IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO

NO. S-1-SC-38396

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

Petitioners,

v.

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, NEW MEXICO RESTAURANT ASSOCIATION,

Real Parties in Interest.

BRIEF OF *AMICUS CURIAE* EDDY COUNTY IN SUPPORT OF THE SEPARATION OF POWERS AND STATE RULES ACT

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INTRODUCTION

This case ultimately comes down to one principle: "[T]he accumulation of too much power within one branch poses a threat to liberty."[1] *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 20, 125 N.M. 343, 349, 961 P.2d 768, 774 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458–59, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); The Federalist No. 47, at 332 (James Madison) (M. Walter Dunne 1901) (discussing Montesquieu)).

On March 11, 2020, State of New Mexico Governor Michelle Lujan Grisham and the New Mexico Department of Health issued a series of increasingly restrictive executive and administrative "orders," which sharply curtailed the rights and freedoms of New Mexicans. Intended to address the COVID-19 virus, the Department of Health, acting under direction of the Governor, shut down the vast majority of businesses and ordered that all New Mexicans stay home, except for purposes deemed essential. While select businesses have been allowed to reopen, others remain burdened by regulations that threaten their very existence. Such is the case for indoor dining restaurants in Eddy County, New Mexico, which has daily temperatures of over 100 degrees Fahrenheit.

While the need for state action during such an emergency cannot be questioned, the form of that action must be carefully scrutinized. The Constitution

[1] No party or counsel for that party authored this brief in whole or in part or made any monetary contribution to fund the preparation or submission of this brief

and laws of the State of New Mexico are the cornerstones of our democratic government. But the New Mexico Constitution faces an existential threat, one that erodes the foundations of democratic self-government—the separation of powers.

This brief is filed to challenge these curtailments of democracy, which have been forced upon the residents of Eddy County. In this light, the County of Eddy respectfully asks that the Court hold: First, the Public Health Emergency Response Act (PHERA) and Public Health Act (PHA) contain both self-executing and non-self-executing provisions. Second, the Acts are intended to limit the Governor and Department of Health's self-executing authority. Third, the Governor and Secretary of Health may only administer their non-self-executing authority in the Acts by statutorily-authorized rulemaking activity. Fourth, the Governor lacks the constitutional authority to create or change substantive law. Fifth, even under an arbitrary and capricious standard of review, the public health "orders" are entitled to little if any deference because they were not the result of any deliberative rule-making process or quasi-judicial administrative proceeding. Sixth, the decision to impose the same indoor dining restrictions across the entire State of New Mexico was arbitrary and capricious.

CONSTITUTIONAL PROVISIONS

1. "The legislative power shall be vested in a senate and house of representatives which shall be designated the legislature of the state of New

Mexico, and shall hold its sessions at the seat of government." N.M. Const. art. IV, § 1.

2. "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 powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted." N.M. Const. art. III, § 1.

STATUTORY BACKGROUND

Enabling Legislation for the Department of Health

3. The Department of Health (DOH) was created by statute and not by the New Mexico Constitution. *See* NMSA 1978, §§ 9-7-4, 9-7-6(B), 24-1-1 to -40.

4. The Secretary of Health and DOH may only act as "expressly enumerated in the laws." *Id.* § 9-7-6(B).

5. The DOH only has statutory authority to issue rules in accordance with the State Rules Act (SRA). *Id.* §§ 9-7-6(E), 9-7-6.3.

Public Health Act (PHA)

6. The PHA, NMSA 1978, Sections 24-1-1 to -40, is a second enabling statute for the DOH.

7. The PHA contains specific, self-executing procedures, including in-court procedures, for implementing isolations and quarantines, managing particular diseases, and managing and enforcing testing and screening. *Id.* §§ 24–1–15, 24-1-15.1, 24-1-15.3.

8. The PHA contains no specific, self-executing procedures for closing public places or forbidding gatherings, even when necessary for the protection of the public health. *See generally id.* §§ 24-1-1 to -40.

Public Health Emergency Response Act (PHERA)

9. The PHERA, NMSA 1978, Section 12-10A-1 to -19, was enacted, in part, to "provide the state of New Mexico with the ability to manage public health emergencies in a manner that protects civil rights and the liberties of individual persons." *Id.* § 12-10A-2(A) (emphasis added).

