  
Joey D. Moya

**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. Ct. No. S1-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,  
RED RIVER BREWING COMPANY, LLC, a New Mexico  
Limited Liability Company,  
NEW MEXICO RESTAURANT ASSOCIATION,**

**Real Parties in Interest.**

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**RESPONSE 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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The Honorable Raymond L. Romero  
District Judge, Fifth Judicial District  
Eddy County Courthouse  
102 N. Canal Street  
Carlsbad, New Mexico 88220  
Phone: (575) 885-4828

Petitioners, Governor of New Mexico Michelle Lujan Grisham and New Mexico Secretary of Health Kathyleen Kunkel, pursuant to Article VI, Sections 3 and 20 of the New Mexico Constitution and Rule 12-504 NMRA, have petitioned this Court to “immediately exercise its power of superintending control to stay a temporary restraining order (TRO) issued by [Respondent]” restraining Petitioners from enforcing a provision of Secretary Kunkel’s July 13, 2020 Public Health Order (PHO), which prohibits restaurants and breweries from providing dine-in service in indoor seating areas, and to “resolve the controlling issues in this case.” This Court granted Petitioners’ request for stay and ordered Respondent to file a response to the Emergency Petition and Request for Stay.

### **INTRODUCTION**

On July 14, 2020, the Real Parties in Interest (RPI) filed a Verified Application for Temporary Restraining Order and Preliminary and Permanent Injunction pursuant to Rule 1-066 NMRA requesting Respondent issue a TRO restraining Petitioners herein from enforcing provisions of the July 13, 2020 PHO which restricts dine-in services at restaurants and breweries, and to hold hearings on whether to grant preliminary and permanent injunctive relief prohibiting the same. See Application filed in Cause No. D-503-CV-2020-506. Subsequent to the filing of the Application, RPIs caused, on July 15, 2020, actual notice thereof to be served upon Petitioners herein by service of process consistent with Rule 1-004

NMRA. See Returns of Service filed July 16, 2020 in Cause No. D-503-CV-2020-506. Counsel for Respondents entered their appearances on July 17, 2020, and at the same time filed an Unopposed Motion for Leave to Exceed Page Limits imposed by Local Rule. Respondent's Assistant promptly communicated to counsel for Petitioners, by e-mail, the Motion would be granted.<sup>1</sup>

Respondent considered the RPI's Verified Application, supporting Affidavits, and the Secretary's PHOs, and determined it clearly appeared immediate and irreparable injury, loss or damage would result to the RPIs before Petitioners herein or their attorneys could be heard in opposition.<sup>2</sup> Although, the RPI's attorney did not certify, in writing, his efforts to give notice, or his reason supporting a claim that notice should not be required, such was unnecessary because Petitioners herein had been given actual notice of the Application.<sup>3</sup> Upon his determination, Respondent granted the RPI's request, and issued the TRO. Because the TRO was issued without a hearing, Respondent imposed the

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<sup>1</sup> Respondent gives his assistant stacks of documents to e-file each day. Although the documents have been signed, because of the assistant's many duties they are not always immediately e-filed. Additionally, once documents are e-filed they must be approved by the Clerk's office staff before they are docketed. The Eddy County District Court Clerk's office has been operating at half-staff for many months, so although the Order Granting Leave was signed by Respondent, and given to his assistant for e-filing before the TRO was entered, it was docketed afterward. Because this has been occurring for several months, upon submission of the Motion for Leave, Respondent had his assistant communicate to Petitioners herein by e-mail that the Motion would be granted. See Exhibit A.

<sup>2</sup> Respondent's consideration of RPI's Application involved a general analysis of the factors to be considered in granting injunctive relief, Rule 1-066 NMRA, however, only requires the TRO define the injury and state why it is irreparable if the a TRO is not granted.

<sup>3</sup> Nothing in Rule 1-066 NMRA prevents a court from issuing a TRO without a hearing when the opposing party has been given notice of an application therefore.

protective requirements attendant to such an order if entered *ex parte*, *i.e.* limiting its effect to no more than ten (10) days, and setting the matter for hearing within that time. Petitioners herein, rather than filing any response to the Application in the district court proceeding, filed their Emergency Petition and Request for Stay.

### **ARGUMENT**

**This Court should not exercise its power of superintending control because Petitioners herein have sought this extraordinary remedy as a means of appealing the entry of the TRO.**

Petitioners herein cite the Court to *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 20, as support for their position that it should exercise its power of superintending control. They advance two reasons:

1. The public interest would be served through expeditious resolution of the legal questions presented; and
2. The Court will be able to provide lower courts with guidance on application of the law.

See Emergency Petition at page 15.

