Respondent Ryan issued the Public Health Orders which are among the subjects of this action.

26. Respondent 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).

Respondent, El Paso County Public Health.

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

28. Respondent 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.

Respondent, Executive Director of EPCPH.

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

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

31. Respondent Wheelan issued the Public Health Orders which are among the subjects of this action.

32. Respondent 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).

Respondent, Denver Department of Public Health and Environment.

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

34. Respondent 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.

Respondent, Executive Director of Respondent DDPHE.

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

DDPHE.

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

37. Respondent McDonald issued the Public Health Orders which are among the subjects of this action.

38. Respondent 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).

The actions complained of and the relief sought.

39. 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 Petitioner is entitled under Article II, Section 6 of the Colorado Constitution, Petitioners' Complaint challenges as unconstitutional various state actions by state actors (Respondents) including, but not limited to:

Respondent Polis, acting by and through one or more Executive Orders ("EOs");

Respondent Ryan, acting by and through one or more of Respondent CDPHE's Public Health Orders ("PHOs");

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

Petitioners challenge the Colorado Disaster Emergency Act as unconstitutional.

40. For the reasons more particularly described in their Complaint, Petitioners 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 consequences of which are unjust injury to the fundamental civil rights, liberty interests, and property rights of each Petitioner.

Petitioners challenge various Executive Orders as unconstitutional.

41. For the reasons more particularly described in their Complaint, Petitioners challenge each of the EOs listed below, and, in particular, Respondent 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 consequences of which are unjust injury to the fundamental civil rights, liberty interests, and property rights of each Petitioner.

Petitioners challenge various CDPHE Public Health Orders as unconstitutional.

42. For the reasons more particularly described in their Complaint, Petitioners challenge each of the CDPHE Public Health Orders listed below, and, in particular, Respondent CDPHE’s Ninth Amended Public Health Order 20-28, as unconstitutional, both facially and “as applied,” because Respondent CDPHE’s Public Health Orders do not comply with the requirements of the United States Constitution and the Colorado Constitution, the direct consequences of which are unjust injury to the fundamental civil rights, liberty interests, and property rights of each Petitioner.

Petitioners challenge various EPCPH Public Health Orders as unconstitutional.

43. For the reasons more particularly described in their Complaint, Petitioners challenge the EPCPH Public Health Orders listed below, and, in particular, Respondent EPCPH’s Order 20-02, as unconstitutional, both facially and “as applied,” because Respondent EPCPH’s Public Health Orders do not comply with

the requirements of the United States Constitution and the Colorado Constitution, the direct consequences of which are unjust injury to the fundamental civil rights, liberty interests, and property rights of each Petitioner.

**Petitioners challenge various DDPHE Public Health Orders
as unconstitutional.**

44. For the reasons more particularly described in their Complaint, Petitioners challenge the DDPHE Public Health Orders listed below, and, in particular, Respondent DDPHE’s “Face Covering Order,” as unconstitutional, both facially and “as applied,” because Respondent EPCPH’s Public Health Orders do not comply with the requirements of the United States Constitution and the Colorado Constitution, the direct consequences of which are unjust injury to the fundamental civil rights, liberty interests, and property rights of each Petitioner.

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

45. The state actions by state actors about which Petitioners complain are based upon certain EOs issued by Respondent Polis and certain PHOs issued by Respondent CDPHE. On information and belief, all of Respondent Polis’ EOs and many, but not all, of Respondent 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 Respondent EPCPH’s Public Health Order,
EPCPH Order 2020-02.**

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

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

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

47. The state actions by DDPHE state actors about which Petitioners complain are based, in part, upon the “Face Covering Order”, a PHO issued on May 14, 2020, by Respondent McDonald for Respondent DDPHE. On information and belief, DDPHE’s “Face Covering Order” and the other DDPHE PHOs are published by Respondent 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 Petitioners’ Complaint.**

48. The EOs issued by Respondent Polis, the CDPHE PHOs issued by Respondent Ryan, the EPCPH PHOs issued by Respondent Whelan, and the DDPHE PHOs issued by Respondent McDonald, about which Petitioners complain are more particularly described in their Complaint, but are here listed 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

For the reasons more particularly described in their Complaint, Petitioners 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.

49. “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

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

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.

50. By and through their Complaint, Petitioners challenge the Colorado Disaster Emergency Relief Act (“CDEA”), C.R.S. § 24-33.5-701, *et seq.*, generally, and specifically C.R.S. § 24-33.5-704(2) and § 24-33.5-704(7)(a) (collectively, “the Target Statutes”), and also a total of thirty-four (34) EOs and CDPHE PHOs and county PHOs (collectively, “the Subject Orders”), as unconstitutional, both as applied and facially, because they do not comply with the requirements of the United States Constitution and the Colorado Constitution.

51. Petitioners’ Complaint identifies a representative subset of only four (4) of the thirty-four (34) Subject Orders; this subset of the Subject Orders is collectively identified in Petitioners’ Complaint, this Petition, and Petitioners’ other pleadings as “the Target Orders.”²

² For purposes of this Petition, Petitioners have treated each of the Target Orders as an archetype of the other Subject Orders of like kind, and it is Petitioners’ intention that the legal effect of the Court’s orders in respect of the Target Orders applies to each of the other Subject Orders of like kind. Petitioners respectfully reserve the right to seek leave to amend this Petition to address with specificity each and every one of the thirty-four (34) Subject Orders, in the event this approach is objected to by any party or the Court.