10. The Governor may declare a public health emergency by issuing an executive order that complies with the statute. *Id.* § 12-10A-5.

11. The Secretary of Health's powers to isolate and quarantine during a public health emergency are limited and require due-process protections for the individuals affected. *Id.* §§ 12-10A-7 to -9.

12. The Secretary of Public Safety and Secretary of Health are authorized to "implement rules that are reasonable and necessary to implement and effectuate the PHERA." *Id.* § 12-10A-17.

State Rules Act (SRA)

13. The SRA, NMSA 1978, Sections 14-4-1 to -11, defines "rule" as "any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and amendments thereto or repeals and renewals thereof, issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency." *Id.* § 9-7-6(F).

14. "An order or decision or other document issued or promulgated in connection with the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts shall not be deemed such a rule, nor shall it constitute specific adoption thereof by the agency." *Id.* § 9-7-6(F).

15. Emergency rules may only be issued if the agency "finds that the time required to complete the procedures would: (1) cause an imminent peril to the public health, safety or welfare; (2) cause the unanticipated loss of funding for an agency program; or (3) place the agency in violation of federal law." *Id.* § 14-4-2(A).

16. Emergency rules must be temporary, no longer than 180 days, may not permanently amend or repeal an existing rule, and may not be readopted as an emergency rule after the 180 days expires. *Id.* § 14-4-2(E).

ARGUMENTS

I. The Public Health Emergency Response Act and Public Health Act contain both self-executing and non-self-executing provisions.

A self-executing law takes effect immediately, without requiring further lawmaking or rulemaking activity. *See, e.g., State v. Sunset Ditch Co.*, 1944-NMSC-004, ¶ 5, 48 N.M. 17, 145 P.2d 219, 221, *Baca v. Burks*, 1970-NMSC-055, ¶ 7, 81 N.M. 376, 377, 467 P.2d 392, 393, *State v. Rascon*, 1976-NMSC-016, ¶ 13, 89 N.M. 254, 259, 550 P.2d 266, 271. This is because a self-executing law "supplies the rule or means by which the right given may be enforced or protected or by which a duty enjoined may be performed." *Jaramillo v. City of Albuquerque*, 1958-NMSC-107, ¶ 8, 64 N.M. 427, 429, 329 P.2d 626, 627 (quoting *Stange v. City of Cleveland*, 94 Ohio St. 377, 144 N.E. 261, 262 (1924); *Emanuel v. Twinsburg Tp.*, 94 Ohio App. 63, 114 N.E.2d 620 (1952)).

In contrast, a non-self-executing law is "a declaration of principle or policy," and requires something else to implement it, be it legislation or rulemaking activity. *Jaramillo*, 1958-NMSC-107, ¶ 14.

The PHA and PHERA have both self-executing and non-self-executing provisions. *Compare* NMSA 1978, § 12-10A-7 (procedures for isolation or quarantine), *id.* § 12-10A-8 (protections for people isolated or quarantined), *id.* § 14-1-15 (protocol for isolation and quarantine); *with id.* § 24-1-3 (granting general

authority to, amongst other activities, "close any public place and forbid gatherings of people when necessary for the protection of the public health").

Whereas the statutes have specific protocols—and extensive due-process protections—for people who are brought into isolation or protocol, they contain no specific procedure to enforce the DOH's other powers. For example, the PHA states that the department has authority to "close any public place and forbid gatherings of people when necessary for the protection of the public health," but the statute has no standards or rules for carrying out that activity. *See generally id.* § 24-1-3 (providing general grants of authority without procedures for carrying them out).

That the legislature never intended for these general grants of authority to be self-executing is apparent because the statute repeatedly authorizes the issuance of rules. *E.g.*, *id.* § 24-1-3 (M), (Q), (R), (S). Indeed, the PHERA, NMSA 1978, Section 12-10A-1 to -19, was enacted, in part, to "provide the state of New Mexico with the ability to manage public health emergencies in a manner that protects civil rights and the liberties of individual persons." (Emphasis added). To hold that the Governor and Secretary of Health may impose such severe restrictions on businesses and local breweries without due process protections would be inconsistent with a specific legislative purpose. *See id.*

The PHA contains specific, self-executing procedures, including in-court procedures, for implementing isolations and quarantines, *id.* § 24–1–15, managing particular diseases, such as active tuberculosis, *id.* § 24-1-15.1, and managing and enforcing testing and screening. *Id.* § 24-1-15.3.

