

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202</p>	
<p>Plaintiff: THE TAVERN LEAGUE OF COLORADO</p> <p>v.</p> <p>Defendants: JARED POLIS, in his official capacity as Governor of the State of Colorado; COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, and JILL HUNSAKER RYAN, in her official capacity as the Executive Director of the Colorado Department of Public Health and Environment</p>	
<p>Attorneys for Plaintiff:</p> <p>Jordan Factor, #38126 Brenton L. Gragg, #52528 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1900 Denver, Colorado 80202 Phone Number: (303) 534-4499 E-mail: jfactor@allen-vellone.com E-mail: bgragg@allen-vellone.com</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case Number: 20CV32484</p> <p>Division/Courtroom: 203</p>
<p>AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</p>	

Plaintiff, by and through undersigned counsel, hereby submits its Amended Verified Complaint for Declaratory and Injunctive Relief as follows.

INTRODUCTION

1. Plaintiff seeks judicial review of orders issued by Defendants and seeks further to restrain the Defendants from enforcing arbitrary and capricious rules depriving Plaintiff's members of their rights, privileges and immunities secured to them by the Constitutions of the United States and the State of Colorado. Specifically, Plaintiff seeks to have this Court declare as unconstitutional, both on its face and as applied, and to enjoin, specified aspects of the Eighth Amended Public Health Order

20-28 Safer At Home and in the Vast, Great Outdoors, June 30, 2020, (hereafter, the “Order”) issued by Defendant Jill Hunsaker Ryan in her official capacity as the Executive Director of Defendant the Colorado Department of Public Health & Environment (“CDPHE”) pursuant to the Colorado Governor’s directive in Executive Order D 2020 091 (as amended by Executive Order D 2020 123). On June 30, 2020, CDPHE issued the Order to slow the spread of COVID-19, imposing uniquely onerous restriction on bars and restaurants and putting thousands of Coloradans out of work. This was not only arbitrary and capricious, as there is no evidence that bars and restaurants spread COVID-19 more than any other non-essential business, but it also violated various federal and state constitutional guarantees. Plaintiff, an organization comprised of bars and restaurants across Colorado, brings this action seeking declaratory and injunctive relief to vindicate its members’ constitutional rights and to rectify the irreparable harm threatened by the arbitrary and capricious Order.

2. Defendants have singled out bars and restaurants for unfair and different treatment, despite the lack of any evidence that bars and restaurants are unique vectors for the spread of COVID-19. Also lacking any evidence is the notion that a restaurant’s square footage is irrelevant to how many patrons it can safely accommodate. Yet Defendants have imposed strict Numerical Capacity Limits on bars and restaurants—different than other indoor venues—that ignore the restaurant’s total size. As a result, Colorado’s restaurants are failing at an alarming rate, unable to pay the rent and utilities at locations that are capable of accommodating, for example, 900 patrons in over 18,000 square feet, when they are limited to no more than 50 patrons per room and only 100 in total. Nearly 80% of Colorado’s restaurants report operating at under 49% capacity due to these restrictions, with over a third able to serve less than 29% of normal capacity.

3. These numerical restrictions have no basis in science. No major public health agency or organization has recommended them. No other state in the country has adopted them. Yet they are in the process of destroying a major industry. In instances like this, Colorado law empowers this Court to do justice and restrain the imposition of these unconstitutional requirements.

4. On July 21, 2020, Plaintiff sent a letter to Colorado Governor Jared Polis describing the harms that the Order’s arbitrary and unconstitutional restrictions impose on Colorado bars and restaurants. Plaintiff then filed its Verified Complaint for Declaratory and Injunctive Relief.

5. This Amended Verified Complaint for Declaratory and Injunctive Relief was necessitated by an additional arbitrary, unreasonable, and unconstitutional restriction that was subsequently imposed on Plaintiff’s members the next day. On

July 21, 2020, Governor Polis issued Executive Order D 2020 142 (“Last Call Order”), restricting bars and restaurants from selling alcohol after 10 p.m.

6. If there were any doubt that bars and restaurants were doomed to closure before the Last Call Order, none remains. While Coloradans eagerly awaited the return of professional sports, and hoped to view them from a regulated setting where social distancing could be maintained and the owners of establishments could ensure a clean and healthy environment, now they must watch late-starting games from home.

7. The Last Call Order effectively shuts down Plaintiff’s members at 10 p.m. when alcohol may no longer be sold, though there is no reason to think that that patrons will visit Plaintiff’s members before then. Instead, Plaintiff’s members will not be patronized at all because no patron will desire to watch the first half of a professional sports game knowing that alcohol will no longer be served halfway through the event. Rather, Coloradans will load up on alcohol at a liquor store and host large viewing parties at their homes—which has been demonstrated to pose a far greater danger to public health than gathering in a well-regulated, socially distanced bar or restaurant. As with the numerical capacity constraints imposed by the Order, the Last Call Order is not propounded because science suggests it is wise or because there is any rational relation between the arbitrary cutoff time it imposes and preventing the spread of COVID-19. No major public health agency or organization has recommended a 10 p.m. last call to control the spread of COVID. Only one other state has adopted a similar requirement.

