IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Petitioners,

v. **S-1-SC-38396**

THE HONORABLE RAYMOND L. ROMERO,

Respondent,

and

OUTLAW MEATS, LLC,
a New Mexico Limited Liability Company,
F-2 ENTERPRISES, INC. d/b/a TEXAS CLUB
GRILL & BAR, a New Mexico Corporation,
K-BOBS OF RATON, INC., a New Mexico Corporation,
K-BOBS OF LAS VEGAS, INC., a New Mexico Corporation,
B.M.B FINANCIAL, INC., d/b/a/ TRINITY HOTEL,
a New Mexico Limited Liability Company,
RED RIVER BREWING COMPANY, LLC,
a New Mexico Limited Liability Company,
NEW MEXICO RESTAURANT ASSOCIATION[1],

Real Parties in Interest.

[1] Undersigned attorney Jonathan Diener authored this brief in full and has received no monetary compensation from anyone, but will receive some compensation from individual voluntary donors and possibly the owners of Jalisco Café.

AMICUS CURIAE BRIEF FOR JALISCO CAFE

INTRODUCTION

It is unclear to this amicus curiae whether the Supreme Court intends to address the merits of the underlying case of the Real Party in Interest, New Mexico Restaurant Association, in this matter. The filing of this brief does not represent a request that the Court do so, but rather is filed in the case that the Court does so.

There are no scientific facts which provide a rational basis for the governor's July 13, 2020 order once again closing all restaurants for indoor dining. There was no increase in death rates in New Mexico from COVID-19 (hereinafter referred to as "COVID") leading up to the governor's July 13 order shutdown of restaurants. The New Mexico death rates were already very low and falling. The governor's public statements that COVID *cases* are on the rise in New Mexico implying a need for measures such as the restaurant shutdown are meaningless because the rise in the numbers of cases is correlative with an increase in the amount of testing. Analysis and studies of the efficacy of shutdowns in stemming the spread of the virus, including comparative data from countries where there were no shutdowns or limited ones, show no positive effect on the spread of the virus.

The governor's July 13 order violates constitutional principles of the separation of powers and substantive due process.

I. THERE ARE NO SCIENTIFIC FACTS WHICH PROVIDE ARATIONAL BASIS FOR THE GOVERNOR'S JULY 13 ORDERS

After a closure of New Mexico restaurants for dine-in service for two months, the governor permitted restaurants to open for indoor dining on June 1, 2020 only to shut them down again on July 13, 2020. On July 6, 2020, just a few days before June 9 when the governor announced her new shutdown of restaurants, the death rates had been steadily falling in the United States for ten weeks. In an article in the Federalist, "*CDC: After 10-Week Decline In COVID-19 Deaths, It May Soon No Longer Be an Epidemic*", the author Allison Schuster, quoting directly from the CDC website, stated: "Based on death certificate data, the percentage of deaths attributed to pneumonia, influenza or COVID-19 (PIC) decreased from 9.0% during week 25 to 5.9% during week 26, representing the tenth week of a declining percentage of deaths due to PIC." Allison Schuster, *CDC: After 10-Week Decline In COVID-19 Deaths, It May Soon No Longer Be an Epidemic,* July 6, 2020, https://thefederalist.com/2020/07/06/cdc-after-10-week-decline-in-covid-19-deaths-it-may-soon-no-longer-be-an-epidemic/

The article also points out that: "The CDC defines an epidemic as an outbreak from which the number of deaths per week exceeds a given percentage of total deaths within the nation. The number of deaths from COVID-19 has steadily declined since hitting its peak in early May after it began spiking in the second week in March.... The CDC said the Wuhan flu death rate had, during the last week

in June, become equal to the epidemic threshold of 5.9 percent, reaching its lowest point since the end of last year."

How is it that New Mexico's governor could believe the state's restaurants should be shut down when COVID deaths had been steadily dropping nationwide to the point that there was no longer technically an epidemic? New Mexico presents no unique case. Its number of deaths from COVID per capita is about 32% *below* the figure for the United States as a whole.[2] The COVID daily new death numbers in New Mexico have also been steadily falling since the peak of May 15, 2020 on which day six COVID deaths were recorded.

In all of June 2020 there was an average of about two new deaths per day. In the week before the governor announced her orders shutting down restaurants again on June 9, the COVID death figures in New Mexico were as follows, July 2– one, July 3 - one, July 4 - four, July 5 - one, July 6 - zero, July 7 - one, July 8 - two. (Figures come from the compilation of the very mainstream Atlantic Monthly magazine's COVID website. There was no uptick in deaths which preceded the governor's orders and which was a rational basis for her decision to shut restaurants yet again.

