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STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF RAMSEY — SECOND JUDICIAL DISTRICT
CASE TYPE: Civil Other/Misc.

Willy McCoys of Albertville, LLC; Willy McCoys of Andover, LLC; Willy McCoys of Bloomington, LLC; Willy McCoys of Champlin, LLC; Willy McCoys of Chaska, LLC; Willy McCoys of Shakopee, LLC (d/b/a Copper Pint); Whiskey Jacks of Ramsey LLC (d/b/a Willy McCoys Ramsey); Brickhouse Tavern, LLC (d/b/a Brewtus' Brickhouse); Last Call, LLC (d/b/a Legends Bar & Grill); Wagon Wheel of Middle River, Inc. (d/b/a The Wheel Bar and Bottle Shop); Two Captains, Inc. (d/b/a Crooks Bar and Bottle Shop); Hudy's Café, Inc. (d/b/a Hudy's Café & The Li'l Bar); Neighbors Bar and Grill, Inc. (d/b/a Neighbors Bar and Grill – Albertville); Route 75 Saloon, Inc. (d/b/a Neighbors Route 75); The Appian Way Company, LLC (d.b.a Crooked Pint Ale House Mpls); Hunn, Inc. (d.b.a Keys Café and Bakery); Jac's Bar & Grill, Inc., Acapulco of Minnesota, Inc.; Acapulco of Stillwater, Inc.; San Jose Hospitality, Inc., Acapulco of Blaine, Inc.; Acapulco of Woodbury, Inc.; Acapulco of New Brighton, Inc.; Acapulco of Ramsey, Inc.; Acapulco of Ham Lake, Inc.; and Torg Brewery, LLC,

Plaintiffs,

v.

Tim Walz, in his official capacity as Governor of Minnesota; Attorney General Keith Ellison, in his official capacity;

Court File No. ___________________

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER

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Jan Malcolm, in her capacity as the Commissioner of the Minnesota Department of Health; Steve Grove, in his capacity as the Commissioner of the Minnesota Department of Employment and Economic Development; and John Harrington, in his official capacity as the Commissioner of the Minnesota Department of Public Safety,

Defendants.

INTRODUCTION

Plaintiffs do not dispute that Defendant Governor Tim Walz has heightened authority in times of public crisis. Plaintiffs also do not dispute that the COVID-19 virus has caused a public health crisis. But Plaintiffs do dispute that the Governor has exercised his heightened authority within the bounds of the Minnesota Constitution.

Plaintiffs, as members of the class of businesses that provide indoor service as a restaurant or bar, are being singled out to bear the unfair brunt of the Governor's authority in a manner that creates an unequal legal regime, preferencing some places of public accommodation to the detriment of others. Plaintiffs are ready, willing, and able to comply with the social distancing and hygiene requirements that have been applied to restaurants previously under the Governor's prior Executive Orders, and to customer-facing businesses similarly situated, such as salons, tattoo parlors and retail operations. Instead, without a rational basis, the Governor has chosen a blanket restriction that is overly broad and that unfairly burdens restaurants and bars that

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could operate indoors safely. The Governor has simply taken that option and opportunity away from Plaintiffs without any rational basis for applying the restriction to some businesses and not others, thereby violating the equal protection clause of the Minnesota Constitution, Art. 1, § 2.

Plaintiffs therefore seek redress from this Court to release them from the excessive restrictions that threaten the very existence of these business and compromise the livelihood of a major sector of the Minnesota hospitality industry. Because Plaintiffs can likely establish that Defendants violated equal protection guarantee under the Minnesota Constitution, and the balance of harms strongly favors Plaintiffs, this Court should grant a temporary restraining order prohibiting further effect of Executive Orders 20-99 and 20-103.

FACTUAL BACKGROUND

On March 13, 2020, Governor Walz issued Emergency Executive Order 20-01, declaring a peacetime emergency. (Compl. ¶ 35; Decl. Of Francis J. Rondoni Ex. A.) On March 16, 2020, Governor Walz issued Emergency Executive Order 20-04, ordering the closure of restaurants and bars for on-premises consumption and closing other places of public accommodation. (Compl. ¶ 36; Rondoni Decl., Ex. B.) The purpose of Executive Order 20-04 was to slow the spread of the COVID-19 pandemic in public spaces where Minnesotans congregate. (Compl. ¶ 37.) Executive Order 20-04 expressly prohibited the

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public from entering, using, or occupying "restaurants" "and other places of public accommodation offering food or beverage for on-premises consumption." (*Id.* ¶ 38.)

