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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO
1437 Bannock Street
Denver, CO 80202</td><td rowspan="2">
▲COURT USE ONLY▲</td></tr>
<tr><td>Plaintiff: THE TAVERN LEAGUE OF COLORADO

v.

Defendant: JARED POLIS, in his official capacity as the Governor of the State of Colorado, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, and JILL HUNSAKER RYAN, in her official capacity as the Executive Director of the Colorado Department of Public Health and Environment</td></tr>
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Division/Courtroom: 203</td></tr>
<tr><td colspan="2">MOTION FOR TEMPORARY RESTRAINING ORDER</td></tr>
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Plaintiff, by and through undersigned counsel, hereby submits its Motion for Temporary Restraining Order as follows.

C.R.C.P. 65(b)(2) Certificate: Counsel for Plaintiff is contemporaneously emailing a courtesy copy of the instant Motion to counsel for the Attorney General's Office, sending the same out for service on all Defendants and the Attorney General's Office along with the Amended Complaint, and actively requesting that Defendants waive service through their counsel. Undersigned counsel intends to work cooperatively with Defendants to set a hearing.

INTRODUCTION AND STATEMENT OF FACTS

The Numerical Capacity Limitations

Plaintiff is a non-profit organization comprised of establishments in Colorado that serve alcohol for on-premises consumption. (Amended Verified Complaint for Declaratory and Injunctive Relief, hereinafter "Compl." at ¶¶ 10, 44). On or about June 30, 2020, Defendant Colorado Department of Public Health and Environment ("CDPHE") issued the Eighth Amended Public Health Order 20-28 Safer At Home and in the Vast, Great Outdoors (the "Order," attached hereto as Exhibit A). (Compl. at ¶¶ 1, 17). The Order extends and modifies its previous iteration and imposes certain requirements on bars and restaurants operating in Colorado. (Order, at 1, 8-9). Among these are that bars and restaurants, regardless of their capacity, may only host 50 patrons on their premises unless they are an "extra large establishment," in which case they may host up to 100 patrons (the "Numerical Capacity Limitations"). (*Id*. at 8-9).

The Numerical Capacity Limitations are imposed without regard to the viability of the establishments they affect, and indeed are a death knell for many of the Tavern League's members. (Compl. at ¶¶ 45-51). While a small establishment may be able to survive and pay its fixed costs by hosting 50 patrons, many of the Tavern League's members will be put out of business even if they qualify as an extra large establishment allowed to host 100 patrons. (*Id*.). The Numerical Capacity Limitations are thus an indirect means of revoking the licenses of these establishments, as compliance with the Numerical Capacity Limitations will necessarily doom many of them to close. (*Id*.). This regulatory taking of the Tavern League member's licenses has been carried out without compensating the establishments it victimizes.

More troubling, however, is the arbitrary nature of the Numerical Capacity Limitations. The Numerical Capacity Limitations are not supported or suggested by science, and the

overwhelming majority of other states simply limit capacity to a percentage of maximum occupancy, instead of a fixed number, to enable appropriate physical distancing between patrons of different households. (Compl. at ¶¶ 30-34 and Exhibits B-MM referenced therein). Unlike Colorado's Order, this comports with United States Center for Disease Control and Prevention's ("CDC") guidance. (*Id*. at ¶¶ 32-33).

Worse still, the Numerical Capacity Limitations are not applied to similarly situated establishments. (*Id*. at ¶¶ 23-25). Under the Order, indoor venues may host 100 patrons per room without caveat, while the Tavern League's members are limited to 100 patrons in total, and then only if they qualify as an extra large establishment. (*Id*.). While outdoor venues may host up to 175 patrons per designated activity, no bar or restaurant may accommodate so many patrons. (*Id*.). This arbitrary distinction is supported by no science or rational basis whatever. (*Id*. at ¶¶ 27-32). Instead, through these Numerical Capacity Limitations the Order arbitrarily provides which business shall live and which shall die.

