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. NO. S-1-SC-38396

THE HONORABLE RAYMOND L. ROMERO,
Respondent,
and

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

RESPONSE OF REAL PARTIES IN INTEREST IN OPPOSITION TO EMERGENCY VERIFIED PETITION FOR SUPERINTENDING CONTROL AND REQUEST FOR STAY OF TEMPORARY RESTRAINING ORDER AGAINST ENFORCEMENT OF DIRECTIVES CONTAINED WITHIN THE PUBLIC HEALTH ORDER

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STATEMENT OF COMPLIANCE

This brief complies with Rule 12-504 (G)(3) NMRA (2020). Pursuant to Rule 12-504 (H) NMRA (2020), the body of this Response Brief contains five thousand and seventy-nine (5,079) words. This word count was generated using Microsoft Word Office 365.

/s/ Antonia Roybal-Mack,

I. A WRIT OF SUPERINTENDING CONTROL IS NOT APPROPRIATE IN THIS MATTER.

"[A] writ of superintending control is most often issued where the public interest would be served through ***expeditious resolution of a legal question*** or where it is appropriate to ***provide guidance to lower courts on the application of the law***." Petition at ¶ 15, citing *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 30-31, 410 P.3d 201 and *State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, ¶8, 120 N.M. 619, 904 P.2d 1044. (emphasis added).

More importantly, this Court has also held that "matters entrusted to the trial court's discretion ordinarily are not matters over which this Court should exercise its jurisdiction to grant extraordinary relief. We acknowledge as well that neither the writ of prohibition nor the writ of superintending control should be used as a substitute for a decision on direct or interlocutory appeal." *Chappell v. Cosgrove*, 1996-NMSC-020, ¶6, 121 N.M. 636, 916 P.2d 836.

The Petition asserts that the "controlling legal issues in this case [are]: (1) whether the Secretary of Health has statutory authority to restrict or close businesses when necessary for the protection of public health; and (2) whether the temporary closure of indoor dining at restaurants and breweries was arbitrary and capricious." Petition at 1.

The first, and most basic problem with Petitioners' request for a writ of superintending control arises from the second issue. The question of whether the temporary closure of indoor dining at restaurants and breweries was arbitrary and capricious, naturally turns on having a full evidentiary record. "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, ***when viewed in light of the whole record***." *Sierra Club v. NM Mining Comm'n*, 2003-NMSC-005, ¶17, 133 N.M. 97, 61 P.3d 806 (emphasis added).

Yet, in this instance, there is no record regarding the rationale and reasons for the Secretary's decision to close indoor dining services at restaurants and breweries in New Mexico. That record would be properly developed by evidence introduced in the trial court, either at a hearing or in a trial on the merits.

The question of whether the Secretary's order is arbitrary and capricious depends significantly on actual evidence, and not just the "resolution of a legal question," which is illustrated by the fact that the Petitioners have attached 143 pages of exhibits to their Petition, including: two affidavits, totaling 11 pages (*see* Petition, Exhibits 1 and 6); a three page transcript, from the Governor's press conference (*see* Petition, Exhibit 7); and Affidavits from the Real Parties in Interest, totaling 12 pages and attached as Exhibits to the Verified Application for Temporary Restraining Order and Preliminary and Permanent Injunction ("Verified Application). *See* Exhibit 7 to the Petition. This count does not include the 10 pages

of facts asserted in the Verified Application itself. *See* Verified Application, Exhibit 7 to the Petition, at 2 – 11.

Significantly, none of the sworn statements currently before the court in these various exhibits have ever been subject to cross-examination, scrutiny or testing of any kind. Again, these are functions that are properly fulfilled by the trial court.

The Real Parties in Interest believe that sorting through the assertions, evidence, and competing claims could easily take 3 to 4 days to be fully heard. Respectfully, it would be inappropriate for this Court to render a decision on whether the Secretary's order is arbitrary and capricious without a full evidentiary record before it; and it would be unusual for this Court to take several days of evidence to decide the issue. In sum, one of the "controlling legal issues" presented by the Petition is more appropriately the subject of a full evidentiary hearing and an appeal and is not solely a "legal question."

Moreover, even if this Court were to decide the legal question of whether the Secretary has the statutory authority to quarantine significant portions of restaurants and breweries in New Mexico, that decision would still not resolve this matter, i.e., the question of whether the Secretary's particular use of that authority in the 7-13-2020 Public Health Order was arbitrary and capricious. A writ of superintending control under these circumstances is contrary to this Court's prior holdings on whether such a writ should be granted. The Petition should, therefore, be denied.