As the time passed, Governor Walz issued several additional Executive Orders, including Executive Order 20-18, extending the closure of restaurants and bars, Executive Order 20-20, the general "stay at home" Order, and Executive Order 20-40, on April 24, 2020, which permitted some business to reopen, but did not permit resumption of indoor services at restaurants and bars. (*Id.* ¶¶ 43-49; Rondoni Decl. Exs. C-E.) While Governor Walz eased restrictions on some customer-facing business over the next month, restaurants remained closed for indoor services until June 10, 2020, when by Executive Order 20-74 they were permitted to re-open with a maximum of 250 people but not to exceed 50 percent of the normal occupant capacity as determined by the fire marshal. (Compl. ¶ 59; Rondoni Decl. Ex. F.) The Minnesota Department of Health ("MDH") issued guidelines and a checklist for restaurants and bars to increase the safety of operations at these businesses. (*Id.* ¶ 60.)

Minnesota has continued to be affected by Covid-19, with the total number of known cases of infection surpassing 400,000 by the end of 2020. MDH has attempted to determine where infected Minnesotans were likely to have been exposed to the virus and publishes a weekly "Covid-19 Report" that breaks down the places of "likely exposure" into nine categories, including travel, congregate care, corrections, homeless/shelter, health care, Community (known contact with confirmed case), Community (unknown

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contact with confirmed case, unknown/missing, and community (outbreak), which is the category that includes "restaurant/bars, sports, worksites that are not living settings, etc." (https://www.health.state.mn.us/diseases/coronavirus/stats/index.html.) According to the MDH Weekly Report, as of December 17, 2020, total likely exposure in the category containing restaurants and bars amounted to 16,715 cases, approximately 4% of the 389,171 total cases in the State of Minnesota. This data is not broken up in such a way as to determine the contribution of restaurants and bars as it includes worksites and other public accommodation facilities.

Minnesota's restaurants were open for limited services for several months, until on November 10, 2020, effective November 13, 2020, Governor Walz issued Executive Order 20-96, limiting the hours for restaurants and bars and dialing back the capacity limit. (Compl. ¶ 62; Rondoni Decl. Ex. G.) As part of his purported rationale for these limitations, Governor Walz cited to internal contact tracing statistics that claimed that there were "over 193 outbreaks connected to social gatherings, events (*e.g.*, concerts, and fairs), and wedding and funeral receptions." (Exec. Order 20-96 at 2.) "Additionally, over 221 total outbreaks have been connected to patrons and employees of bars and restaurants." (*Id.*) It is plausible to conclude, based on this limited information, that restaurants and bars represent somewhere near 50% of the roughly 16,000 total likely exposures attributed to the category "community (outbreak)," or somewhere around 2%

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of the total number of cases in Minnesota.[1] Notwithstanding this minimal impact on the totality of Minnesota Covid-19 cases, Governor Walz followed on Executive Order 20-96 by ordering a complete shutdown of indoor in-person services at Minnesota restaurants and bars approximately one week later. (Rondoni Decl. Ex. H (Executive Order 20-99).)

Plaintiffs are restaurants located in Minnesota who assert that Governor Walz's decision to close all Minnesota restaurants and bars to indoor services lacks a rational basis. Executive Order 20-96, which limited the hours of service for restaurants and bars, was in part based on the idea that later activities, likely more fueled by alcohol, were more dangerous. (Compl. ¶¶ 62-63.) Whether or not this was based on any evidence or merely conjecture, is unknown, but the theory does not impact restaurant service at normal dining hours. Executive Order 20-96 did, however, reduce the capacity limits for an indoor space from 250 to 150 people. This executive order went into effect on November 13, 2020. Five days after Executive Order 20-96 went into effect, Governor Walz announced that restaurants and bars would be closed to indoor services beginning November 20, 2020. (*Id.* ¶ 64; Rondoni Decl. Ex. H at 4.) Executive Order 20-99 shut down indoor dining throughout Minnesota.

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[1] Other reporting, presumably also involving contact tracing data that is not available to Plaintiffs, has fixed this percentage closer to 1.1%. *See https://www.twincities.com/2020/11/18/here-is-every-minnesota-restaurant-and-bar-thats-had-a-covid-outbreak/* This report found that 139 out of the 10,000 bars and restaurants in Minnesota are responsible for these cases, while more than 98% of the restaurants and bars have not contributed to the number of "outbreaks."

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Governor Walz's stated rationale for this abrupt change of the restrictions placed on indoor dining was that in the week between issuing Executive Order 20-96 and 20-99 there were 30 "additional outbreaks connected to the gatherings, bars, and restaurants that were encompassed by Executive Order 20-96." (Compl. ¶¶ 64-65; Rondoni Decl. Ex. H at 2.) Statewide, the reported cases of Covid-19 increased by approximately 48,000 during that time, with 241 cases attributable to the general category that includes restaurants and bars. (Compl. ¶ 84.) In other words, within one week of limiting the hours and occupancy of restaurants and bars, the most the data indicates is that up to 30 out of the approximately 10,000 restaurants and bars in Minnesota had outbreaks (.3%) and approximately .5% of the cases reported that week could be attributed to those locations. (*Id.*; Rondoni Decl. Ex. H at 2.) From this limited data, Governor Walz shut down all the restaurants and bars that had not had outbreaks and placed the employment of hundreds of thousands in limbo, threatening the viability of Minnesota restaurants already reeling from the limitations that began nine months ago. (Compl. ¶¶ 86, 97-98.)