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[2] COVID death figures throughout this brief come from the Center for Disease Control website, the John Hopkins University Corona Virus Resource Center at https://coronavirus.jhu.edu/data/mortality and compilations done by the COVID Tracking Project of the Atlantic magazine at https://covidtracking.com/

The total COVID death numbers in New Mexico have been and remain low: 601 deaths as of July 25, 2020, in a population of about 2,100,000. That is a percentage of under .0003 percent of the population. How does such a very low death rate justify the governor shutting down New Mexico restaurants yet again? When looking at the actual numbers one feels a little like the child in the story of the emperor's new clothes who yelled to the crowd who were admiring the supposed new clothes, that the emperor was in fact naked. So much hysteria and fear and overresponse from the governor's office for a death rate that is so small and on the decline.

Shutdown supporters may cry it is only because the governor has been so vigilant that has kept the death figures so low. This is another fallacy. There are three industrialized countries which did not utilize lockdowns: Japan, Sweden and South Korea. Sweden's COVID death to population percentage is .00056 %. (5,697 deaths in a population of 10,100,000, July, 2020 figures). This is only slightly higher than the percentage in the United States which is approximately .00044 percent (145,013 deaths in a population of 3,330,003,650, July 2020) where lockdowns were used extensively.

In Japan, business closures were only recommended and not mandated as there was no legal basis for the prime minister to mandate closures. Some businesses closed voluntarily. Others did not. No shelter in place orders were

issued. See Isabel Reynolds, *Tokyo Reluctantly Shuts Some Non-Essential Businesses After Coronavirus Cases Triple in 10 Days*, TIME, April 10, 2020, https://time.com/5818968/tokyo-coronavirus-lockdown/. With a population of over 126 million, in Japan there have been only 992 COVID deaths.

South Korea shut down public places such as museums and libraries, but not restaurants or businesses. There were no shelter in place orders, although it was recommended that people who could work from home do so. Businesses remained open and people were allowed to go to work. See Andrew Jeong, *South Korea Tamps Down Coronavirus, but Economy Remains Paralyzed,* Wall Street Journal, April 6, 2020, https://www.wsj.com/articles/south-korea-tamps-down-coronavirus-but-economy-remains-paralyzed-11586180838; Max Fisher and Coe Sang-Hun, *How South Korea Flattened the Curve,* April 10, 2020, https://www.nytimes.com/2020/03/23/world/asia/coronavirus-south-korea-flatten-curve.html?action=click&module=RelatedLinks&pgtype=Article
In South Korea, with a population of over 51 million, there have been under 300 COVID deaths.

The lockdowns were an unprecedented mass experiment on a huge scale. In the past, during epidemics only the sick were quarantined. In spite of the extensive use of lockdowns in the West, comprehensive studies of their effectiveness, which looked at the dates of lockdowns in various U.S. states and countries in relation to

the COVID death rates over time have concluded that they were ***not*** effective in curtailing the spread of the virus. (For a summary and analysis of the J.P. Morgan study see *Lockdowns failed to alter the course of pandemic, JP Morgan study claims,* May 22, 2020, https://internewscast.com/lockdowns-failed-to-alter-the-course-of-pandemic-jp-morgan-study-claims/. Graphs 1 and 2 in the J.P. Morgan study just cited show that in almost every country and every state of the U.S. rates of contraction of the virus dropped after the lockdowns were lifted. The J.P. Morgan study concluded that COVID "likely has its own dynamics" which are "unrelated to often inconsistent lockdown measures." The same finding was reported in an article in the Wall Street Journal on April 26, 2020. T.J. Rodgers, *Do Lockdowns Save Many Lives? In Most Places, the Data Say No*, The Wall Street Journal, April 26, 2020. For a summary and analysis of the Wall Street Journal article, see Nickie Louise, Tech Startups, April 27, 2020, https://techstartups.com/2020/04/27/lockdowns-dont-seem-save-many-lives-places-new-data-show/

The governor, in her public statements leading up to her July 13 orders at issue in this case, referred to numbers of COVID cases being on the rise in New Mexico. But this was not meaningful and actually misleading because the amount of testing was increasing in a correlative manner. See Exhibit 1, for graphs of both

case numbers and testing in New Mexico. (Graphs obtained from the COVID Tracking Project of the Atlantic magazine, *supra*, at https://covidtracking.com/)

II. THE SEPARATION OF POWERS DOCTRINE REQUIRES THIS COURT TO STRIKE DOWN THE JULY 13 ORDERS

Article III § 1 of the New Mexico Constitution explicitly provides for the separation of governmental powers:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted....
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> N.M. Const. art. III, § 1.