II. THE SECRETARY HAS FAILED TO FOLLOW THE REQUIREMENTS OF THE NEW MEXICO PUBLIC HEALTH ACT.

Petitioners argue that "Section 24-1-3(E) of the PHA [Public Health Act] provides that the DOH [Department of Health] may '**close any public place and forbid gatherings of people when necessary for the protection of the public health**.'" Petition at 16 (emphasis provided by Petitioners).

Although Petitioners acknowledge that the Public Health Act (NMSA 1978 §§ 24-1-1 to – 40) "is a comprehensive statutory framework . . . ." (Petition at 16), they apparently believe that other, significant provisions of the Act do not apply to a public health order that closes public places or forbids gatherings of people.

Of course, the Act should be read as a whole.

> It is likewise a cardinal rule that in construing particular statutory provisions to determine legislative intent, an entire act is to be read together so that each provision may be considered in its relation to every other part, and the legislative intent and purpose gleaned from a consideration of the whole act.

Winston v. N.M. State Police Board, 1969-NMSC-066, ¶5, 80 N.M. 310, 454 P.2d 967.

Among the provisions of the Act that the Petition ignores are:

1. NMSA 1978 § 24-1-15(P)(5), which defines "quarantine" as follows:

> quarantine means the precautionary physical separation of a person who has or may have been exposed to a threatening communicable disease or a potentially threatening

> communicable disease who does not show a sign or symptom of a threatening communicable disease from persons who are not quarantined to protect against the transmission of the disease to persons who are not quarantined.

2. NMSA 1978 § 24-1-15(P)(1), which defines an "area of isolation or quarantine" as "the physical environs that the department designates as the area within which to restrict access as required to prevent the transmission of a threatening communicable disease."

Under the 7-13-2020 Public Health Order, indoor dining spaces have been closed. These spaces constitute an "area within which to restrict access as required to prevent the transmission of a threatening communicable disease." Thus, under a plain reading of the statute, indoor dining spaces are an area of quarantine. And, the restaurant owners, their employees, and their customers have been subjected to a "precautionary physical separation," within indoor dining spaces, i.e., they have been quarantined.

NMSA 1978 § 24-1-15 provides a comprehensive set of requirements and procedures for instituting and maintaining a quarantine, none of which the Respondents have followed in this instance.

3. NMSA 1978 § 24-1-15(C) provides that a:

> . . . petition [from the Secretary] for a court order shall be made under oath or shall be accompanied by a sworn affidavit setting out specific facts showing the basis upon which isolation or

> quarantine is justified, including whether a person to be isolated or quarantined:
>
> (1) is infected with, reasonably believed to be infected with or exposed to a threatening communicable disease; and
>
> (2) poses a substantial likelihood of transmission of the threatening communicable disease to others because of inadequate separation from others.

Since the COVID-19 pandemic was first declared in March 2020, the Petitioners have never filed a petition with any court in the state of New Mexico prior to issuing any of their public health orders. In addition, Petitioners have never provided any sworn affidavit setting out the specific facts showing the basis upon which the isolation or quarantine is justified. Instead, the Petitioners have held numerous press conferences referencing data that has not been made publicly available or provided to the Real Parties in Interests to justify the unprecedented, sweeping closures that are wrecking the businesses and lives of thousands and thousands of New Mexicans.[1]

4. NMSA 1978 § 24-1-15(D) provides that upon the filing of a petition, the court shall:

> (1) immediately grant ex-parte a court order to isolate or quarantine the affected person if there is probable cause from the specific facts shown by the affidavit or by the petition to give the

[1] See *New Mexico Restaurant Association, et. al. v New Mexico Department of Health*, et. al, D-202-CV-2020-4272.

judge reason to believe that the affected person poses a substantial threat to the public health and safety;

(2) cause the court order, notice of hearing and an advisement of the terms of the court order, including the affected person's rights to representation and re-petition for termination of a court order that removes and detains the affected person, to be immediately served on the affected person; and

(3) within five days after the granting of the court order, hold an evidentiary hearing to determine if the court shall continue the order.