The Last Call Order

On the same day the Tavern League filed its Verified Complaint for Declaratory and Injunctive Relief, new restrictions on bars and restaurants were announced. (Compl. at ¶ 5). Without consulting the relevant data, on July 21, 2020, Governor Polis issued Executive Order D 2020 142 (the "Last Call Order," attached hereto as **Exhibit B**) prohibiting bars and restaurants in Colorado from serving alcohol after 10 p.m. Though purportedly to control the spread of the COVID-19 pandemic, no justification in science or research supports this measure that arbitrarily determines 10 p.m. to be the hour at which ostensible COVID-19 prevention must increase. (Compl. at ¶¶ 5, 7). No science or research suggests that alcohol spreads or increases the spread of

COVID-19, much less that it does so more effectively after 10 p.m. (*Id.*). Indeed, when announcing the measure, Governor Jared Polis admitted that "[i]f you want to get drunk, nobody is saying alcohol causes coronavirus. It doesn't." Fox 21 News, Gov. Polis moves "last call" at bars in effort to increase social distancing, (accessed July 22, 2020), https://www.fox21news.com/health/coronavirus/gov-polis-gives-tuesday-july-21-update-on-colorado-coronavirus-response/ (the "Press Release"). Instead, Governor Polis simply stated that "[t]he state of inebriation in a public place is inconsistent with social distancing." *Id.*

Of course, this does not address the 10 p.m. restriction on serving alcohol, as the state of inebriation is not limited to hours after 10 p.m. No science suggests that limiting regulated establishments and forcing patrons to congregate in unregulated establishments is rationally related to the government's end of reducing the spread of COVID-19. (Compl. at ¶ 42). The CDC does not suggest that earlier closing times for restaurants prevents the spread of COVID-19, nor has any other major public health agency or organization recommended this measure. (*Id.* at ¶ 42)

The arbitrariness and unreasonableness of the restriction imposed by the Last Call Order is far from its only flaw. It presents an independent *de facto* revocation of the Tavern League members' liquor licenses without due process. (Compl. at ¶¶ 53-58). A liquor license is worthless when an establishment cannot make use of it, and the Last Call Order ensures that no beneficial use remains to establishments so limited. (*Id.*). Moreover, because the Tavern League members' primary business is serving alcohol, and because patrons visit member establishments to watch professional sports while consuming alcohol, the Tavern League's members are essentially shut down at 10 p.m., unlike similarly situated businesses. (*Id.*). Governor Polis admitted this was the case when announcing the restriction. When discussing the current, 2 a.m. last call, he noted that

bars "don't actually technically have to close then, but . . . they stop serving alcohol so they stop making money so they generally want to close." (Press Release).

The Tavern League, on behalf of its members, moves for a temporary restraining order to protect their rights under the constitutions of Colorado and the United States, and to preserve the economic viability of its members.

ARGUMENT

Temporary restraining orders are designed to prevent immediate and irreparable harm to a party. *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004); *Mile High Kennel Club v. Colo. Greyhound Breeders Ass'n*, 559 P.2d 1120, 1122 (Colo. App. 1977). A court may issue a temporary restraining order "if it clearly appears from the facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result." C.R.C.P. 65(b)(1). To obtain a restraining order, a plaintiff need only show the requisite risk of harm and need not satisfy all of the requirements for a preliminary injunction. *City of Golden*, 853 P.3d at 96 (distinguishing between the types of preliminary relief available). "What makes an injury irreparable is the inadequacy of, and the difficulty of calculating, a monetary remedy after a full trial . . . **Any deprivation of any constitutional right fits that bill**." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 806 (10th Cir. 2019) (emphasis added) (citation omitted).

C.R.S. § 25-1-113(1) provides that "[a]ny person aggrieved and affected by a decision of . . . executive director of the [CDPHE] is entitled to judicial review by filing in the district court . . . of the city and county of Denver . . . an appropriate action requesting such review." A district court may "reverse or modify" such a decision if a claimant's "substantial rights . . . have been

prejudiced as a result" of the decision because, *inter alia*, the decision was 1) "[c]ontrary to constitutional rights or privileges" or 2) "arbitrary or capricious." *Id.*

Agency decisions are arbitrary and capricious when they are not justified by evidentiary findings or do not take into account the underlying circumstances. *Williams v. Dep't of Pub. Safety*, 2015 COA 180, ¶ 29 ("an administrative agency has acted arbitrarily or capriciously where 'no substantial evidence exists in the record to support the agency's decision.'") (quoting *Gessler v. Grossman*, 2015 COA 62, ¶ 39); *Gessler v. Grossman*, 2015 COA 62, ¶ 39, *aff'd sub nom. Gessler v. Smith*, 2018 CO 48, ¶ 39; *see also Ritzert v. Bd. of Educ. of Acad. Sch. Dist. No. 20*, 2015 CO 66, ¶ 34. Arbitrary and capricious decisions should be set aside. *CF&I Steel, L.P. v. Pub. Utilities Comm'n of State of Colo.*, 949 P.2d 577, 585 (Colo. 1997); *Davison v. Indus. Claim Appeals Office of State*, 84 P.3d 1023, 1029 (Colo. 2004), *as modified on denial of reh'g* (Feb. 9, 2004).