52. The Target Orders subset of the Subject Orders is comprised of: (1) one of the EOs issued by Defendant Polis; (2) one of the CDPHE PHOs issued by Defendant Ryan; (3) one of the EPCPH PHOs issued by Defendant Wheelan; (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, (**Exhibit 1 to Petitioners’ Complaint and this Petition**);

CDPHE Ninth Amended Public Health Order 20-28, issued July 30, 2020, (**Exhibit 2 to Petitioners’ Complaint and this Petition**);

EPCPH PHO 2020-02, issued April 27, 2020, (**Exhibit 3 to Petitioners’ Complaint and this Petition**); and

DDPHE’s “Face Covering Order,” issued May 14, 2020, (**Exhibit 4 to Petitioners’ Complaint and this Petition**).

53. Petitioners will frame this Petition, their Complaint, and Petitioners’ 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 Petitioner.³

54. 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, Petitioners Complaint seeks:

(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)

³ Each and all of Petitioners' 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 Petitioners' Complaint (and all other Petitioners' pleadings) to the United States Constitution and U.S. Constitutional jurisprudence are to place in proper context the Colorado state laws upon which Petitioners 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 Petitioner 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.

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 Petitioners 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' challenged 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' challenged 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' challenged 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 Petitioners 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 challenged 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 challenged 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 challenged 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 challenged 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 Petitioners 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 challenged 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 challenged 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 challenged 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 challenged 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 Petitioners 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 challenged 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 challenged 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 challenged 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 challenged 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 Petitioners 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 Petitioner.

55. In addition, by and through the Claims more particularly stated elsewhere in their Complaint, Petitioners seek:

(1) declaratory relief from this Court declaring that each of the Subject Orders violates each Petitioner’s fundamental civil rights and liberty interests 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
and

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

Not all relief requested by Petitioners in their Complaint is requested in this action under Colorado Appellate Rule 21.

56. Petitioners recognize that some of the relief requested in their Complaint as reiterated in this Petition is beyond the scope of the relief available in an action under C.A.R. 21. Those elements of relief clearly beyond the scope of relief under C.A.R. 21 are not included in the relief requested below.

CONCLUSION

57. In *Ritchie v. Polis* the Colorado Supreme Court considered whether Governor Polis could, by Executive Order, suspend the operation of Article V, section 1(6) of the Colorado Constitution, and concluded “that the Colorado Disaster Emergency Act, §§ 24-33.5-701 to -716, C.R.S. (2019), does not authorize the Governor to suspend a constitutional requirement.” *Ritchie v. Polis, en banc, per curiam* opinion, July 1, 2020, 467 P.3d 339, 341.

58. “The Colorado Disaster Emergency Act authorizes the suspension of certain statutes, rules, and regulations, but not of constitutional provisions. *See* § 24-33.5-

704(7)(a), C.R.S. (2019).” *Ritchie v. Polis, id.* ¶18, at 345.

59. A constitutional “... requirement cannot be suspended by executive order, even during a pandemic.” *Ritchie v. Polis, id.* ¶19, at 345.

60. The essence of Petitioners’ Complaint is that the chief executive by executive order is purportedly making new laws and implementing new public policies which wholly usurp the power of the legislative department to make the laws, a power which has been delegated by the People through their Colorado Constitution exclusively to the legislative department. Colorado Constitution Art. III and Art. V.

61. 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.

62. 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).

63. From the year 1901, in *People ex rel. Alexander v. District Court*, to 1958 in *Colorado State Bd. of Med. Examiners v. Dist. Court*, through the year 2020, in

Ritchie v. Polis, the Colorado Supreme Court, when called upon to do so, has enforced the primacy of the Colorado Constitution.

64. Each Petitioner seeks judicial enforcement of the letter and the spirit of Article III of the Colorado Constitution.

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

Colo. Const. Art. III.

RELIEF REQUESTED

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

- A. with findings of fact and conclusions of law in respect of judgment in favor of Petitioner and against Defendant on each Claim stated above;
- B. striking down as unconstitutional the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*;
- C. striking down as unconstitutional C.R.S. § 24-33.5-704(2) of the Colorado Disaster Emergency Act;

- D. striking down as unconstitutional C.R.S. § 24-33.5-704(7)(a) of the Colorado Disaster Emergency Act;
- E. striking down as unconstitutional each and all of the Executive Orders complained of by Petitioners, beginning with Executive Order D 2020 138;
- F. striking down as unconstitutional each and all of the CDPHE Public Health Orders complained of by Petitioners, beginning with CDPHE Ninth Amended Public Health Order 20-28;
- G. striking down as unconstitutional each and all of the EPCPH Public Health Orders complained of by Petitioners, beginning with EPCPH Order 2020-02;
- H. striking down as unconstitutional each and all of the DDPHE Public Health Orders complained of by Petitioners, beginning with DDPHE Face Covering Order;
- I. granting Declaratory Relief pursuant to C.R.S. §§ 13-51-106, *et seq.*, and C.R.C.P 57;
- J. granting Injunctive Relief pursuant to C.R.S. §§ 13-51-106, *et seq.*, and C.R.C.P. 65; and
- K. any other Relief this Court deems just and proper.

Respectfully submitted via CCEF on August 26, 2020.

**LAW OFFICES OF
RANDY B. CORPORON, P.C.**

/s/ Randy B. Corporon
Randy B. Corporon
ATTORNEY FOR PETITIONERS