5. NMSA 1978 § 24-1-15(G) provides:

At the evidentiary hearing, the court shall review the circumstances surrounding the court order and, if the petitioner [i.e., the Secretary] can show by clear and convincing evidence that the person being held has not voluntarily complied or will not voluntarily comply with appropriate treatment and contagion precautions, the court may continue the isolation or quarantine. The court shall order regular review of the order to isolate or quarantine by providing the person being held with a subsequent hearing within thirty days of the court order's issuance and every thirty days thereafter. The court order to isolate or quarantine shall be terminated and the affected person shall be released if:

(1) the person being held is certified by a public health official to pose no further risk to the public health;

(2) at a hearing, the petitioner [i.e., the Secretary], whose burden of proof continues under a clear and convincing standard, can no longer show that the person being held is infected with, reasonably believed to be infected with or exposed to a threatening communicable disease and that the affected person will not comply with appropriate treatment and contagion precautions voluntarily; or

> (3) exceptional circumstances exist warranting the termination of the court order.

Because no petition has ever been filed by Petitioners prior to issuance of any of the public health orders, including, but not limited to, the most recent order of 7-13-2020, there has never been a finding of probable cause necessary to support the quarantine of New Mexico Restaurants' indoor dining spaces, and no determination that the indoor dining spaces of restaurants pose "a substantial threat to the public health and safety."

By the Petitioners own evidence and reasoning, the order is arbitrary and capricious, and not supported by substantial evidence. As stated in the Real Parties in Interest' s Motion to Lift the Stay of Temporary Restraining Order at p.7, fn 1:

> Although Dr. Scrase declares that the PHO is a decision based upon data and experiences from other states and nations, he does not explain, *inter alia*, how 47 other states have considered these same issues and presumably the same research and data and have come to the opposite conclusion and decided not to impose a complete ban on indoor dining. Critical public information in Petitioners' hands that would explain the basis or lack thereof, for the PHO decisions is not being located or produced in a time frame that would shed any light on these matters. Exhibit A. Three day letter from the Department of Health, and Exhibit B Three day letter from the Department of Health. 'A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances…' NMSA 1978 § 14-2-8 (D).

If New Mexico knows something that 47 other states' experts do not, that public information is being withheld from the public without regard to the

requirements of the Inspection of Public Records Act, NMSA 1978 §14-2-1 *et seq*. In light of the government's order imposing far-reaching and draconian restrictions on New Mexico's restaurants, closing businesses, and putting New Mexicans out of work, the statutory right to "the greatest possible information regarding the affairs of government and the official acts of public officers and employees" (NMSA 1978 § 14-2-5) is being rendered meaningless at a time that information is most critical.

6. NMSA 1978 § 24-1-15(I), provides that a person who is quarantined pursuant to a court order may petition the court to contest the order or the conditions of quarantine at any time before the expiration of the order. If a petition is filed, the court must hold a hearing within five days after the date of filing. At the hearing, the Secretary "shall offer clear and convincing evidence that:

(1) the isolation or quarantine is warranted; or

(2) the conditions of isolation or quarantine are compliant with the provisions of this section."

Again, at no time have Respondents presented "clear and convincing" evidence to any court that would justify their quarantine of New Mexico restaurants or any other business.

7. NMSA 1978 § 24-1-15(J), provides that when ordering a quarantine, the Secretary must ensure that:

> (1) isolation or quarantine is the ***least restrictive means*** necessary to protect against the spread to others of a communicable disease or a potentially threatening communicable disease and may include confinement to the affected person's private home, if practicable, or if not practicable, to a private or public premises; …
>
> (7) an area of isolation or quarantine is maintained in a manner that minimizes the likelihood of further transmission of infection or other injury to other persons who are isolated or quarantined; …

"Administrative bodies, however well intentioned, must comply with the law; and it is necessary that they be required to do so, to prevent any possible abuse." *Cont'l Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 31, 70 N.M. 310, 373 P.2d 809 (emphasis added).

Here, because Petitioners have repeatedly and deliberately circumvented both the unequivocal requirements of the PHA and the Judiciary, Petitioners have never had to explain how their absolute ban on indoor dine-in services is the "least restrictive means necessary to protect against the spread to others of a communicable disease . . . ." Nor have Petitioners ever had to explain how their ban on indoor dine-in services "minimizes the likelihood of further transmission of infection," as compared to outdoor dining or other, higher risk activities that were not similarly shuttered.

Petitioners' argument is that the Secretary can "close any public place and forbid gatherings of people when necessary for the protection of the public health,"

without having to follow any of the carefully crafted and extensive quarantine provisions of the Public Health Act. This argument asks the Court to ignore the long-settled holding in *Winston*, that "an entire act is to be read together so that each provision may be considered in its relation to every other part, and the legislative intent and purpose gleaned from a consideration of the whole act." If accepted, the Petitioners' argument would create an exception that truly swallows all of the quarantine procedures and requirements set out by the Legislature in the Public Health Act.