1. This Court Should Enjoin the Order's Numerical Capacity Limitations Under C.R.S. § 25-1-113(1) Because They Are Arbitrary and Capricious and Threaten the Tavern League Members with Imminent and Irreparable Ruin.

The Order does not cite, reference, refer, or allude to any evidence to support the arbitrary 50-person and 100-person capacity limits imposed on bars and restaurants. (See Order). The CDC does not recommend it. (Compl. at ¶¶ 32-33). CDPHE's proffered data does not support it. (*Id.* at ¶¶ 28-29). Worse still, there is substantial evidence to the contrary: Bars and restaurants are not a major contributing factor to the spread of COVID-19. (*Id.* at ¶ 28). Nor is there evidence supporting disparate treatment for similarly situated establishments, such as indoor venues which may also provide dining services but are not subject to the same Numerical Capacity Limitations as bars and restaurants. (Order, at p. 7, § I.H.4.i).

This lack of "substantial evidence . . . in the record to support the [CDPHE]'s decision" is fatal because it means that the Numerical Capacity Requirements are arbitrary and capricious. *Williams*, 2015 COA 180, ¶ 29. Because "no substantial evidence exists in the record to support the [CDPHE]'s decision," and in light of the fatal constitutional flaws it contains, it must ultimately be reversed, and its enforcement should be stayed in the interim to prevent irreparable economic and constitutional harm. *Gessler*, 2015 COA 62, ¶ 39; *CF&I Steel, L.P.*, 949 P.2d at 585; *Davison*, 84 P.3d at 1029; C.R.S. § 25-1-113(1).

2. The Numerical Capacity Limitation and Last Call Order Will Irreparably Harm the Tavern League's Members Because its Application Violates the Fourteenth Amendment to the United States Constitution and Colo. Const. Art. 2, § 25

The Order and Last Call Order contain constitutional violations that threaten Plaintiff's members with imminent irreparable harm. First, the Numerical Capacity Limitations are unequally applied to similarly situated persons, *i.e.*, restaurants versus other indoor venues. Second, the restrictions in the Order and Last Call Order are so onerous that they deprive Plaintiff's members of property without due process, despite that process being codified by statute. Third, as a regulatory taking the Order and Last Call Order also violate due process by regulating out of existence Plaintiff's members without abiding by statutory requirements and eliminating any possibility of just compensation. Finally, the Order and the Last Call Order deprive Plaintiff's member of a substantive due process right: the occupational liberty component of the Fourteenth Amendment's Due Process Clause and Article II, Section 25 of the Colorado Constitution.

a. <u>The Numerical Capacity Limitations are a Violation of Equal Protection Under the Laws</u>

The equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and § 25, Article II of the Colorado Constitution requires "that all persons similarly situated should be treated alike." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 798 (10th Cir. 2019) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("we have explained that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination") (punctuation and quotation omitted); *People v. Wilhelm*, 676 P.2d 702, 704 n.4 (Colo. 1984) ("Article II, § 25 of the Colorado Constitution, states: 'No person shall be deprived of life, liberty or property, without due process of law.' The right to due process of law necessarily includes the right to equal protection of the laws.").

When states make distinctions with respect to persons the resulting classifications must "[a]t a minimum . . . be rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see Wilhelm*, 676 P.2d at 704 (Colo. 1984) ("statutory classifications . . . must be based on differences that are real in fact and reasonably related to the purposes of the legislative enactments"); *Free the Nipple-Fort Collins*, 916 F.3d at 798 ("At a minimum [equal protection] requires that any statutory classification be 'rationally related to a legitimate governmental purpose.'") (citation and internal punctuation omitted).

The equal protection guarantee insists that any unequal classification have a rational basis and not rely on bases that are arbitrary, capricious, or unreasonable. *Indus. Claim Appeals Office of State of Colo. v. Romero*, 912 P.2d 62, 66 (Colo. 1996). Classifications that "arbitrarily single

out a group of persons for disparate treatment and not single out for such treatment other persons who are similarly situated" cannot stand. *Id*.

Plaintiff's members operate establishments serving alcohol for on-premises consumption. (Compl. at ¶ 44). Even Plaintiff's extra-large members are prohibited by the Numerical Capacity Limits to host more than 100 patrons, but no such restriction applies to other indoor venues. (Compl. at ¶¶ 23-25). Whereas indoor venues, where people gather in groups to celebrate or participate in events, may host 100 patrons per room, Plaintiff's extra large members can host only 100 patrons in total, regardless of how many rooms they maintain on their premises. (*Id*.). No rational basis supports this distinction, as indoor venues may also serve food. (Order, at p. 7, § I.H.4.i). The Order thus picks winners, indoor venues who may operate closer to their actual capacity, and losers, Plaintiff's members who are prohibited in many cases from operating at even half of their own capacity.