Executive Order 20-103 extended the shutdown of indoor restaurant and bar services through January 10, 2021. (*Id.* ¶¶ 66-67; Rondoni Decl. Ex. I at 3.) However, the growth in the number of cases attributed to the "Community (outbreak)" category has not slowed. "Community (outbreak)" numbers represented 3.44% of the increase in the number of cases during the last week that Executive order 20-99 was in effect, meaning that these exposures must be attributable to some other location in the broader

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classification. (Compl. ¶ 87.) Put another way, the percentage of marginal "Community (outbreak)" cases actually **increased** after Governor Walz shutdown restaurants and bars.

Other data from MDH indicates that the majority of restaurants are not the problem and MDH has provided a developed a checklist to help restaurants to mitigate the risk of virus transmission. (See https://www.health.state.mn.us/news/pressrel/2020/covid090920.html.) MDH has also performed contact tracing.[2] While contact tracing only indicates that an infected person was at a location, and cannot determine that the person contracted the virus there, it is likely the most reliable tool available to determine the effects of congregation at a specific location even if it is a better determinant of correlation than causation. According to one report using contact tracing data, there were 2766 cases that could be traced to outbreaks from 139 restaurants and bars. (https://www.twincities.com/2020/11/18/here-is-every-minnesota-restaurant-and-bar-thats-had-a-covid-outbreak/.) This represents 1.6% of the total cases for which there is a known likely source of infection, and less than 1% of all reported cases, even accepting the difficulty of reconciling correlation and causation in favor of attributing the most cases to restaurants and bars.

[2] Plaintiffs have been told that the contact tracing interview skews its questions to ask about restaurant or bar visits, asking specifically about restaurants and bars, but not about other customer-facing businesses that would be in the "Community (outbreak) category of "likely exposures." (Compl. ¶¶ 78-79.)

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MDH has admitted that most restaurants were able to comply, and were complying, with the regulations placed upon them. However, instead of using the regulatory and policing functions of the State to address the problem spots, Governor Walz has treated all Minnesota restaurants the same. Governor Walz's Executive Orders treat the vast majority, more than 98% by some reporting, of Minnesota restaurants as the small minority of venues that facilitated (or correlated to) the outbreaks, and in contrast to the manner the State has treated similarly situated customer-facing businesses such as tattoo parlors, nail salons, spas, and barbershops.

ARGUMENT

A TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF SHOULD ISSUE REQUIRING DEFENDANTS TO ALLOW PLAINTIFFS TO REOPEN THEIR BUSINESSES IN A MANNER EQUIVALENT TO SIMILARLY SITUATED CUSTOMER-FACING BUSINESSES.

Rule 65 of the Minnesota Rules of Civil Procedure governs the procedures under which a party may seek injunctive relief. When considering whether to grant a motion seeking injunctive relief under Rule 65, Minnesota courts are to consider (1) the relationship between the parties before the dispute arose; (2) the harm plaintiff may suffer if an injunction is denied and the harm to the defendant if the injunction is granted; (3) the likelihood that the moving party will prevail on the merits; (4) public policy; and (5) the administrative burden on the court if the injunction is issued. *See M.G.M. Liquor Warehouse International, Inc. v. Forsland*, 371 N.W.2d 75, 77 (Minn. Ct. App. 1985) (citing *Dahlberg Brothers, Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321–22 (Minn. 1965)). Moreover,

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the moving party must show that its legal remedy is inadequate and that without the injunction, the party would suffer irreparable injury. *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979) (internal citation omitted). A consideration of these factors compels the conclusion that a temporary restraining order is appropriate under the circumstances of this case.

I. THE RELATIONSHIP OF THE PARTIES WEIGHS IN FAVOR OF INJUNCTIVE RELIEF.

The first element of the temporary restraining order analysis is the relationship between the parties. *Dahlberg Bros., Inc.*, 137 N.W.2d at 321-22. While Defendants have substantial powers during a declared emergency, Plaintiffs are not without rights that must be respected. Plaintiffs are at the mercy of Defendants absent judicial intervention, subject to civil and criminal sanctions. Defendants regulate Plaintiffs and enforce these regulations against them.