The Petitioners' reliance on NMSA 1978 § 24-1-3(E) is misplaced. It makes no sense for the Legislature to have taken the time and effort to provide comprehensive statutes governing the Secretary's power to quarantine, and in the same act, to have given the Secretary unlimited power to close public places and forbid gatherings of people for an unlimited time, and for any reason related to public health. It is an even further stretch for the Secretary's power to then be free from any court scrutiny based upon long standing evidentiary standards.

Because the Petitioners have failed to follow the law set forth in the Public Health Act, the 7-13-2020 Public Health Order closing indoor dining spaces in restaurants and breweries, i.e., declaring them a place of quarantine, is *ultra vires*. *Ultra vires* acts and any orders arising from such an abuse of authority are void *ab initio*. *See, e.g., Swiney v. Deming Board of Educ.*, 1994-NMSC-039, 117 N.M. 492,

873 P.2d 238 (1994) (a policy that violates the specific statutory provisions governing it is *ultra vires* and void).

III. THE 7/13/2020 PUBLIC HEALTH ORDER ESTABLISHING THE CLOSURE OF INDOOR DINING IS ARBITRARY AND CAPRICIOUS.

While "…constitutional rights 'may at times, under the pressure of great dangers' be restricted 'as the safety of the general public may demand.'" *Legacy Church, Inc. v. Kunkel,* No. CIV 20-0327 JB\SCY, 2020 WL 1905586, at *25 (D.N.M. Apr. 17, 2020) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 358, 49 L.Ed. 643 (1905). Even so, the authority of the government is not unlimited. It is unlawful for an administrative agency to establish restrictions in an arbitrary or capricious manner.

The 7-13-2020 Public Health Order issued by Secretary of Health is subject to the arbitrary and capricious standard of judicial review. There is nothing in the law that suspends the system of checks and balances mandated by having three branches of government during a pandemic.

Courts will review an agency's decision "… to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law." *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 15, 137 N.M. 161, 108 P.3d 1019. The role of the court is to determine whether an agency has abused its discretion by acting

in an arbitrary and capricious manner. *See Sais v. N.M. Dep't of Corr.*, 2012-NMSC-009, ¶ 17, 275 P.3d 104. While the scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency, ***the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action***. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30–31, 103 S. Ct. 2856, 2860–61, 77 L. Ed. 2d 443 (1983) (emphasis added). In reviewing the agency's explanation, a court must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. *Id.* This is accomplished by reviewing available records to determine whether there has been unreasoned action without proper consideration in disregard for the facts and circumstances. *See Perkins v. Dep't of Human Servs.*, 1987-NMCA-148, ¶ 20, 106 N.M. 651, 748 P.2d 24 (citations omitted).

An agency's decision "…is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Archuleta at ¶ 17*; *see also Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. An agency must be able to articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made. *See Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 38, 138 N.M. 625, 124 P.3d 1164 (citing

Atlixco Coal. v. Maggiore, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 965 P.2d 370). An agency decision is arbitrary and capricious if there is no rational connection between the facts found by the agency and its decision, or if the agency entirely omitted consideration of relevant factors. *See Atlixco, at ¶¶ 24-25*. Furthermore, an arbitrary and capricious action has been viewed as the result of an "…unconsidered, willful and irrational choice of conduct and not the result of the 'winnowing and sifting' process." *Perkins at ¶19* (quoting *Garcia v. N.M. Human Servs. Dep't*, 1979-NMCA-071, ¶ 6, 94 N.M. 178, 608 P.2d 154 (overturned on other grounds) (citations omitted).

The 7-13-2020 Public Health Order, by its very nature, is arbitrary and capricious. The Order did not shutter businesses considered by the Department of Health itself, to have a higher level of risk for the transmission of COVID-19.

Moreover, the Affidavit of Dr. Scrase does not cite a single data point to support the conclusion that indoor dining poses a higher risk of COVID-19 transmission than other, permitted activities. There is not one instance of community spread cited in the Affidavit or one statistic that could support such a conclusion. Most importantly, the Public Health Order does not distinguish between various communities that have very different exposure levels for COVID-19. One of the real parties in interest in this case, Outlaw Meats, LLC, is located in De Baca County where zero cases of COVID-19 have been reported.