The CDC and overwhelming majority of states have recognized that the arbitrary imposition of strict numerical caps is unwarranted by the state of science with respect to COVID-19. (Compl., ¶¶ 32-34). No other state mirrors Colorado's Numerical Capacity Limits. (*Id*). This "arbitrar[y] singl[ing] out . . . [of Plaintiff's members] for disparate treatment and not singl[ing] out for such treatment [indoor venues] who are similarly situated" is a violation of due process and must be reversed. *Romero*, 912 P.2d at 66. The Order's classifications, singling out restaurants for different treatment, are not "based on differences that are real in fact [or] reasonably related to the purposes of the legislative enactments," and therefore cannot withstand scrutiny. *Wilhelm*, 676 P.2d at 704.

Plaintiff's members cannot be compensated with money for this deprivation of their constitutional rights. "Any deprivation of any constitutional right" is an irreparable harm because mere monetary remedies are inadequate, not to mention nearly impossible to calculate. *Free the Nipple-Fort Collins*, 916 F.3d at 806.

b. The Numerical Capacity Limitations and Last Call Order Violate Due Process by their de facto revocation of the Tavern League Members' Licenses.

The Tavern League's members have a property interest in their liquor licenses and are entitled to due process with respect to the deprivation of those licenses. *Morris-Schindler, LLC v. City & Cty. of Denver*, 251 P.3d 1076, 1085 (Colo. App. 2010) ("A liquor license, like any business or professional license, is a property right which is entitled to due process protection.") (citing *LDS, Inc. v. Healy*, 197 Colo. 19, 589 P.2d 490 (1979)); *A. D. Jones & Co. v. Parsons*, 319 P.2d 480, 483 (1957) ("The license can be recalled with all other similar license during the year only by legislative action; otherwise, it is revocable during the year only for breach of the conditions upon which it was issued. As thus viewed, it is property within the meaning of the due process clause of the Federal Constitution.") (quotation and citation omitted). Colorado provides for due process for liquor license holders such as the Tavern League's members before that property right may be taken away. C.R.S. § 44-3-601(1) ("the state or any local licensing authority has the power, . . . after investigation and public hearing at which the licensee shall be afforded an opportunity to be heard, to suspend or revoke" a license); 1 C.C.R. § 203-2:47-600 ("The purpose of this regulation is to establish general processes and procedures required for the licensing authority to suspend or revoke a license"). Colorado's regulations require, among other things, that a license holder be allowed a notice and hearing before their license is suspended or revoked. C.R.S. § 44-3-601(1); 1 C.C.R. § 203-2:47-600 B-E.

The Order's Numerical Capacity Limits circumvent the due process owed to the Tavern League's members before their licenses may be suspended or revoked. Instead of providing a notice and hearing pursuant to C.R.S. § 44-3-601(1) and 1 C.C.R. § 203-2:47-600, the Order arbitrarily dictates capacity limits that make liquor licenses useless. This indirect license revocation means that the Tavern League's members do not have the opportunity to be heard before they are deprived of their property interest, in contravention of due process. *Morris-Schindler*, 251 P.3d at 1085.

The Last Call Order also circumvents due process because its effect on the Tavern League's members is the same: an indirect revocation of their liquor licenses. *Parsons*, 319 P.2d at 483; *Morris-Schindler*, 251 P.3d at 1085. Not only are bars and restaurants limited to an unsustainably small number of patrons for their establishments, now they must also limit the time in which they may perform their primary service. No notice or hearing occurred or was available prior to this revocation that circumvents C.R.S. § 44-3-601(1) and 1 C.C.R. § 203-2:47-600. Instead, the Tavern League's members learned by press conference that alcohol service must stop at 10 p.m., effectively shutting them down at that time because alcohol is the reason patrons attend. (Compl. at ¶¶ 5, 9, 39). There is no reason to believe that many patrons will visit the members before that time either, because the Last Call Order will stop alcohol sales midway through many professional sporting events that patrons would normally view at the Tavern League members' establishments. (*Id*. at 52-55). Knowing that alcohol consumption is so limited at bars and restaurants, but not at private residences or house parties, most patrons will decide not to go out at all.

c. The Numerical Capacity Limitations and Last Call Order Will Irreparably Harm the Tavern League's Members Because its Application Violates the Fifth Amendment to the United States Constitution and Leaves Bars and Restaurants with no Recourse.