Article VI, Section 3 of the New Mexico Constitution establishes this Court's power of superintending control over all inferior courts. This Court has described that power as "a long-standing power 'to control the course of ordinary litigation in inferior courts.'" *Whitaker*, 2018-NMSC-005 ¶ 30 citing *State v. Roy*, 1936-NMSC-048, ¶ 89, 40 N.M. 397, 60 P.2d 646. This Court has held that it may

exercise this power when it is “in the public interest to settle a question involved at the earliest moment.” *Id.* citing *Kerr v. Parsons*, 2016-NMSC-028, ¶ 16, 378 P.3d 1. And further, to “offer guidance to the lower courts on how to properly apply the law.” *Id.* citing *New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, ¶ 25, 274 P.3d 53. Despite the Court’s clear authority to exercise this power for legitimate reasons, it has made clear “a writ of superintending control should not ‘be used as a substitute for . . . appeal.’” *Id.* citing *Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6, 121 N.M. 636, 916 P.2d 836; see also *State Game Comm’n v. Tackett*, 1962-NMSC-154 ¶ 13, 71 N.M. 400, 379 P.2d 54 (S. Ct. 1962) *citing State ex rel. Harvey v. Medler*, 19 N.M. 252, 142 P. 376 (“The superintending control will not be invoked merely to perform the office of an appeal.”), and *State ex rel. Anaya v. Scarborough*, 1966-NMSC-009 ¶ 6, 75 N.M. 702, 410 P.2d 732 (S. Ct. 1966) (“It can be taken as settled that this control may not be invoked to perform the office of an appeal.”)

The Application filed in this matter in the district court was promptly served upon Petitioners herein. Five (5) days after service, Petitioners had not filed any type of responsive pleading, even though it appears clear they had drafted one.<sup>4</sup> Petitioners still have never filed a responsive pleading to the Application in the

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<sup>4</sup> Petitioners filed their Emergency Petition and Request for Stay with this Court two and one-half hours after the District Court entered its TRO.

district court. Rather than filing their response, and seeking emergency relief in the district court by way of a motion to dissolve the TRO,<sup>5</sup> or simply waiting to address the merits of the RPI's claims at the scheduled hearing, they chose to file this Emergency Petition seeking an extraordinary remedy. See *Tackett*, 1962-NMSC-154 ¶ 13 (“In *State ex rel. Transcontinental Bus Co. v. Carmody*, [53 N.M. 367, 208 P.2d 1073] [], we warned that the superintending power would not be exercised except under unusual circumstances.”); see also *State ex rel. Dubois v. Ryan*, 1973-NMSC-097 ¶ 2, 85 N.M. 575, 514 P.2d 851 (S. Ct. 1973) (“We exercised our superintending control herein only because of the extremely unusual circumstances.”) It would appear Petitioners never intended to litigate this matter in the District Court of Eddy County, and to extricate themselves from that proceeding, have filed this Emergency Petition as a means of appealing the District Court's grant of the TRO.

The right of appeal in a civil case is based upon the entry in the district court of a “final judgment or decision, or any interlocutory order or decision which practically disposes of the merits of the action. . .” See NMSA 1978 39-3-2. The District Court's entry of the TRO is not a decision from which Petitioners herein can appeal as a matter of right. If they are to appeal its entry, Petitioners must do

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<sup>5</sup> Rule1-066 NMRA allows an adverse party, on two (2) days' notice to the party who obtained the temporary restraining order to appear and move for its dissolution or modification.

so under some exception to the general rule. This Court has adopted the collateral order doctrine as a “narrow exception” to the final order requirement, however the doctrine’s “reach is limited to trial court orders affecting rights which will be irretrievably lost in the absence of an immediate appeal.” See *Carrillo v. Rostro*, 1992-NMSC-054 ¶ 16, 114 N.M. 607, 617, 845 P.2d 130, 140 (1992). For the District Court’s entry of the TRO in this case to fall within the exception it must satisfy three conditions:

It must ‘conclusively determine the disputed question,’ ‘resolve an important issue completely separate from the merits of the action,’ *and* ‘be effectively unreviewable on appeal from a final judgment.’

*Id.* (emphasis added). With certainty, the TRO cannot satisfy at least two of these conditions. First, it does not conclusively determine the disputed question, as it is only effective for ten days. Second, it does not resolve an important issue completely separate from the merits of the action. Petitioners herein were precluded from appealing the TRO, and rather than seek expedited relief therefrom in the district court, they have asked this Court grant the extraordinary remedy of superintending control, only to have it “perform the office of an appeal.”

*Scarborough*, 1966-NMSC-009 ¶ 6. The Court should decline to exercise its authority on this ground alone.