The New Mexico Public Health Act NMSA 1978 § 24-1-3, limits the authority of the department of health to, in pertinent part:

> …
>
> B. supervise the health and hygiene of the people of the state and identify ways to evaluate and address community health problems;
> C. investigate, control and abate the causes of disease, especially epidemics, sources of mortality and other conditions of public health;
> D. establish, maintain and enforce isolation and quarantine;
> E. close any public place and forbid gatherings of people when necessary for the protection of the public health;
>
> …
>
> W. administer legislation enacted pursuant to Title 6 of the Public Health Service Act…
> Z. do all other things necessary to carry out its duties.

NMSA 1978 § 21-1-3 (B, C, D, E, W, Z).

Contradicting the alleged basis for the restrictions, Petitioners allow some commercial activities to occur, but fail to provide a rational explanation for the disparate handling of indoor dining for restaurants and breweries. Petitioners have failed to present any basis and explanation for restricting all indoor dining. Instead, they have relied upon generalized data and sweeping statements in press conferences. The publicly available data demonstrates that at the time of filing of the injunction (July 14, 2020) there were 98 rapid responses to restaurants and 114 total COVID-19 cases. As of today, there are 127 total cases attributed to employees

of restaurants. These simple data points demonstrate that the COVID Safe practices within restaurants are preventing community spread within restaurants. If those figures are extrapolated further to the total number of cases of COVID-19 in New Mexico, the spread within restaurants is at 1.2% not the 14% cited using only the rapid response data.

In *Legacy Church v. Kunkel,* the United State District Judge, in considering whether the NMDOH classification of houses of worship as essential and non-essential "back and forth" is permissible under the First Amendment, stated:

> But I guess my question still stands. If the state has almost unlimited discretion to determine who gets the exemption and who doesn't get the exemption I guess that gives me some pause under the First Amendment of saying that it's neutral and there is some limitation on the Government's ability to move people from list to list.

Legacy Church, Inc. v. Kunkel, No. CIV 20-0327 JB\SCY, 2020 WL 1905586, at *17 (D.N.M. Apr. 17, 2020) (Browning, J.). The same question applies here – ***what is the state's authority to make determinations about which business is restricted and to what extent it is restricted?***

In *Legacy Church*, the court, emphasized its concern that "…Secretary Kunkel appears to have discretion to categorize and recategorize activities as essential or nonessential ... " *Id.* (citing *Sherbert v. Verner*, 374 U.S. at 401, 83 S.Ct. 1790 (invalidating denial of unemployment benefits where statute allowed officials

to evaluate, on a case-by-case basis, whether an individual's termination from employment was for "good cause"); *Cantwell v. Connecticut*, 310 U.S. at 305, 60 S.Ct. 900 (invalidating a statute that prohibited solicitation for religious or charitable causes without a designated official's approval, and authorizing the official to determine whether the cause is genuinely religious or charitable).

Petitioners argue that "[o]nly agency action that is 'willful and unreasoning' and done 'without consideration and in disregard of facts and circumstances' can be deemed 'arbitrary and capricious.'" Petition at 19 – 20, *quoting Old Abe Co., v. N.M. Mining Comm'n*, 1995-NMCA-134, ¶10, 121 N.M. 83, 908 P.2d 776. Using the Petitioners' own standard, there is no evidence that the "facts and circumstances" warrant the closure of indoor dining.

One must question whether the Secretary is taking into consideration all of the facts, circumstances and consequences that arise from the decisions to prohibit, then open, and then prohibit again, indoor dining. The Secretary's public health orders have already resulted in the permanent closure of 210 restaurants in the State of New Mexico. *See* Petition, Exhibit 7, Application at ¶25 (citing Exhibit 6 to the Application, Affidavit of Carol Wight, CEO New Mexico Restaurant Association, at ¶25). How many more will permanently go bankrupt as a result of the most recent prohibition on indoor dining?

Moreover, to date, no "100% effective" flu vaccine has ever been developed. *See* Exhibit 1, Vaccine Effectiveness: How Well do the Flu Vaccines Work? Published by the U.S. Centers for Disease Control and Prevention (". . . recent studies show that flu vaccination reduces the risk of flu illness by between 40% and 60% among the overall population during seasons when most circulating flu viruses are well-matched to the flu vaccine."). *Vaccine Effectiveness: How Well Do the Flu Vaccines Work?*, Centers for Disease Control and Prevention, https://www.cdc.gov/flu/vaccines-work/vaccineeffect.htm (last visited July 22, 2020).

Based on human experience with flu virus vaccines, is there any likelihood that a 100% effective vaccine will be developed for COVID-19? Without such a vaccine, does the Secretary intend to keep the restrictions on indoor dining in place forever, since the risk of contracting COVID-19 can never be completely eliminated? What are the state's criteria for allowing indoor dining? What preparations are being made to co-exist with this virus?