"This provision reflects a principle that is fundamental in the structure of the federal government and the governments of all fifty states. The doctrine of separation of powers rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty. See *Gregory v. Ashcroft*, 501 U.S. 452, 459, 111 S.Ct. 2395 2400, 115 L.Ed.2d 410 (1991). James Madison expressed this sentiment more than two hundred years ago when he wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Alexander Hamilton, James Madison & John Jay, The Federalist, A Commentary on the

Constitution of the United States No. XLVII, at 329 (1901 ed.)." *State ex rel. Clark v. Johnson,* 120 N.M. 562, 904 P.2d 11, 1995 NMSC 48 (N.M.1995)

In *State ex rel. Clark v. Johnson, supra,* the Court held that the governor's entering into comprehensive casino contracts without the Legislature's involvement violated the separation of powers required by the New Mexico constitution. The Court said, "This Court has previously held that Article III, Section 1 mandates that it is the Legislature that creates the law, and the Governor's proper role is the execution of the laws. State v. Fifth Judicial Dist. Court, 36 N.M. 151, 153, 9 P.2d 691, 692 (1932); see also State v. Armstrong, 31 N.M. 220, 255, 243 P. 333, 347 (1924) (recognizing that the Legislature has "the sole power of enacting law"). Our task, then, is to classify the Governor's actions in entering into the gaming compacts. Although the executive, legislative, and judicial powers are not " 'hermetically' sealed," they are nonetheless "functionally identifiable" one from another. Chadha, 462 U.S. at 951, 103 S.Ct. at 2784. If the entry into the compacts reasonably can be viewed as the execution of law, we would have no difficulty recognizing the attempt as within the Governor's authority as the State's chief executive officer. If, on the other hand, his actions in fact conflict with or infringe upon what is the essence of legislative authority--the making of law--then the Governor has exceeded his authority."

It is certainly as important for this Court to scrutinize the actions of the current governor and the DOH as it was when this Court decided *State ex rel. Clark v. Johnson*. Here, not only the constitutional principle of separation of powers is at stake, but basic liberties such as the right to earn a living, to have a business and the right to property (what is a restaurant worth if people aren't allowed to eat there?), which are protected by the New Mexico due process clause, are being seriously infringed on by a governor, in concert with her agency the DOH, who are creating law, executing it and enforcing it. (The Court may take judicial notice of the fact that the governor has been using the State police to enforce her orders throughout New Mexico and prosecute violators, in part, because local law enforcement are simply unwilling to do so due to the orders' draconian nature.)

To say that the Legislature has already authorized the shutdown policies issuing from the governor's office by enacting the health emergency powers she is basing her orders on is incorrect. The Legislature's public health emergency enactments are broad and general in their language and purview. One act relates primarily to quarantines of sick people. The other gives the governor power to close public places. Does that mean public places such as schools, museums, parks and government facilities? Or does that mean any place where the public might go, i.e. stores, restaurants, etc. It is not clear. But even if it means any place the

public might go, did the Legislature mean to give the governor unbridled power as long as she alone determined that there still existed a public health emergency? Perhaps in March when little was known about the properties of this virus and its potential impact, when the Imperial College of London's chief epidemiologist's opinion that 2.2 million people in the U.S. would die from the virus was being taken seriously by the White House and was greatly influencing Great Britain's policies, perhaps at that time there was a public health emergency justifying some draconian utilization of the emergency powers in the Acts.

But now that the U.S. death rate is no longer high enough to classify this as an epidemic, now that the numbers of the daily COVID related deaths in New Mexico are hovering around two, isn't it time to realize we are not in a public health emergency that would allow a governor to shut down the entire restaurant industry in New Mexico? At what point do these emergency powers end—when the governor decides they do? That would be giving her the absolute and unbridled power about which great constitutional thinkers cited in *State ex rel. Clark v. Johnson*, *supra,* and the Wisconsin Supreme court concurring opinion have warned.

Certainly, our Legislature never envisioned nor intended conferring this kind of unchecked power on the governor for an indefinite time period with no limits for her to set policy, make laws and shut industries down in New Mexico without

their consent. When they passed the public health emergency acts they had no idea that they would be used for a lockdown of the population or of businesses or a particular industry. No one had ever considered this to be an appropriate or necessary response to a disease epidemic so they clearly had not envisioned this when they enacted the laws they did.

The Eleventh Circuit in *Robinson v. Attorney Gen.*, 957 F.3d. 1171, 1179 (11th Cir. 2020) had this to say about the current situation that the case at bar is dealing with. "[J]ust as constitutional rights have limits, so too does a state's power to issue executive orders limiting such rights in times of emergency." That is, even during a pandemic, state actions undertaken in service of the public health cannot clearly infringe constitutional rights. Thus, "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so to the public health if it is "exercised in particular adjudge, and thereby give effect to the Constitution." *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) at 31. State action may impermissibly deviate from having a "real or substantial relation" circumstances and in reference to particular persons" in "an arbitrary, unreasonable manner." *Id.* at 28.