But the PHA contains no specific, self-executing procedures for closing public places or forbidding gatherings, even when necessary for the protection of the public health. *See generally id.* § 24-1-1 to -40.

If the legislature had intended for these general grants of authority to be self-executing, it would have included specific procedures for carrying them out and would not have repeatedly referenced the need to issue rules. But the secretaries are not empowered to issue generally-applicable orders, which carry the full force of law, in the absence of the normal, deliberative administrative process. *See generally id.* § 12-10A-1 to -19.

II. The Public Health Emergency Response Act and Public Health Act are intended to limit the Governor and Department of Health's self-executing authority.

When a statute grants power, it does so on a limited basis and only as clearly delineated. *See Fernandez v. Espanola Pub. Sch. Dist.*, 2005-NMSC-026, ¶ 6, 138 N.M. 283, 285, 119 P.3d 163, 165. "Where authority is given to do a particular thing and a mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. This is a part of the so-called doctrine of *expressio unius*

est exclusio alterius." *Id.* ¶ 6 (quoting *Bettini v. City of Las Cruces*, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971) (quotation marks and quoted authority omitted), quoted in *City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003–NMSC–028, ¶ 21, 134 N.M. 472, 79 P.3d 297). Thus, when statutes define how and when an agency may exercise authority, they necessarily limit how and when that authority may be exercised. The DOH is no exception.

Being a statutory creation, the DOH has no inherent constitutional authority to act. *See* N.M. Const. art. V, § 1 (creating certain offices, lieutenant governor and secretary of state, but not including the Secretary of Health), NMSA 1978, § 9-7-6(B) (granting "every power expressly enumerated in the laws, whether granted to the secretary or the department or any division of the department, except where authority conferred upon any division is explicitly exempted from the secretary's authority by statute" (emphasis added)).

The County does not dispute that the Governor has explicitly, enumerated, self-executing powers under the PHERA, including the power to declare a "public health emergency," defined as "the occurrence or imminent threat of exposure to an extremely dangerous condition or a highly infectious or toxic agent, including a threatening communicable disease, that poses an imminent threat of substantial harm to the population of New Mexico or any portion thereof." NMSA 1978, §§ 12-10A-3(G), 12-10A-5 to - 6.

But the Governor's self-executing powers are limited to those enumerated within the statute. *See Fernandez*, 2005-NMSC-026, ¶ 6. The PHERA specifically delineates when and how the Governor may declare a public health emergency, *id.* § 12-10A-5, and specifically limits the Governor's power during such an emergency. *Id.* § 12-10A-6. The Act further limits the Governor's authority to implement isolation and quarantine. *Id.* §§ 12-10A-6 to –11.

The Act also limits the Secretary of Health's authority to issue substantive health orders. For example, the DOH is authorized to "make[] a finding that a delay in isolating or quarantining a person will significantly jeopardize the secretary's ability to prevent or limit the transmission of a threatening communicable disease." *Id.* § 12-10A-9(A). If the department made such a finding, "then the Secretary of Health may, by public health order, isolate or quarantine a person without first obtaining a written, ex parte order from a court." *Id.* § 12-10A-9(A). But "within twenty-four hours of the imposition," the Secretary of Health "shall apply for an ex parte order that authorizes the isolation or quarantine," following the procedures delineated by statute. *Id.* § 12-10A-9(B).

Because the statute specifically allows these kinds of health orders, the use of other, more expansive health orders is necessarily precluded. *See Fernandez*, 2005-NMSC-026, ¶ 6.

By failing to define procedures for the exercise of other powers, such as closing public places and forbidding gatherings of people when necessary for the protection of the public health, the PHA demonstrates a legislative intention for these provisions to be non-self-executing.