Plaintiffs have not violated or flouted Defendants' regulations and are not subject to government enforcement actions. In this respect, Plaintiffs are different from the bar at issue in *State of Minn. v. Schiffler, et al,* Court File No.: 73-CV-20-3556 (Minn. Dist. Court (Stearns County) June 2, 2020). In the *Schiffler* case, the district court stated the relationship between the parties was one of "regulator and non-compliant regulated entity." *Schiffler* Order at 11 (citing *Swanson v. CashCall, Inc.,* Nos. A13-2086, A14-0028, 2014 WL 4056028, *5 (Minn. Ct. App. Aug. 18, 2014)). Here, Plaintiffs represent parties in

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compliance seeking to redress a grievance concerning an overbroad regulation. *Id.* at 15 ("[C]ourts must remain vigilant, mindful that government claims of emergency have served in the past as excuses to curtail constitutional freedoms") (quoting *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *7 (N.D. Ill. May 3, 2020)).

The Governor's obligation to promulgate and enforce laws within the confines of the Minnesota Constitution essentially puts him in a fiduciary role with regard to Minnesota citizens and businesses. This duty, now breached, is subject to redress in the judiciary, by design originating from the very foundation of this State and Nation. The relationship of the parties requires this Court to intervene to protect Plaintiffs' interests, rendering this factor favorable to Plaintiffs.

II. DEFENDANTS' ACTIONS WILL CAUSE IRREPARABLE HARM TO PLAINTIFFS FOR WHICH THERE IS NO REMEDY AT LAW.

A. Plaintiffs will Suffer Irreparable Harm as They Will Cease to be Able to Exist and Operate if not Permitted to Provide Indoor Services Immediately.

The second element to be considered in granting a temporary restraining order is whether the failure to maintain the status quo will irreparably harm the moving party. *Pickerign v. Pasco Mktg., Inc.*, 228 N.W.2d 562, 564 (Minn. 1975). "A court may grant a temporary injunction when it is apparent that the rights of a party will be irreparably injured before a trial on the merits is reached or where the relief sought in the main action will be ineffectual or impossible to grant." *Id.* In this case, this factor falls decidedly in favor of Plaintiffs. Plaintiffs' harm is not only severe and potentially irreversible absent

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injunctive relief, Plaintiffs are without any remedy at law to seek compensation for their loss.

Plaintiffs are facing an existential crisis—Plaintiffs have seen the revenues of their businesses reduced to a mere fraction of their former levels and cannot continue with so little revenue for much longer. (*See*, *e.g.*, Bannerman Decl. ¶¶ 3, 5.) One need only read recent newspaper articles to know the devasting impact the closures have had on businesses. Scores of restaurants and bars have closed, most likely permanently. *See e.g.* Sharyn Jackson, 94 Twin Cities restaurants that closed in 2020, Minneapolis Star Tribune, Dec. 28, 2020 (available at *https://www.startribune.com/94-twin-cities-restaurants-that-closed-in-2020/600002645/*). Plaintiffs have been essentially closed, or a shell of their former selves, and simply cannot continue like this much longer. Executive Order 20-103 permitting outdoor dining is not a viable economic solution either, as the costs to provide a useable space in a Minnesota winter is prohibitive. Because of these restrictions, Plaintiffs have had to lay off a significant number of their employees, leaving Minnesotans unemployed and without income. Plaintiffs have sizable indoor spaces for which they continue to pay but they are prohibited from using these spaces to generate income. This is unsustainable.

A continuation of Defendants' policy of classifying, without basis, Plaintiffs' businesses as unsafe at any level of occupancy and unlike other customer-facing service businesses will be fatal, likely to a large portion of the restaurant and bar industry

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throughout the state of Minnesota, putting thousands out of work and leaving properties vacant throughout the state. The determination cannot wait for a trial. This factor strongly favors granting Plaintiffs' motion.

B. The Balance of Harms Weighs in Favor of Plaintiffs.

In determining whether to grant a temporary restraining order, courts consider "[t]he harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial." *Dahlberg Bros., Inc.*, 137 N.W.2d 321-22. Defendants' harm if an injunction is granted will be minimal, if any, as Plaintiffs are not seeking to undo the complete regulatory regime that Defendants have installed in their efforts to protect the citizens of Minnesota. Defendants have other regulatory and policing functions to maintain safety standards short of the blunt instrument of a complete shutdown.[3]

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[3] Though not precedential, other courts confronted with the issue of apparently arbitrary shutdowns have enjoined the imposition of restrictions. In New York, a court issued a preliminary injunction allowing gyms to be open with 100% capacity, finding the restriction to 25% capacity to be arbitrary. *See* https://www.wgrz.com/article/news/local/orchard-park-gym-athletes-unleashed-robbie-dinero-wins-in-court-xcwill-be-allowed-to-open-at-100-percent-capacity/71-69ff6719-13df-472e-ae68-5b20484bfbe8. In California, a San Diego County Court and a Los Angeles County Court each ruled that local restrictions on dining were arbitrary and that the agencies failed to perform an adequate cost-benefit analysis, with the harm to the businesses not considered in light of other regulatory options. *See* https://www.courthousenews.com/wp-content/uploads/2020/12/Minute-Order-12.16.20-Midway-Venture-LLC-vs-County-of-SD.pdf (San Diego Order); *see also* https://www.courthousenews.com/wp-content/uploads/2020/12/CRA_LACounty-RULING_compressed.pdf (LA Order at 108) ("The balance of harms works in Petitioners' favor until such time as the County concludes after proper risk-benefit analysis that restaurants must be closed to protect the healthcare system.")