In Wisconsin, the Legislature took issue with the powers asserted by the executive branch in response to the coronavirus pandemic and filed suit. As here, the Wisconsin governor had issued an order which declared a public health emergency and directed the DHS, equivalent to New Mexico's Department of Health, to "take all necessary and appropriate measures to prevent and respond to incidents of COVID-19 in the State". The order further suspended administrative rules that the DHS Secretary thought would interfere with the emergency response and increase the health threat and proclaimed "that a period of abnormal economic disruption existed". Whereupon the Secretary of the Wisconsin DHS issued orders which, among other things, prohibited all forms of travel except what he deemed essential and ordered"[a]ll for-profit and non-profit businesses" to "cease all activities" except for minimum operations that the Secretary deemed basic.

While the technical holding of the Wisconsin Supreme Court finding the governor's and DHS's orders unlawful hinged on whether the DHS Secretary's orders were or were not "rulemaking", the Court's opinion clearly takes issue with the unchecked policymaking powers wielded by the executive branch in derogation of the role of the Legislature and the affront to the constitutional rights and freedoms of the people of Wisconsin the DHS's orders represented. The Court said:

> Although the Secretary's argument seems to accept the conceptual distinction between executive and legislative power, it does not adequately

address the totality of what the Order accomplishes. The Order, it is true, contains an executive component. But much more significantly for our analysis today, it also announces some shockingly profound public policy decisions, or assumes they have previously been made. For example, the Order could not function without a public policy decision that the Secretary of the Department of Health Services has the authority to confine people to their homes. That's a policy decision with respect to both the grant of authority itself, as well as the choice of person in which to vest it. So is the public policy decision that the Secretary has the power to close private businesses, or forbid private gatherings, or ban intra-state travel, or dictate personal behavior. The Order also depends on a public policy decision that the Secretary has the authority, all by herself, to criminalize whatever conduct she believes is anathema to controlling communicable diseases.

The heart of the Secretary's error is her failure to recognize that her Order contains both executive and legislative components. Executive action does not exist in a vacuum. It must execute on a policy——a policy chosen by the legislature or promulgated as a rule. When such a policy decision has not been promulgated by the agency or adopted by the legislature, and the executive acts anyway, it is by that very action either announcing adoption of the policy or erroneously assuming its existence. Consequently, when the Order confines people to their homes to manage the spread of COVID-19, it does far more than engage the executive power. It also simultaneously asserts there has been a public policy decision to vest this type of power in the Secretary. Her exercise of that authority in this situation is executive in nature, but the genesis of the authority itself is not——it is legislative. The same is true with respect to the Order's implicit assertion that there has been a public policy decision to vest in the Secretary the power to close private businesses, or forbid private gatherings, or ban intra-state travel, or dictate personal behavior.

But no such public policy decisions have been taken. There are no statutes or rules that confer on the Secretary these sweeping powers. The Secretary not only knows this, she affirmatively asserts that Wis. Stat. § 252.02 gave her all the power needed to confer this type of authority on herself: "Under the statute's plain language," the Secretary says, "DHS may give legal force to suitable actions that it then carries out. The law requires no intermediary that DHS must go through . . . ." If § 252.02 enables the Department to confer on itself the power to confine people to their homes, close businesses, etc., then it has quite obviously transferred no small amount of the legislature's core

> authority to the executive branch, thereby enabling the Secretary to make up public policy decisions as she goes along. Without that understanding of the Secretary's authority, the Order could not function.
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> *Wisconsin Legislature v. Secretary-Designee Andrea Palm, Julie Willems Van Dijk and Lisa Olson, In Their Official Capacities as Executives of Wisconsin Department of Health Services*,
> 2020 WI 42;
> https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=260868

The concurring opinion of Justice Rebecca Grassl Bradley explored the constitutional importance of the separation of powers doctrine as it applied to the exercise of emergency powers by the executive branch and executive orders in Wisconsin in response to the COVID epidemic. Although the quote from her opinion is long, the opinion's lucidity and the weight of the authority it cites warrant its inclusion.