**This Court should not exercise its power of superintending control because the area of law related to RPI’s most substantive claim, equal protection, needs no illumination from this Court, and is a fact sensitive issue.**



Respondent will concede that the issues raised by RPIs in their Application regarding the interpretation of the New Mexico Public Health Act (the Act), are novel. Indeed, RPIs have cited the District Court to no authority in support of their claims in that regard. Additionally, Respondent would concede that the legal issue of the extent of the Secretary's authority under Section 24-1-3(E) is an issue of great public interest. One has only to watch or read the New Mexico news on a daily basis to see the angst the Secretary's exercise of that authority has caused. Nevertheless, and importantly, the most substantive issue raised by RPIs does not challenge whether the Secretary has authority under the Act to take action to close any public place and forbid gatherings of people when necessary for the protection of the public health, but instead challenges the manner in which she has exercised that discretionary authority. It is this type of issue that has typically been resolved in the first instance by the district courts, and is why this Court should decline to exercise its authority of superintending control.

Both Petitioners and RPIs have cited the Court to *Old Abe Co. v. New Mexico Mining Comm'n*, 1995-NMCA-134, 121 N.M. 83, 908 P.2d 776 (Ct. App. 1995). Therein, the New Mexico Court of Appeals sets out very clearly the law applicable to a court's analysis of an equal protection challenge to administrative action. Additionally, this Court, as recently as 2016, in *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, 378 P.3d 13, thoroughly expounded the law relating to an

equal protection challenge. There is presently no need for this Court to further elucidate this area of the law. Moreover, analysis of an equal protection challenge, especially one which challenges an administrative action—as opposed to a statute, is fact sensitive, and the district courts have traditionally been entrusted to find facts.

Here RPIs have asserted the Secretary’s July 13, 2020 PHO draws distinctions between restaurants and breweries, and other businesses whose activities the Secretary has deemed as equal or higher Coronavirus risk activities, such as hair salons, barbershops, public pools and churches. The factual basis for the Secretary’s decision will certainly be at issue in this litigation, and that basis must necessarily be established by the presentation of testimony and other evidence. Without question, this Court is competent to receive that evidence, but it is the district courts who have traditionally been entrusted with finding facts. Indeed, Chief Justice Vigil just recently authored this Court’s opinion reminding courts exercising appellate jurisdiction to afford proper deference to a district court’s findings of fact. See *State v. Martinez*, 2018-NMSC-007, 410 P.3d 186.

In summary, while there are issues asserted by RPIs that may benefit from this Court’s guidance, the most substantive issue raised in their Application is the constitutionality of the Secretary’s line drawing. This Court has clearly established

the law in this area, and since analysis of this claim will be fact sensitive, the finding of those facts should be left to the court which has traditionally found facts.

**This Court's stay should be lifted, and the District Court should be permitted to address the parties' claims in ruling on a motion to dissolve the TRO, or at a consolidated hearing/trial on the RPI's request for preliminary and permanent injunctive relief.**

Petitioners herein have not sufficiently articulated the loss or damage they would suffer if a stay was not issued, nor have they even asserted that no loss or damage would result to the RPIs if the stay was not issued. See Rule 12-504(D)(2) NMRA, and subsection D of the Emergency Petition and Request for Stay.

Petitioners assert they will be irreparably injured or damaged if the TRO is allowed to stand because the New Mexico citizenry will be confused by conflicting decisions as to the legality of the Secretary's emergency response actions. The effect of the TRO was simply to re-impose the Secretary's restrictions on restaurants and breweries under her previous PHO. The TRO's directive applied only to a very limited portion of the July 13, 2020, PHO, and was clear. To say that restaurateurs would be confused by an order very clearly directing they are allowed to operate dine-in services at fifty percent capacity, rather than zero percent capacity, seems disingenuous.

Rule 12-504(D)(2) NMRA allows this Court to issue a stay only if it clearly appears that no loss or damage will result to the real parties in interest. Here, that cannot be said. In fact, it is without question that the inability of the RPIs to

operate a significant portion of their businesses will result—and has resulted—in permanent loss or damage. See Affidavit of Carol Wright, CEO of the New Mexico Restaurant Association (“At least 210 restaurants in New Mexico have permanently closed as a result of the state’s COVID-19 restrictions on their operations.”)

The stay should be lifted, and this matter remanded to the District Court where Petitioners herein can seek the remedies available to them for immediate relief from the TRO, and where the District Court can find facts necessary to determine whether preliminary and/or permanent injunctive relief is warranted. To expedite the matter, the District Court would issue a notice, pursuant to Rule 1-066 NMRA, ordering trial of the action on the merits be advanced and consolidated with the hearing on the application for preliminary injunction. Such would satisfy Petitioners’ desire for an expeditious resolution of the legal questions presented in the RPI’s Application.