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Defendants have concluded that customer-facing businesses can be operated safely under certain circumstances, and the relief sought by Plaintiffs will merely incrementally increase the businesses subject to the same requirements. Plaintiffs represent a portion of an industry that is just one more public accommodation in line with those already permitted to operate, pledged and bound to operate under the social distancing guidelines. Put another way, Plaintiffs assert that if it does not harm the State to have tattoo parlors operating, for instance, with people in close and prolonged contact, then Plaintiffs' limited customer-facing operations, involving small groups, spaced out, with less frequent and continuous customer contact, and subject to other safety and hygiene-related protocols, are unlikely to pose a substantial harm to public safety. The experience of the past nine months bears this out, as the vast majority of restaurants have had little to no likely exposures traced to their premises and with care can be operated in relative safety. Plaintiffs are not seeking a lawless free-for-all threatening public safety, and as such Defendants' interests should suffer minimal harm.

If the injunction is not granted, Plaintiffs' business are essentially ended. Plaintiffs already have and will continue to suffer irreparable harm, and as such any possible, unspecified limited harm to Defendants is distinctly outweighed. This factor heavily favors Plaintiffs.

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III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF ESTABLISHING THAT ORDER 20-99 AND 20-103 VIOLATE THE EQUAL PROTECTION CLAUSE OF THE MINNESOTA CONSTITUTION.

The third factor the Court considers in determining whether to grant a temporary restraining order is the likelihood that the moving party will be successful on the merits of their claim. *Dahlberg Bros., Inc.*, 137 N.W.2d at 321-22. Plaintiffs are likely to succeed on the merits of their claims because the Orders violate the constitutional guarantee of equal protection under the Minnesota Constitution. The Court should therefore grant Plaintiffs' Motion for a Temporary Restraining Order.

"The equal protection guarantees contained in [ ] Minn. Const. Art. 1, § 2, require that persons similarly situated be treated alike unless a rational basis exists for discriminating among them." *Bernthal v. City of St. Paul*, 376 N.W.2d 422, 424 (Minn. 1985) (*citing Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Glassman v. Miller*, 356 N.W.2d 655 (Minn. 1984)). In fact, the equal protection clause is a "mandate" that similarly situated parties be treated alike. *Weir v. ACCRA Care, Inc.*, 828 N.W.2d 470, 472 (Minn. Ct. App. 2013) (*citing Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 725 (Minn. 2008)). The Governor's Orders, in prohibiting restaurants/bars from indoor operations, while allowing salons, barbers, and tattoo artists (collectively "salons/tattooists") to operate indoors, violates the equal protection guarantee because the two groups are sufficiently similar and the Order's differentiation does not satisfy the rational basis test. Furthermore, the State's own data indicates minimal impact in having most restaurants

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open, as only a minority or restaurants are creating issues, and the amount of infection arising out of restaurants is minimal.[4]

A. *Restaurants/Bars Are Sufficiently Similar to Salons/Tattooists in Relation to the State's Order.*

The threshold requirement for an equal protection claim is that the persons claiming disparate treatment are similarly situated to those with whom they compare themselves. *State v. Johnson*, 777 N.W.2d 767, 772 (Minn. Ct. App. 2010), *aff'd*, 813 N.W.2d 1 (Minn. 2012) (holding that felons and non-felons were not similarly situated classes so as to make an equal protection claim concerning the mandatory DNA submission statute Minn. Stat. § 609.117, subd. 1(1)). The compared groups do not have to be identical; rather, they must merely be alike in "all relevant respects." *St. Cloud Police Relief Ass'n v. City of St. Cloud,* 555 N.W.2d 318, 320 (Minn. Ct. App.1996).

By its terms, these Orders have created two classifications: customer-facing businesses that can operate indoors with certain safety protocols, such as the salons/tattooists; and customer-facing businesses that are prohibited from indoor operation even were they to employ safety protocols, such as restaurants. Both groups are customer-facing businesses in that citizens come to their locations for a product or service. Both groups have products or services that can be obtained and consumed

[4] Executive Order 20-96 took aim primarily at bar activity, citing late night alcohol consumption as a factor in increased risk of virus transmission. Plaintiffs respectfully assert that closing restaurants to cease supposedly dangerous bar activity amounts to the proverbial throwing the baby out with the bathwater.