Indeed, the DOH's enabling legislation, NMSA 1978, Section 9-7-6(B), limits the Department's authority "take administrative action by issuing orders and instructions, not inconsistent with the law, to assure implementation of and compliance with the provisions of law for which administration or execution the secretary is responsible and to enforce those orders and instructions by appropriate administrative action in the courts." *Id.* § 9-7-6 (emphasis added). The express text of the statute requires that the Secretary only act in accordance with a substantive law, under her express, self-executing authority, and the statute contemplates that enforcement would occur not by decree, but in the courts. *See id.*

Therefore, the Governor and Secretary of Health do not have the broad, self-executing powers, which they have exercised during this emergency. As will be shown, the only manner in which the Governor may exercise the non-self-executing powers of the PHA and PHERA would be through administrative rulemaking.

III. The Governor and Secretary of Health may only administer their non-self-executing authority in the Public Health Act and Public Health Emergency Response Act by statutorily-authorized rulemaking activity.

Because statutes serve to limit power, when a statute grants rulemaking authority to an executive agency, it necessarily limits that agency's policy-making power to the issuance of rules. *See Fernandez*, 2005-NMSC-026, ¶ 6 ("[a] statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way."). Thus, even if an agency had the constitutional and statutory authority to issue a particular rule, its failure to comply with the SRA in doing so would invalidate the rule. *State v. Joyce*, 1980-NMCA-086, ¶ 7, 94 N.M. 618, 621, 614 P.2d 30, 33.

For example, the PHERA grants general rulemaking authority to the Secretary of Health and impliedly precludes any other manner of creating public policy. NMSA 1978, § 12-10A-17; *see Fernandez*, 2005-NMSC-026, ¶ 6. Because the SRA applies to the secretary and DOH's rulemaking authority, NMSA 1978, § 9-7-6.3, this Act also limits how and when the Secretary of Health may make rules.

The SRA defines "rule" broadly to include "any rule, regulation, or standard . . . issued or promulgated by an agency and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency." *Id.* § 14-4-2. Orders and decisions, unlike rules, are intended to apply

only to "the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts." *Id.*

This expansive definition of rule includes any attempt to grant a non-self-executing statement of public policy the full force of law. *Livingston v. Ewing*, 1982-NMSC-110, ¶ 9, 98 N.M. 685, 687, 652 P.2d 235, 237. Rules are "not merely an announcement to the public of past or present practice or understanding, or tentative intentions for the future." *Id.* Rules "assert[] a standard of conduct which has the force of law; [they] affect[] the rights or obligations of those who fall within [their] ambit." *Id.* (citing 2K. Davis, Administrative Law Treatise § 7:5 (2d ed. 1979 & Supp.1982)).

The DOH's enabling legislation further limits the Secretary of Health's rulemaking authority:

> Unless otherwise provided by statute, no rule affecting any person or agency outside the department shall be adopted, amended or repealed without a public hearing on the proposed action before the secretary or a hearing officer designated by the secretary. . . . Notice of the subject matter of the rule, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed rule or proposed amendment or repeal of an existing rule may be obtained shall be published once at least thirty days prior to the hearing date in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. All rules shall be filed in accordance with the State Rules Act."

NMSA 1978, § 9-7-6 (emphasis added) (footnote omitted).

The SRA contains rulemaking procedures, which are intended to address the substantive and procedural due process requirements of the New Mexico Constitution. *See id.* §§ 14-4-5.1 to –5.8 (outlining specific procedures for rulemaking, including a notice and comment period, public participation, and concise explanatory statement). Thus, the SRA also limits the DOH's rulemaking authority.

The SRA does grant limited, emergency rulemaking authority to the department, but it limits how and when that authority may be exercised. *See id.* § 14-4-5.6. For example, emergency rules may not "permanently amend or repeal an existing rule," are limited to 180 days in duration, and may not be readopted upon their expiration. *Id.* § 14-4-5.6(E).

But here, the Governor and DOH have used public health orders to issue generally-applicable rules, rules which they assert carry the full force and effect of law. Thus, they have turned non-self-executing grants of authority into law with the stroke of a pen, a process that the SRA was intended to preclude.