> Under the Wisconsin Constitution, all governmental power derives "from the consent of the governed" and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1. The people of Wisconsin never consented to any elected official, much less an unelected cabinet secretary, having the power to create law, execute it, and enforce it. "[E]ver vigilant in averting the accumulation of power by one body— —a grave threat to liberty——the people devised a diffusion of governmental powers" among three branches of government. Gabler v. Crime Victims Rights Bd., 2017 WI 67, ¶60, 376 Wis. 2d 147, 897 N.W.2d 384. Whenever any branch of government exceeds the boundaries of authority conferred by the people, it is the duty of the judicial branch to say so.
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> However well-intentioned, the secretary-designee of the Department of Health Services exceeded her powers by ordering the people of Wisconsin to follow her commands or face imprisonment for noncompliance. In issuing her order, she arrogated unto herself the power to make the law and the

power to execute it, excluding the people from the lawmaking process altogether. The separation of powers embodied in our constitution does not permit this. Statutory law being subordinate to the constitution, not even the people's representatives in the legislature may consolidate such power in one person.

To the Framers of the United States Constitution, the concentration of governmental power presented an extraordinary threat to individual liberty: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961).

…Endowing one person with the sole power to create, execute, and enforce the law contravenes the structural separation of powers established by the people. Through the Wisconsin Constitution, the people confer distinct powers on the legislative, executive, and judicial branches of government. "Three clauses of the Wisconsin Constitution embody this separation: Article IV, Section 1 ('[t]he legislative power shall be vested in a senate and assembly'); Article V, Section 1 ('[t]he executive power shall be vested in a governor'); and Article VII, Section 2 ('[t]he judicial power . . . shall be vested in a unified court system')." Gabler, 376 Wis. 2d 147, ¶11. "[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). Under the Wisconsin Constitution, the legislature makes the laws; an unelected cabinet secretary serving in the executive branch cannot unilaterally do so.

Underlying the separation of powers reflected in our governmental structure is an avoidance of concentrations of authority: "it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them." John Locke, The Second Treatise of Civil Government § 143 (1764), reprinted in Two Treatises of Government 119, 194 (Thomas I. Cook ed., 1947). "Montesquieu shared Locke's concern about the threat to liberty from accumulated power, expressing apprehension that a government with shared legislative and executive power could first 'enact tyrannical laws' then 'execute them in a tyrannical manner.'" Gabler, 376 Wis. 2d 147, ¶5 (citing 1 Montesquieu, The Spirit of the Laws 151-52 (Oskar Piest et al.

eds., Thomas Nugent trans., 1949) (1748) (footnote omitted)). Preserving the perimeters of power constitutionally conferred on each branch of government is essential for securing the liberty of the people. "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting). Although consolidation of power in one person may be tempting in times of exigency, for purposes of expeditiously producing an efficient and effective response to emergencies like a pandemic, history informs of the perils of the consolidation of power, and not merely through the exhortations of the Founders and philosophers. Regrettably, we have tangible examples of judicial acquiescence to unconstitutional governmental actions considered——at the time——to inure to the benefit of society, but later acknowledged to be vehicles of oppression. This is particularly true in the context of the police power, the source of authority cited by the DHS secretary-designee in this case.

"Historically, when courts contaminate constitutional analysis with then-prevailing notions of what is 'good' for society, the rights of the people otherwise guaranteed by the text of the Constitution may be trampled. Departures from constitutional text have oppressed people under all manner of pernicious pretexts:

[T]he notion of "social harm" supporting the police power was completely untethered from constitutional text and ripe for misuse in the hands of a Justice such as Holmes, who believed that the Constitution could be reduced to ad hoc balancing. Eugenics was built upon the notion of harm; indeed, it thrived on a sense of imminent doom: that society was degenerating because of what were called its "weaklings" and "discards." The idea that society was being swamped by incompetents was a common trope for eugenicists: the unfit were a "menace." . . . Like the great popular eugenicists of the day, Holmes wrote in Buck that eugenics would prevent society from being "swamped" by incompetents, that fewer criminals would be executed, and that fewer imbeciles would starve.

Victoria Nourse, Buck v. Bell: A Constitutional Tragedy from a Lost World, 39 Pepp. L. Rev. 101, 114-15 (2011) (emphasis added; footnotes omitted)." State v. Roberson, 2019 WI 102, ¶84, 389 Wis.2d190, 935 N.W.2d813

In Korematsu v. United States, 323 U.S. 214 (1944), the United States Supreme Court professed to apply "the most rigid scrutiny" to the internment of Japanese-Americans during World War II but nevertheless found the "assembling together and placing under guard all those of Japanese ancestry" in "assembly centers" to be constitutional based on "[p]ressing public necessity" and further rationalized this defilement of the Constitution because "the need for action was great, and time was short." Id. at 216, 221, 223-24. "Korematsu is one of the Supreme Court's most reviled decisions——a relic of this nation's dark past widely regarded as unlikely to be repeated." Stephen Dycus, Requiem for Korematsu, 10 J. Nat'l Sec. L. & Pol'y 237 (2019). And thankfully so. Nonetheless, the public fear underlying this contemptible case is capable of pressuring jurists to misuse the constitution in other contexts:

Judges "are heavily influenced by the perceived practical consequences of their decisions rather than being straight-jacketed by legal logic. . . . In a democracy," [Eric Yamamoto] writes, "judicial independence serves as the crucial check on the political branches' majoritarian impulses." Careful judicial scrutiny is especially important in times of stress, when Americans may find themselves "at the mercy of wicked rulers, or the clamor of an excited people."