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within a relatively set amount of time. Both groups' employees have direct interactions with the consumers; though the salons'/tattooists' interactions are far more prolonged, physical and intimate than a restaurant server. Both groups have the ability to employ safety measures, including capacity limitations, use of sanitizer, distanced seating, facemasks, and gloves. The differences between the two customer-facing groups of businesses are irrelevant to the allowance of indoor operation. Though restaurants/bars serve food and beverages, while salons serve haircuts and pedicures, there is nothing about that difference in their offerings that is relevant to the Order's prohibition, particularly in light of the fact that kitchens in restaurants/bars are open for take-out and patio service. The threshold requirement for asserting an equal protection claim has been satisfied.

B. There is No Rational Basis for Preventing Restaurants/Bars from Indoor Operations in Adherence with Safety Protocols, While Allowing Salons/Tattooists to Operate Indoors.

Where an equal protection challenge involves neither a suspect classification nor a fundamental right, as those terms have been defined by the courts, the review of the equal protection challenge is a rational basis standard. *Bernthal*, 376 N.W.2d at 424. Minnesota's constitution requires a higher level of review for rational basis than does its federal counterpart:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the

> classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Gluba ex rel. Gluba v. Bitzan & Ohren Masonry, 735 N.W.2d 713, 721 (Minn. 2007) (citing *State v. Russell,* 477 N.W.2d 886, 888 (Minn.1991)), *cited in In re Guardianship and Conservatorship of Durand*, 859 N.W.2d 780, 784 (Minn. 2017). The Order fails on two of the three requirements for a statute to pass constitutional muster.

1. *The Order's distinction between restaurants/bars and salons/tattooists for indoor operations is not genuine and substantial and there is not a reasonable basis to justify the Order in relation to public health and the COVID-19 pandemic.*

The first element of the Minnesota rational basis test is whether there is a "genuine and substantial difference between those inside and outside of a class" and whether there is a substantiated basis for that difference. *Weir*, 828 N.W.2d at 473 (*citing State v. Russell,* 477 N.W.2d 886, 888 (Minn. 1991)); *see also Gluba*, 735 N.W.2d at 721. To meet this element, "the state must provide more than anecdotal support for [the classification]." *Russell*, 477 N.W.2d at 889 (determining that basis for legislative distinction between crack and cocaine was based on a county attorney's anecdotal observations and knowledge "from the streets" was insufficient). Rather, there must be some factual evidence to support the classifications, and failure to provide such rationale renders the classifications arbitrary. *Weir v. ACCRA Care, Inc*., 828 N.W.2d 470, 474 (Minn. Ct. App. 2013) (*citing Russell*, 477 N.W.2d 890). Without factual support for the alleged basis for

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the distinction creation, the government may be seen as acting "purely on assumptions rather than facts." *Id.* at 474-75 (requiring DEED to have offered some evidence or legal authority as a basis for the disparate treatment and finding the distinction arbitrary on grounds that "an offered explanation for why similarly situated people should be treated differently, without evidence to support it, is "purely anecdotal.") In this case, the distinction in allowing salons/tattooists to conduct indoor customer-facing business, while prohibiting restaurants from doing the same, is similarly arbitrary and has no substantiated basis.

Governor Walz's statements preceding his Orders are replete with assumptions that bars and restaurants are equivalent and incapable of safe operation.

> Social gatherings, celebrations, restaurants, and bars by their nature, allow people to gather and congregate around people from different households to eat and drink without face coverings, often for extended periods of interaction. These settings and gatherings can be loud, leading to a larger volume of respiratory droplets in the air as people talk, raise their voices to be heard, laugh, or sing. Many gatherings, celebrations, bars, and restaurants also serve or involve alcohol, which can lower inhibitions and interfere with effective social distancing. Further, we tend to let our guard down when we gather around close friends and family, even though the data shows that these gatherings are often just as risky as gathering around strangers.

(Rondoni Decl. Ex. G (Executive Order 20-96) at 2.) With almost no time elapsed from the institution of the dial back on restaurants hours and capacity, Governor Walz then proceeded to shut down all restaurants based on the small fraction of cases attributable to restaurants. (*See* Compl. ¶¶ 84-86 ("From November 13 to November 20, 2020, the

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total number of cases where the 'likely exposure' was classified as 'Community (outbreak)' was 241.").)

> I recently issued Executive Order 20-96, which placed limits on the social gatherings and establishments that posed the most serious concern according to MDH data. In the week since, MDH has confirmed over 30 additional outbreaks connected to the gatherings, bars, and restaurants that were encompassed by Executive Order 20-96.

(Rondoni Decl. Ex. H (Executive Order 20-99) at 2.) Closing restaurants has not shrunk the percentage of cases in the "Community (outbreak)" category, yet Governor Walz extended the shutdown of indoor dining anyway, without evidence to support the differentiation of restaurants from other customer-facing businesses.