But because the Governor and DOH acted without self-executing authority, and because they did not follow any valid, rulemaking procedures, the public health orders are unenforceable against the real parties in interest. *See Rivas v. Bd. of Cosmetologists*, 1984-NMSC-076, ¶ 4, 101 N.M. 592, 593, 686 P.2d 934, 935.

IV. The Governor lacks the constitutional authority to create or change substantive law.

Just as statutes serve to limit an agency's authority, "state constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each. No branch of the state may add to, nor detract from its clear mandate. " *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 20, 120 N.M. 562, 570, 904 P.2d 11, 19 (quoting *State ex rel. Hovey Concrete Products Co. v. Mechem*, 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), overruled on other grounds by *Wylie Corp. v. Mowrer*, 104 N.M. 751, 726 P.2d 1381 (1986)). This separation-of-powers doctrine is embodied within the New Mexico Constitution in Article III, Section 1.

One branch of government acts unconstitutionally when it "unduly encroaches or interferes with the authority of another branch"— "prevent[ing] another branch from accomplishing its constitutionally assigned functions." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 23 (citing *State ex rel. Clark*, 1995–NMSC–051 (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 433, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977)) (other citations omitted).) "

If a governor's actions infringe upon "the essence of legislative authority—the making of laws—then the [g]overnor has exceeded his authority." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 24 (quoting *State ex rel. Clark,* 1995–NMSC–051).

For example, when New Mexico Governor Gary Johnson attempted to overhaul the state's public assistance programs without legislative authority—altering, modifying, and expanding existing law—he unconstitutionally infringed upon the legislature's authority, and the New Mexico Supreme Court struck down the revisions. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 24.

Administrative agencies are also barred from overstepping their constitutional roles and infringing upon the legislature's authority. "[I]t is the particular domain of the legislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, [but] to a lesser extent, [and only] as authorized by the constitution or legislature." *Id.* ¶ 21 (quoting *Torres v. State,* 119 N.M. 609, 612, 894 P.2d 386, 389 (1995)). For example, the New Mexico Public Utility Commission acted unconstitutionally "by effectively deregulating the retail side of the electric power industry in New Mexico in the absence of a statutory mandate from the Legislature." *State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 9, 127 N.M. 272, 276, 980 P.2d 55, 59.

Finally, one branch of government may not unconstitutionally delegate its authority to another branch. *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 41, 140 N.M. 77, 89, 140 P.3d 498, 510. "The Legislature may not vest unbridled or arbitrary authority in an administrative body, however, and must provide

reasonable standards to guide it." *Id.* ¶ 41 (citing *City of Santa Fe v. Gamble–Skogmo, Inc.*, 73 N.M. 410, 417, 389 P.2d 13, 18 (1964)). "An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority." *Rivas v. Bd. of Cosmetologists,* 1984–NMSC–076, ¶ 3. Further, the ability of agencies to create substantive law is limited to rulemaking proceedings, typically under the SRA. *See* NMSA 1978, § 12-8-23 (limiting the application of the Administrative Procedures Act), *id.* § 14-4-1 to -11 (State Rules Act).

The Governor and DOH have attempted to overhaul not an administrative system but the everyday lives of New Mexicans. Implementing massive shutdowns and social distancing measures, the Governor and DOH have seized legislative authority on a massive scale—authority which the constitution vests exclusively in the Legislative Branch. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21.

If the Governor had determined that special or emergency legislation was required on such a massive scale, the New Mexico Constitution provided two answers in Article 4, Section 6—those being special or extraordinary legislative sessions. Then, as part of the political, legislative process, the Governor could use her authority to guide the legislature in passing the new laws that she deems appropriate, with the final decision on which regulations passed resting solely with the legislature. The Governor could then exercise her constitutionally-granted veto

power or sign the politically-negotiated legislation into law. This was how the New Mexico Constitution was designed to operate.

V. Even under an arbitrary and capricious standard of review, the public health "orders" are entitled to little if any deference because they were not the result of a deliberative rule-making process or quasi-judicial administrative decision-making.

Under the SRA, administrative agencies may act in either a quasi-legislative capacity or quasi-judicial capacity: they either (1) make binding law by creating rules; or (2) apply the law to the facts by making orders. But under the current circumstances, and without the backdrop of quasi-legislative rulemaking or any quasi-judicial proceeding, the Governor and Secretary of Health are attempting to create substantive law from whole cloth, on an *ad hoc* basis, and obtain judicial deference. But there is no basis for granting deference when the government acts so outside the normal procedures of the SRA, procedures which are intended to bind and limit the government's authority.