Id. at 246 (citing Eric K. Yamamoto, In the Shadow of Korematsu: Democratic Liberties and National Security (Oxford Univ. Press 5 Abrogated by Trump v. Hawaii, 138 S. Ct. 2392 (2018). No. 2020AP765-0A.rgb 8 2018) (footnotes omitted))...

...These cases, among other similarly despicable examples, illustrate rather painfully why the judiciary cannot dispense with constitutional principles, even in response to a dire emergency. Indeed, it is in the midst of emergencies that constraints on government power are most important..... "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure…. [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting). Even if a significant portion of the public supports the Safer at Home Order, the judiciary must protect the structural separation of powers embodied in our state and federal constitutions in order to avoid future monumental mistakes from which our republic may never recover.

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evilminded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (overruled in part on other grounds by Katz v. United States, 389 U.S. 347 (1967)).

Wisconsin Legislature v. Secretary-Designee Andrea Palm, Julie Willems Van Dijk and Lisa Olson, In Their Official Capacities as Executives of Wisconsin Department of Health Services, 2020 WI 42.

III. THE JULY 13 ORDERS VIOLATE THE DUE PROCESS CLAUSES OF THE NEW MEXICO AND U.S. CONSTITUTION

The governor's orders were substantive due process violations of the U.S. and New Mexico's due process clauses, and the case is ripe for a decision on that claim. See *Am. Fed'n of State v. Bd. of Cnty. Comm'rs of Bernalillo Cnty.*, 2016 NMSC 17, 373 P.3d 989 (N.M. 2016). The various COVID-related public health orders, including amended and renewed orders, are available at https://cv.nmhealth.org/public-health-orders-and-executive-orders/. This Court may take judicial notice of the well-known fact that these orders compelled New Mexicans to shelter in place and ordered all non-essential businesses to close, including restaurants and churches.

It is a fundamental tenet of constitutional analysis that where a constitutional right is restricted by a government's actions, that a court must use "strict scrutiny" to determine the validity of the action. This scrutiny requires the finding of a

compelling state interest, but also asks whether the restriction on the right alleged was done in a manner that is least restrictive. *State v. Bent*, 328 P.3d 677 (N.M. App. 2013). An explanation of the traditional three-tiered analysis of substantive due process claims is articulated in the case of *ACLU of NM v. City of Albuquerque*, 2006 NMCA 78, 137 P.3d 1215 (2006), NMCA 78, 139 N.M. 761 (N.M. App. 2006).[3]

The shutdown orders issued by the governor and the DOH clearly affected fundamental rights. The orders to shelter in place and close businesses, like others in this country, were an utterly unprecedented restriction on the fundamental right to travel and the right to assemble. Closure of non-essential businesses, including churches, affected religious rights, which too are fundamental.

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[3] "When an ordinance is challenged on due process or equal protection grounds, one of three levels of review is applied, depending on either the rights affected by the ordinance, or the status or group of people it affects. Breen v. Carlsbad Mun. Schs., 2005-NMSC-028, ¶ 8, 138 N.M. 331, 120 P.3d 413. "Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty" guaranteed by the constitution. Marrujo, 118 N.M. at 757, 887 P.2d at 751. Under strict scrutiny, the government bears the burden to demonstrate a compelling state interest supporting the challenged scheme, and to show that the statute accomplishes its purpose by the least restrictive means. Id. at 757, 887 P.2d at 751. Intermediate scrutiny applies when legislative classifications infringe on important but not fundamental rights, or involve sensitive but not suspect classes.2 Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 15, 125 N.M. 721, 965 P.2d 305. Under intermediate scrutiny, the party supporting the statute must prove the scheme is substantially related to an important governmental interest. Breen, 2005-NMSC-028, ¶ 13, 138 N.M. 331, 120 P.3d 413. If the ordinance "does not affect a fundamental right or create a suspect classification, nor impinge upon an important individual interest," rational basis review applies. Mieras v. Dyncorp, 1996-NMCA-095, ¶ 27, 122 N.M. 401, 925 P.2d 518. Under rational basis, the challenger has the burden to demonstrate that the ordinance is not rationally related to a legitimate state interest, defined by our Courts as the absence of a "firm legal rationale or evidence in the record to support the . . . classification." Breen, 2005-NMSC-028, ¶ 16, 138 N.M. 331, 120 P.3d)

Quarantines in the past, which courts have approved, involved quarantining a small group of people such as persons coming to an area in a boat. *City of St. Louis v. McCoy*, 18 Mo. 238 (Mo. 1853). Laws and their execution permitting quarantines of various kinds have been scrutinized carefully. *Hurst v. Warner,* 102 Mich. 238, 60 N.W. 440 (Mich. 1894) (actions based on a law allowing for a quarantine of boat passengers until luggage could be disinfected were found to be violative where there was no evidence there was disease in the area the boat came from).