Executive Order 20-103 does not provide a legally substantiated basis for the distinction it creates between similarly situated customer-facing businesses. If anything, the rationale set forth in the Order itself does just the opposite. Executive Order 20-103 allows a maximum of 10 people from no more than two households can gather indoors socially, but those same 10 people cannot do so at a restaurant, where spacing and hygiene can be professionally tended to by staff trained to follow MDH's checklist. (*Id.* Ex. I (Executive Order 20-103) at 2.) The Order also generally describes indoor activities as posing a higher risk than outdoor activities, while allowing indoor activities by salons/tattooists, but not restaurants. (*Id.*) Finally, the Order permits indoor fitness

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facilities to re-open under certain restrictions, notwithstanding the added risks associated with people exercising in proximity with each other.[5]

Likewise, the State's public information also fails to demonstrate a basis for the distinction. (*See* https://www.health.state.mn.us/diseases/coronavirus/stats/index.html.) The State has not provided any basis for the distinction between restaurants/bars and salons/tattooists. (*See id.; see also* Compl. ¶¶ 63, 78-82, 87-89 (Weekly Reports do not differentiate between these categories, and available contact tracing information indicates that restaurants and bars together are likely contributing less than two percent to the total number of outbreaks or cases throughout the state.).) In fact, even when restaurants and bars were shut down, the percentage of total cases attributed to "Community (outbreaks)" did not go down substantially. (*Compare* Compl. ¶¶ 82 and 84 *with* ¶ 87.)

Governor Walz's assumptions related to retail imply that a comparison is being made between the interactions of the public and workers at the location in a retail setting versus a hospitality setting. But any such distinction does not hold up.

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[5] Governor Walz, when discussing exercise, appears to engage in a cost-benefit analysis approach. "We know that physical activity can strengthen immune systems and provide mental health benefits. Research suggests that physical activity can help address the stress and anxiety resulting from the COVID-19 pandemic." (Rondoni Decl. Ex. I (Executive Order 20-103) at 2.) He concludes: "In balancing the risk of infection with the positive benefits of exercise, exercise facilities will need to limit their capacity, increase social distancing requirements, require their patrons to wear face coverings at all times, and follow the guidance available on the StaySafe Minnesota website (https://staysafe.mn.gov)." There is no evidence that Governor Walz engaged is such an analysis with respect to restaurants.

> For example, we see relatively fewer outbreaks in retail settings, which generally involve brief, masked, transient interactions that pose lower transmission risk. According to the CDC, an individual is not considered a "close contact" of someone with COVID-19 unless they were within 6 feet of the individual for 15 or more minutes. These extended interactions can be limited in retail environments

(Rondoni Decl. Ex. I (Executive Order 20-103) at 3.) But interactions at restaurants between staff and patrons are also intermittent, transient, almost always less than a total of 15 minutes, and masked. Steps can be taken to limit interactions with staff and others. If the contact at issue is with the people sharing a table, they too can be spaced and there is no reason to see a difference between people shopping together and people eating together. Even more to the point, there is nothing in any Executive Order that prohibits people who are not of the same household from driving together to a retail location and spending the whole day together, while two people who drive separately to a restaurant, sit 4-6 feet from each other, and wear masks for the time when they are not specifically eating or drinking, spend 30 minutes total, is outlawed. This is not rational.

In short, Defendants have failed to demonstrate a substantiated basis for allowing one group of businesses to re-commence indoor operations (*e.g.* salons/tattooists or other customer-facing retail), while foreclosing the ability of other businesses to the do the same (*e.g.* restaurants). As a result, the Order fails to meet the rational basis test and therefore it is unconstitutional as it violates Minnesota's equal protection constitutional guarantee. As a result, Plaintiffs are likely to succeed on the merits of the lawsuit. This is a further

and compelling reason that the Court should grant Plaintiffs' Motion for a Temporary Injunction.

2. *There is nothing peculiar about restaurants in relation to indoor operations that justifies its prohibition in contrast to salons/tattooists.*

The second element is whether the distinction is relevant to the purpose of the law with an evident connection between the distinction and the prescribed remedy. *Russell*, 477 N.W.2d at 888; *see also Durand*, 859 N.W.2d at 786-87 (determining that the distinction between protected and non-protected persons in probate proceedings was appropriate because a conservator for the protected person should not have unilateral decision-making power based on pecuniary and non-pecuniary interests). In the instant case, there is nothing unique to customer-facing businesses like salons/tattooists, as opposed to restaurants/bars, in relation to conducting business indoors that justifies opening the former, while completely shuttering the latter. However, the distinction drawn as between restaurants/bars and salons/tattooists does not itself further that purpose.

> The virus is everywhere, meaning that every interaction we have with people outside of our households poses a risk of transmission. When we cannot effectively trace infections due to community spread, we cannot keep COVID-19 out of our businesses, our schools, or the congregate care facilities that house our most vulnerable residents. For the benefit of our economy and all Minnesotans, we need to buckle down.