The Governor and Secretary of Health cite to a variety of administrative law cases to argue that the Court owes them special deference when interpreting the applicable statutes. (Pet. 17-19 (citing *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, 120 N.M. 579, 904 P.2d 28 (reviewing an administrative order), *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806 (reviewing

an administrative order), *Mitchell v. City of Roswell*, 1941-NMSC-007, 45 N.M. 92, 111 P.2d 41 (reviewing a city ordinance)). But each case is distinguishable, as they all dealt with either administrative orders, consistent with the definition within the SRA, or an ordinance passed by a legislative body.

The United States Supreme Court decision of *Jacobson v. Massachusettes*, 197 U.S. 11 (1905), is likewise distinguishable. At issue was a statute, not a generally-applicable order or rule, which granted cities and towns in Massachusetts the authority to require vaccinations.

South Bay United Pentacostal Church v. Newsom, 140 S. Ct. 1613 (2020), and *Calvary Chapel Cayton Valley v.* Sisolak, No. 19A1070, 591 U.S. ___ (2020), are distinguishable because they did not review the authority of the state to prohibit all gatherings of five or more people but rather, much larger. Moreover, the Supreme Court was not reviewing the authority of the California governor and DOH to make sweeping policy declarations outside the normal administrative process; that question was simply not before the court and would have needed to be resolved under each state's own administrative law. *Legacy Church v. Kunkel*, No. CIV 20-0327 JB/SCY, 2020 U.S. Dist. LEXIS 68415 (D.N.M. April 17, 2020), is likewise inapposite because it only reviewed a similarly narrow question under federal constitutional law.

The Court decision to issue a writ in *State of New Mexico v. Hicks*, Case No. S-1-SC-38279, is also distinguishable. The issue in *Hicks* was whether the Mayor of Grants, New Mexico, could contradict the directives of the Governor and Secretary of Health. But the Court never issued a formal opinion, and never endorsed the authority of the Governor and Secretary of Health to bind parties outside of the government.

Moreover, at issue is the DOH's jurisdiction to issue public health orders that have the force and effect of law, and "New Mexico courts will accord 'little deference' to the agency's own interpretation of its jurisdiction." *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 13 (quoting *El Vadito de los Cerrillos Water Ass'n v. New Mexico Pub. Serv. Comm'n*, 115 N.M. 784, 787, 858 P.2d 1263, 1266 (1993)).

VI. The decision to impose the same indoor dining restrictions to all of New Mexico was arbitrary and capricious.

Eddy County has some of the highest temperatures in the State of New Mexico. In June 2020, temperatures exceeded 100 degrees Fahrenheit on ten of thirty days.[2] The two hottest days in Carlsbad, the county seat, were June 22 and 23, 2020, which topped at 106 and 107 degrees, respectively.

[2] The temperature data for Carlsbad in June and July 2020 is available at the website for the National Weather Service Forecast Office in Midland / Odessa, TX, available at https://w2.weather.gov/climate/xmacis.php?wfo=maf, with a last date of access of July 23, 2020.

July has been even hotter. Temperatures in Carlsbad exceeded 100 degrees Fahrenheit on sixteen days between July 1, 2020, and July 23, 2020; they exceeded 105 on seven days; and the hottest days were July 10, 11, 12, 13, 14, and 16, when temperatures were 112, 108, 108, 108, 112, 109, and 107, respectively.

With these temperatures, not only is it unwise to be outside, it is dangerous. "Heat is one of the leading weather-related killers in the United States, resulting in hundreds of fatalities each year and even more heat-related illnesses." Heat Safety Tips and Resources, National Weather Service, National Oceanic Atmospheric Administration, https://www.weather.gov/safety/heat; *see also* Warning Signs and Symptoms of Heat-Related Illness, Centers for Disease Control and Prevention, June 19, 2017, https://www.cdc.gov/disasters/extremeheat/warning.html. The Centers for Disease Control advises that people "[s]tay in an air-conditioned place as much as possible" during high temperatures, and that even fans will not prevent heat-related illness when temperatures are in the high 90s. *Id.* "Although anyone at any time can suffer from heat-related illness, some people are at greater risk than others:

- Infants and young children
- People 65 years of age or older
- People who are overweight
- People who overexert during work or exercise

- People who are physically ill, especially with heart disease or high blood pressure, or who take certain medications, such as for depression, insomnia, or poor circulation.