Perhaps the broadest quarantine addressed by an American court until the present was in *Compagnie Francaise De Navigation A Vapeur v. Louisiana State Board of Health* et al., 86 U.S. 380 22, S.Ct. 811, 46 L.Ed. 1209 (1902), where the Court approved legislation that was used to prevent healthy persons from entering a port area in New Orleans where an outbreak of yellow fever had occurred.

In the present day, we have stay-at-home orders and business closure orders which were issued statewide. New Mexico is about 425 miles from north to south. This is further than it is from Baltimore, Maryland to Boston, Massachusetts, a route which crosses five different states. Assuming he had the power to do it, would it have made sense for a Maryland governor to make the shutdown orders for a Massachusetts county which had been unaffected by the virus based on the existence of many cases in Baltimore?

The governor's and DOH shelter in place and business closure orders were being renewed even when it became clear that the disease was not spreading to all parts of the state in any appreciable numbers. Other states' governors ended the closures in some parts of their states where COVID had not reached any appreciable numbers. In the first week of May, the Indiana governor opened businesses in many counties of the state but not others where there were more COVID cases. Governor Kate Brown gave permission to 28 of Oregon's 36 counties to reopen bars, restaurants, personal services businesses and malls as of May 15. Colorado allowed Grand Junction and Mesa County to open before others because of the low COVID case count in that county. It would seem that New Mexico may have been the only, or one of a very few states, at least of its physical size, which employed a "one shutdown fits all" approach, an approach which has resulted in a serious violation of the rights of New Mexicans.

Silver City Mayor Ken Ladner has said: "I can understand the governor's logic behind wanting to treat the state as a whole, but down here in southwest New Mexico, we really haven't had that many cases." Ladner also said. "I think that using best practices and good common sense, we could operate safely." Jens Gould, *Mayors across New Mexico divided on communication from Governor's Office*, Santa Fe New Mexican, May 23, 2020, https://www.santafenewmexican.com/news/coronavirus/mayors-across-new-

mexico-divided-on-communication-from-governor-s-office/article_21c7f408-99e9-11ea-a10b-730e2bfdb2a9.html.

There is no question that the governor's and DOH orders were not the least restrictive means to protect citizens from COVID.

It could be argued that the right to run a business, as asserted by Jalisco Café in its case currently before the Sixth Judicial District, is an economic right, which is not a fundamental right and, therefore, the least restrictive means test is inapplicable. That argument overlooks the point that the business closure as well as the shelter in place orders were part of an overarching government response to what it decided was a public health emergency. It also overlooks the point that the overall response and its orders clearly did impinge on fundamental constitutional rights of all New Mexicans, including the right to travel, to assemble, and the right to practice religion by attending church. Since the orders did not utilize the least restrictive means to carry out the state's agenda, they violated substantive due process.

Moreover, "there is no obvious reason why occupational freedom should be relegated to nonfundamental status and deprived of any serious judicial protection. Most Americans care deeply about the ability to put food on their families' tables. Indeed, just one year before penning the Court's most deferential occupational-licensing decision, Justice William O. Douglas described "[t]he right to work" as

"the most precious liberty that man possesses." (from *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 472 Douglas, J., dissenting); Clark Neily, *Beating Rubber-Stamps into Gavels: A Fresh Look at Occupational Freedom,* 126 Yale L.J. F. 304 (2016), http://www.yalelawjournal.org/forum/beating-rubber-stamps-into-gavels.

Occupational freedom was actually among the first unenumerated rights ever recognized by the U.S. Supreme Court. In *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889) the Court said: "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition." The Court extolled the right of occupational freedom again in *Truax v. Raich*, 239 U.S. 33, 41 (1915) explaining that "the right to work for a living . . . is of the very essence of the personal freedom and opportunity" that the due process clause was designed to secure.

Moreover, the U.S. Supreme Court and other courts have in recent years eschewed the adherence to a strict scrutiny test for the violation of constitutional rights which are deemed fundamental and the rational basis test for constitutional rights which are not deemed fundamental.