(Rondoni Decl. Ex. H (Executive Order 20-99) at 2.) There is nothing about the distinction between the classifications to demonstrate that allowing salons/tattooists to open for indoor operations, but foreclosing restaurants/bars from the same, serves the purpose of

keeping COVID-19 out of businesses. Rather, it appears that the distinction is not justified; rather, restaurants/bars were singled out for exclusion from the opportunity to conduct business operations indoors.

The meritless distinction is further borne out by the State's own graphics attempting to justify the distinction:

(https://mn.gov/covid19/.) It appears that the State has chosen to view the salons/tattooists as "workplace[s]," while categorizing restaurants/bars as "social settings." (*Id.*) The "dials" for the respective categories, into which the State has arbitrarily placed one business, but not the other, represent narrow views of the

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respective settings.[6] (*Id.*) While all salons, barbershops and tattoo parlors require people to be in close proximity for a period of time, and tend towards smaller locations, restaurants can vary from a single lunch counter to sizes that resemble auditoriums. The restaurant worker, unlike in the tattoo setting, is unlikely to touch the patron. The result of the analysis is determined by the assumption—restaurants are social places and salons are workplaces. This distinction is not rational; the result is that one type of customer-facing indoor business is allowed to re-open, while the other (with less frequent, persistent, and close contact between business and consumer) is prohibited.

As a result, the Order also fails the second prong of the rational basis test for equal protection and thereby is unconstitutional. Therefore, Plaintiffs are likely to succeed on the merits of their claims and the Court should grant Plaintiffs' Motion for a Temporary Restraining Order.

V. PUBLIC POLICY SUPPORTS GRANTING OF THE TEMPORARY RESTRAINING ORDER TO ALLOW FOR EQUAL TREATMENT OF THE RESTAURANT AND BAR INDUSTRY.

The fourth element for a court to consider in granting a temporary restraining order is public policy. *Dahlberg Brothers, Inc.*, 137 N.W.2d at 321–22. Plaintiffs acknowledge that in the instant case, there are a variety of public policy considerations at issue. However, that does not mean all of those considerations are at odds. The public

[6] The State's attempt at graphical depiction makes little sense—apparently it is safe to go to work where the dial is set to approximately 2 o'clock but not to go to that worksite "socially."

policy ensuring equal protection of the law, enshrined in the Minnesota Constitution, is the paramount public policy to be evaluated when confronted with laws disproportionally impacting and damaging citizens and businesses in Minnesota.

Plaintiffs are small businesses, one of the backbones of our State and our society and their very existence is being threatened by the prohibition on indoor dining by the Governor's Executive Orders. The State publicly concedes the importance of these entities. (Rondoni Decl. Ex. H (Executive Order 20-99) ("I recognize and regret that this Order will affect the bottom line of businesses that have already borne a great deal of hardship due to this pandemic."); see also https://www.health.state.mn.us/news/pressrel/2020/covid090920.html (quoting Minn. Pub. Safety Comm'r John Harrington, "Keeping bars and restaurants open is critical to our state's economy. We need everyone to follow the guidelines to ensure we slow the spread of COVID-19 so that these businesses can continue to operate.").) It is poor public policy to allow these important pieces of the State's economy, not to mention the State's social fabric, to unnecessarily fail and disappear.

There is obviously also the policy consideration of the horrible COVID-19 pandemic that has assaulted the entire country. But that consideration is not at odds with the consideration of continued economic viability. As has been shown, and in fact specifically allowed, in other contexts for other customer-facing businesses, safety measures can be undertaken to ensure that the health public policy consideration is

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valued simultaneously with the consideration of these Minnesota businesses' very existence. It is this balance that is encapsulated in the relief sought by Plaintiffs that causes this favor to also weigh in favor of the Court granting a temporary restraining order.

VI. THE LACK OF ADMINISTRATIVE BURDEN IN GRANTING THE INJUNCTION WEIGHS IN FAVOR OF PLAINTIFFS.

The final element in granting a temporary restraining order is the administrative burden on the court if the injunction is issued. *Dahlberg Brothers, Inc.*, 137 N.W.2d at 321–22. The administrative burden on the Court in enforcing this order is minimal. The Defendants in this case are already, and appropriately, deeply involved in the regulation of the State's businesses and citizenry for the purpose of preserving health. The Court's Order would simply shape one part of their regulatory scheme to afford equal protection as between indoor customer-facing businesses. This factor weighs in favor of the Court granting a temporary restraining order.

CONCLUSION

Plaintiffs come to this Court for a lifeline. Without a temporary restraining order, these businesses will shutter, and further economic ruin will be wrought. Plaintiffs do not seek any more than to be allowed to operate indoors with safety protocols, just as other businesses have been allowed to do, even businesses with far more intimate, prolonged, and physical contact between them and the consumer. There is simply not a

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rational basis for the differential treatment that is part and parcel of the Governor's Executive Order prohibiting indoor dining for restaurants and bars.

The Court should grant Plaintiffs' Motion for a Temporary Restraining Order.

CHESTNUT CAMBRONNE PA

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