Id. Outdoor eating in Eddy County, New Mexico, is simply not a viable option for the vast majority of restaurants and local breweries. Absent conditions that would simulate indoor air-conditioning, which would defeat the purpose of outdoor eating policies, allowing restaurants to operate outdoor-only dining is the equivalent of not allowing them to operate at all.

The Court should therefore hold that the Governor and DOH have simply painted with too broad a brush; the policies in place for Southeast New Mexico are unreasonable given the weather conditions that exist. The policies cause too great a burden on local restaurants and breweries and must fail even under an arbitrary and capricious standard of review.

CONCLUSION

The Court should hold that the public health orders are unenforceable against the real parties in interest. First, the acts at issue have both self-executing and non-self-executing provisions. Self-executing laws contain detailed procedures, which are intended to have immediate effect upon their adoption. Non-self-executing laws, in contrast, require some other implementing rule or legislation before they carry the full force of law. The structure of the PHERA and

PHA show an intention to make some powers self-executing—like those relating to the quarantine and isolation of individuals—and some non-self-executing—like the authority to close public places and forbid gatherings of people.

Second, the PHERA and PHA are intended to limit the Governor and DOH's self-executing authority. When statutes enumerate the manner in which something should be done, that enumeration serves to limit the options available to only those means. Because the acts specifically enumerate how and when the Governor and Secretary of Health may exercise their authority—for example, by specifying the exact quarantine and isolation procedures that apply—other means of exercising the authority are necessarily precluded.

Third, the Governor and Secretary of Health may only administer their non-self-executing authority in the PHA and PHERA by statutorily-authorized rulemaking activity. The SRA defines a "rule" as any generally-applicable law put in place following a number of specified procedures. The SRA is not inflexible and provides the means for the Governor and Secretary of Health to implement emergency rules, with limitations that are consistent with democratic principles of self-governance. Orders, in contrast, apply the law to a <u>particular</u> set of facts and do not apply generally to everyone. But the Governor and Secretary of Health have been using orders in the place of rules and have not followed the necessary quasi-legislative or quasi-judicial procedures necessary for either one. Therefore, the

public health orders cannot have the full force and effect of law and are unenforceable against the real parties in interest.

Fourth, the Governor lacks the constitutional authority to create or change substantive law. The division of powers, while not inflexible, is intended to keep one branch of government from overstepping its bounds and intruding into the roles and functions of another branch. The Governor and Secretary of Health are within the executive branch and therefore lack the inherent constitutional authority to create substantive law. Therefore, there is no constitutional support for their completely side-stepping the procedure and requirements of the SRA.

Fifth, even under an arbitrary and capricious standard of review, the public health "orders" are entitled to little if any deference because they were not the result of a deliberative rule-making process or quasi-judicial administrative decision-making. Moreover, the issue before the Court is whether the Governor and Secretary of Health have jurisdiction to issue sweeping public health orders that carry the full force of law, and agencies are entitled to little deference when the question is jurisdictional.

Finally, the decision to impose the same indoor dining restrictions on Eddy County—where temperatures top 110 degrees Fahrenheit—as apply to the rest of New Mexico was arbitrary and capricious. Outdoor eating in Eddy County, New Mexico, is simply not a viable option. Absent conditions that would simulate

indoor air-conditioning, allowing restaurants to operate outdoor-only dining is the equivalent of not allowing them to operate at all.

WHEREFORE, Petitioner asks that the Court hold that the Governor's and Department of Health's Orders, which entirely preclude indoor dining, are unconstitutional and unenforceable against the residents of Eddy County, New Mexico.

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CERTIFICATE OF SERVICE

I certify that on Friday, July 24, 2020, I electronically filed the foregoing document, and that a copy of the foregoing was served by electronic mail to the following counsel of record:

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