> "One could argue that Griswold and Roe are exceptional because the Court recognized the rights at issue as "fundamental," whereas the Court has not recognized economic rights, including the right to pursue an occupation, as fundamental. In recent years, however, doctrinal coherence in the realm of

due process has collapsed. It used to be black letter law that the Court divided due process liberty claims into two categories. Due process claims involving rights the Court recognized as fundamental, such as rights relating to the decision to bear a child, were subject to a very demanding "strict scrutiny" standard. To survive judicial review, infringements on such rights needed to be "narrowly tailored" to serve a "compelling" government interest. Non-fundamental rights claims, including economic rights claims, received cursory review under the rational basis standard. This paradigm is no longer an accurate description of the Court's jurisprudence.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, the plurality applied something less than strict scrutiny to infringements on the fundamental right of a woman to terminate her pregnancy. Casey replaced the "compelling state interest" test for abortion regulation with an "undue burden" test. In Troxel v. Granville, the plurality found that the right to raise one's children is a fundamental right, but, as Justice Thomas pointed out, failed to articulate the relevant standard of review. In Lawrence v. Texas, the Court protected the right to engage in homosexual sodomy without identifying it as a fundamental right, while seemingly applying something stricter than the ordinary rational basis test. In Obergefell v. Hodges, the Court enforced a right to same-sex marriage by creating a due process-equal protection stew, without applying the "compelling interest" test that is supposed to govern infringements on fundamental rights. And, most recently, in Whole Women's Health v. Hellerstedt, the Court seemed to rewrite the undue burden test as a new test bearing the same name but requiring stricter scrutiny (but not "strict scrutiny") of challenged abortion regulations.

In short, in cases involving unenumerated rights claims brought under the Due Process Clause, the Court has been ignoring prior doctrine and instead balancing the importance of the right at issue against the government's interest in infringing upon that right. The Court has done so without addressing the formalities of the fundamental/non-fundamental distinctions or the compelling interest/rational basis test."

David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation, A Brighter Future Ahead?* The Yale Law Journal, Volume 126, 2016-2017.

The Court is urged to either apply strict scrutiny to the present case or the balancing approach utilized in the cases cited in Yale Law School Journal, quoted hereinabove. However, even if the Court chooses to utilize the intermediate level of scrutiny for important but not fundamental rights, the governor cannot show that the tests for "lesser" constitutional rights applied to the facts of this case should result in a finding that the governor's July 13 orders do not violate the substantive due process rights of the real parties in interest, New Mexico's restaurant owners. Applying the intermediate test for important fundamental rights, the governor must "prove the scheme is substantially related to an important governmental interest". It is not enough for the governor to state that the government has an important interest in protecting citizens from COVID. The state must show that restaurant closures will substantially further that interest, which it cannot do.

If the Court instead uses the rational basis test, amicus contends that in light of the facts stated in the first section of this brief, the restaurant closure orders of July 13, 2020 are not "rationally related" to a legitimate state interest, and that there is no "firm legal rationale or evidence in the record" to support the government's orders.

WHEREFORE, for all the reasons stated above amicus respectfully requests that the Court find that the July 13, 2020 orders of the governor closing restaurants for indoor dining are arbitrary, capricious, in violation of the constitutional

provision for separation of powers and violate the due process clause of the New Mexico and United States constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

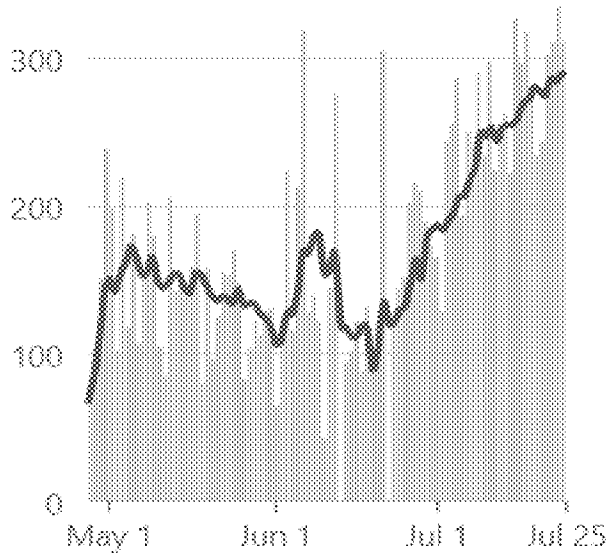
I hereby certify that the foregoing was served on opposing counsel and counsel for the Real Parties in Interest via e-mail on July 28, 2020.

/S/Jonathan Diener
Jonathan Diener

EXHIBIT 1: NEW MEXICO CASES AND TESTING

(From: COVID Tracking Project, *The Atlantic*)

New cases



New tests