Since 1922 the Supreme Court of the United States has recognized that "[t]he general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" under the Fifth Amendment to the United States Constitution. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Even when not all economically viable use of property has been denied a property owner, a taking "nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island,* 533 U.S. 606, 617-18 (2001).

In the event the Tavern League's members are forced out of business because the Order and the Last Call Order effectively shut down their operations, it is highly unlikely that they will be able to then hire counsel to pursue claims for compensation. Enforcement of the Order and Last Call Order therefore deprive the Tavern League's members of their property rights in their liquor licenses and establishments without due process and assures them that they will never be compensated for that regulatory taking. *Morris-Schindler, LLC*, 251 P.3d at 1085; *Costiphx Enterprises, Inc. v. City of Lakewood,* 728 P.2d 358, 361 (Colo. App. 1986); *Parsons*, 319 P.2d at 483; *Mr. Lucky's, Inc. v. Dolan*, 591 P.2d 1021, 1022 (Colo. 1979).

The economic effects of the restrictions in the Order and Last Call Order on the property owners here, the members, will be devastating; their reasonable investment-backed expectations will be completely destroyed; and the character of the government action effecting these injuries

is arbitrary and made to send a message, not to secure a public good. (Compl. at ¶¶ 44-58); *Palazzolo*, 606 U.S. at 617–18.

Moreover, Colorado law provides certain procedures that must be followed when private property is taken for public use, as the Tavern League members' licenses and establishments are being taken. C.R.S. § 38-1-101(1)(a), (2)(a). Neither the Order nor the Last Call Order allow, provide, or are amenable to the due process owed to the Tavern League members. (See Order, Last Call Order). Because the Order and Last Call Order represent a regulatory taking of the Tavern League members' property rights in their licenses and establishments, and no compensation will ever be afforded them for their injuries, the Order's Numerical Capacity Limitations and the Last Call Order should be reversed as against the Fifth and Fourteenth Amendments to the United States Constitution.

d. The Order and Last Call Order Violate the Occupational Liberty Component of the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Constitution of the State of Colorado

Similarly, the Order and Last Call Order violate the occupational liberty component of the Fourteenth Amendment's Due Process Clause and Article II, Section 25 of the Colorado Constitution. *See, e.g., Allgeyer v. La.*, 165 U.S. 578, 590 (1897); *Conn v. Gabbert*, 526 U.S. 286, 291 (1999) (noting that there is "some generalized due process right to choose one's field of private employment"); *Engquist v. Oregon Dep't of Agric*., 478 F.3d 985, 997 (9th Cir. 2007), *aff'd sub nom., Engquist v. Oregon Dep't of Agr.*, 53 U.S. 591 (2008) ("We have recognized the liberty interest in pursuing an occupation of one's choice . . . **a plaintiff can make out a substantive due process claim if she is unable to pursue an occupation and this inability is caused by**

government actions . . . ."); *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992)) (noting "due process clause has long included occupational liberty").

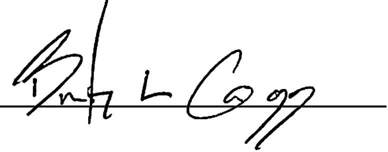
This substantive right being denied to the Tavern League members is the right "to live and work where [t]he[y] will; to earn [their] livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to . . . carrying out to a successful conclusion the purposes above mentioned." *Allgeyer*, 165 U.S. at 589. The Order and the Last Call Order infringe this substantive right by regulating Plaintiff's members out of business. Defendants must at least show that their means of doing so is rationally related to preventing the spread of COVID-19. They cannot, instead arbitrarily, capriciously, and unreasonably purchasing political messaging at the expense of local bar and restaurant owners. This violation of the Tavern League members' substantive constitutional rights is an irreparable harm that must be prevented by temporarily retraining Defendants from enforcing the Order and the Last Call Order.

WHEREFORE, the Tavern League respectfully requests that this Court enter a temporary restraining order enjoining the enforcement of the Numerical Capacity Limitations and the Last Call Order, and for such other and further relief as this Court deems just and proper.

DATED this 22nd day of July, 2020.

Respectfully Submitted,

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By:*s/ Brenton L. Gragg* 
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Certificate of Service

The undersigned certifies that on July 22, 2020 a true and correct copy of the foregoing is being sent via email to counsel for the Colorado Attorney General's office at the following e-mail addresses:

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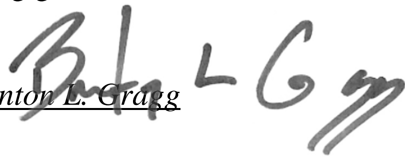

/s/ Brenton L. Gragg