Petitioners have not given any answers to these questions; and in the absence of such answers, it appears that they have not considered all of the facts and circumstances as they are required to do.

Further proof of the arbitrary nature of the current Public Health Order can be found when one considers the data from each county in New Mexico. For example,

to date, the following New Mexico counties have had fewer than 20 cases reported: Harding, Mora, Catron, Union, Colfax, and Los Alamos. *See* Exhibit 2, Cases & Deaths by County, as of July 22, 2020, as reported by the Centers for Disease Control and Prevention. *Cases & Deaths by County*, Centers for Disease Control and Prevention https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/county-map.html (last visited July 22, 2020). De Baca County has zero reported cases. Hidalgo, San Miguel, Guadalupe, and Sierra County have fewer than 100 reported cases, and zero reported deaths. *Id.*

The 7-13-2020 Public Health Order appears to take none of this data into consideration. The ban on indoor dining is statewide. As shown by the data, not all New Mexico counties are experiencing the same level of spread. Indeed, it appears that the current Public Health Order is "willful and unreasoning" and has been issued "without consideration and in disregard of facts and circumstances" of the impact on restaurants and breweries, and on the reported experience of each county. The 7-13-2020 Public Health Order is therefore, arbitrary and capricious.

Petitioners argue that courts should exercise restraint when asked to invalidate reasonable agency actions addressing public health emergencies. Petitioners quote *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) for the proposition that ". . . a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Petition at 20. Petitioners further argue that

"[t]his legal maxim reflects the commonsense notion that the promotion of public health and safety may require the ***temporary disruptions of business*** activities; an assessment of governmental action during the pendency of a health emergency must be viewed in the context of public safety." Petition at 20.

Again, using the Petitioner's own logic, there is, unfortunately, nothing "temporary" about bankruptcy. Losing one's livelihood is more than a temporary disruption. Moreover, the harm being suffered by the Real Parties in Interest is as a result of a virus that Petitioners themselves concede results in "mild symptoms or no symptoms" for a significant portion of the reported cases. Petition at 3.

Petitioners note that under the 7-13-2020 Public Health Order, "[r]estaurants may provide delivery or carryout service and outdoor dine-in service at up to 50% of their ***outdoor fire code occupancy***." Petition at 6 – 7 (emphasis added). Real Parties in Interest have searched the New Mexico Statutes and the Fire Codes for Bernalillo, Santa Fe, and Sandoval counties. There is reference to an "outdoor fire code occupancy." In the absence of published and commonly understood standards, how is a restaurant or brewery supposed to comply? The current Public Health Order, in addition to all its other faults, is also vague and in and of itself creates health issues.

In Southern New Mexico, sitting outside, on a patio, for any extended period of time during the heat of summer poses its own set of health risks. The Public Health

Order does not address the fact that in historical buildings, outdoor patios cannot be constructed. The Public Health Order falls short of addressing the realities of restaurant operators seeking to survive in these very difficult circumstances.

Additional restrictions placed on restaurants and breweries by the 7-13-2020 Public Health Order also appear to lack any rationale. For example, "[o]utdoor dine-in service may only be provided to **seated patrons** . . . ." Petition at 7. Bar and counter service are not permitted. *Id.* Petitioners provide no rationale or reasoning to establish that bars and countertops are more problematic. The order further provides that no more than six people may be seated at a single table. *Id.* Again, Petitioners fail to articulate any reason, including why six is the optimal number, or how seven or eight or nine people at a table differ from a table with the maximum six allowed. Nor do Petitioners articulate or explain if the risk decreases with only four people and if so, by how much. Without any articulation, rationale or reasoning, the 7-13-2020 Public Health Order, in and of itself, is defective and is arbitrary and capricious.

Finally, other close contact facilities, such as "[g]yms and salons are subject to a 25% occupancy restriction." Petition at 7. But according to data from the New Mexico Department of Health, gyms are more likely to result in a spread of COVID-19 than restaurants. *See* Petition, Exhibit 7, Coronavirus Risk Levels By Activity.

CONCLUSION

For all the foregoing reasons, the Emergency Petition for Writ of Superintending Control should be denied, the stay lifted, and the case remanded back to the Fifth Judicial District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response was served to Petitioners and Respondent via the Court's eFile system on the 27th day of July, 2020. I further certify that a courtesy copy has been mailed to all parties.

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