### **CONCLUSION**

For the foregoing reasons Respondent asks this Court to decline to exercise its power of superintending control, to lift its stay, and to remand this matter to the District Court for trial on the merits.

Respectfully submitted,

/s/ Raymond L. Romero  
The Honorable Raymond L. Romero

District Judge, Fifth Judicial District  
Eddy County Courthouse  
102 N. Canal Street  
Carlsbad, New Mexico 88220  
Phone: (575) 885-4828  
**Respondent, *Pro se***

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Response 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 was served to Petitioners and the Real Parties in Interest  
via the Court's eFile system, and by e-mail to any attorneys of record not attached  
to the eFile system regarding this case on the 27<sup>th</sup> day of July, 2020.

/s/ Raymond L. Romero  
The Honorable Raymond L. Romero  
District Judge, Fifth Judicial District  
Eddy County Courthouse  
102 N. Canal Street  
Carlsbad, New Mexico 88220  
Phone: (575) 885-4828



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**[carddiv1proposedtxt] D-503-CV-2020-00506, Outlaw Meats, LLC, et. al., v. Michelle Lujan Grisham, et. al.: Order on Unopposed Motion for Leave to File**

3 messages

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**Kennedy, Vanessa, GOV** <Vanessa.Kennedy@state.nm.us>

Fri, Jul 17, 2020 at 1:56 PM

To: "carddiv1proposedtxt@nmcourts.gov" <carddiv1proposedtxt@nmcourts.gov>

Cc: "Garcia, Matt, GOV" <Matt.Garcia@state.nm.us>, "Guss, Jonathan, GOV" <Jonathan.Guss@state.nm.us>, "DARREN@ROYBALMACKLAW.COM" <DARREN@roybalmacklaw.com>, "ANTONIO@ROYBALMACKLAW.COM" <ANTONIO@roybalmacklaw.com>

Dear Judge Romero:

Attached please find an endorsed copy of Respondents' Unopposed Motion for Leave to Exceed Page Limits together with a proposed Order for your consideration.

Respectfully,

**Vanessa S. Kennedy** (she/her)

Paralegal | Publication & Record Liaison Officer

Office of Governor Michelle Lujan Grisham

490 Old Santa Fe Trail, Suite 400 | Santa Fe, New Mexico 87501

P: 505-476-2210 | E: [vanessa.kennedy@state.nm.us](mailto:vanessa.kennedy@state.nm.us) | W: [governor.state.nm.us](http://governor.state.nm.us)

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**2 attachments**



**Order granting unopposed motion for leave to exceed page limits.docx**  
22K



**D-503-CV-2020-506 Unopposed mot for leave to exceed page limits (1).pdf**  
29K



Dannielle Marrs <carddem@nmcourts.gov>

Fri, Jul 17, 2020 at 3:02 PM

To: "Kennedy, Vanessa, GOV" <Vanessa.Kennedy@state.nm.us>

Cc: "carddiv1proposedtxt@nmcourts.gov" <carddiv1proposedtxt@nmcourts.gov>, "Garcia, Matt, GOV"

<Matt.Garcia@state.nm.us>, "Guss, Jonathan, GOV" <Jonathan.Guss@state.nm.us>, "DARREN@ROYBALMACKLAW.COM" <DARREN@roybalmacklaw.com>, "ANTONIO@ROYBALMACKLAW.COM" <ANTONIO@roybalmacklaw.com>

The Judge is granting the Motion for Leave, I will file the signed order shortly.

Thank you!

Dannielle Marrs

TCAA for Judge Romero, Div. I

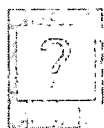
[Quoted text hidden]

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Mail Delivery Subsystem <mailer-daemon@googlemail.com>

Fri, Jul 17, 2020 at 3:02 PM

To: carddem@nmcourts.gov



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Remote-MTA: dns; roybalmacklaw-com.mail.protection.outlook.com. (104.47.46.36,  
the server for the domain roybalmacklaw.com.)

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To: "Kennedy, Vanessa, GOV" <Vanessa.Kennedy@state.nm.us>

Cc: "carddiv1proposedtxt@nmcourts.gov" <carddiv1proposedtxt@nmcourts.gov>, "Garcia, Matt, GOV"

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Bcc:

Date: Fri, 17 Jul 2020 15:02:09 -0600

Subject: Re: [carddiv1proposedtxt] D-503-CV-2020-00506, Outlaw Meats, LLC, et. al., v. Michelle Lujan Grisham, et. al.:  
Order on Unopposed Motion for Leave to File

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