8. Nor is it equally applied. While Plaintiff’s members are effectively shut down at 10 p.m. and may never obtain patrons at all because of the Last Call Order, other establishments that do not depend on the sales of alcohol can continue operating.

9. There is no evidence that ordering alcohol after 10 p.m. increases the spread of COVID-19. Instead, bars and restaurants are being scapegoated so that Governor Polis can make a political statement. In announcing the arbitrary 10 p.m. cutoff, the governor stated that he “want[s] to send the right message here,” specifically, that this is not the summer to party. It’s the summer of no parties.” But the Constitution does not permit the governor to destroy an industry in order to send a political message.

PARTIES

10. The Tavern League of Colorado (the “Tavern League”) is a non-profit trade association representing members who serve on-site alcoholic beverages in the State of Colorado. The Tavern League is located in the City and County of Denver at 496 S. Broadway, Denver, CO 80209.

11. Defendant CDPHE is a Colorado agency created and authorized pursuant to CRS § 25-1-101, et seq. The CDPHE is headquartered at 4300 Cherry Creek Drive South, Denver, Colorado.

12. Defendant Jill Hunsaker Ryan is the Executive Director of the CDPHE, and is sued in her official capacity only, as the Executive Director of the CDPHE.

13. Defendant Jared Polis is the Governor of the State of Colorado, and is sued in his official capacity only, as the Governor of the State of Colorado.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over this action pursuant to the Constitution of the State of Colorado, Article VI, Section 9.

15. This Court has personal jurisdiction over Defendants because they are located and perform government functions in the State of Colorado.

16. Venue is proper in this Court under C.R.C.P. 98(b)(2) because Ms. Ryan is a public officer and claims brought against her are in virtue of the discharge of her duties as a public officer. Those duties were discharged in the City and County of Denver. Venue is proper against Defendant CDPHE pursuant to C.R.S. § 24-4-106(4) and C.R.S. § 25-1-113(1).

RELEVANT STATUTORY AND ORDER PROVISIONS

17. Defendant Jill Hunsaker Ryan (“Ms. Ryan”) signed the Order on June 30, 2020, and it is currently in effect.

18. A true and accurate copy of the Order is attached hereto as **Exhibit A** and is hereby incorporated by reference as though fully set forth herein.

19. The Order provides, in part:

4. Effective June 18, 2020, indoor and outdoor events such as receptions, events, non-critical auctions, theaters, trade shows, markets, indoor malls, rodeos, fairs, festivals and parades or other indoor or outdoor events not

otherwise covered by this Order may operate in accordance with the following requirements:

a. Outdoor venues may allow up to 175 people within their usable space calculated using the Social Distancing Space Calculator, excluding staff, per designated activity with a minimum of 6 feet of distance between individuals or non-household contacts.

b. Indoor venues may allow up to 100 people within their usable space calculated using the Social Distancing Space Calculator, excluding staff, per room with a minimum of 6 feet of distance between individuals or non-household contacts.

[Order, pp. 5-6, I.H.4.a-b]

* * *

Effective June 18, 2020, bars, taverns, brew pubs . . . and other places of public accommodation offering alcoholic beverages for on-premises consumption, referred to as Bars, may operate with the lesser of 25% of the posted occupancy limit or 50 patrons, whichever is less. If the establishment also ensures access to food from a licensed retail food establishment for on-premise consumption, it may operate at the lesser of 50% of the posted occupancy limit or no more than 50 patrons indoors within their usable space . . . Extra large establishments may expand to no more than 100 patrons indoors within their usable space[.]

[Order, p. 9, II.C.2]

Effective July 1, 2020, paragraph 2 in this Section II.C is rescinded, and only Bars that offer food from a licensed retail food establishment for on-premise consumption . . . may operate up to 50% of the posted occupancy limit or 50 patrons indoors, whichever is less. Extra large establishments may expand to no more than 100 patrons indoors within their usable space[.]

[Order, p.9 II.C.3]

20. Ms. Ryan's stated authority for promulgating the Order stems from a directive set forth by Colorado Governor Jared Polis in Executive Order D 2020 091, as amended by Executive Order D 2020 123.

21. The guidance cited in the Order, (e.g. Order p. 7, I.H.5, hereinafter the “Guidance”), defines an “extra large establishment” as one that has square footage in excess of 7,200 square feet. Colorado Dept. of Public Health and Environment, Safer at Home: Restaurants & food services, (accessed July 16, 2020), <https://covid19.colorado.gov/safer-at-home/restaurants-food-services>.

22. Thus, an establishment with 7,199 square feet is limited to 50 patrons, while establishments with 7,200 square feet or more may host up to 100 patrons.

23. The Order offers no justification for treating similarly situated businesses differently, arbitrarily allowing indoor venues to host 100 patrons **per room** without caveat while bars serving food are limited to the lesser of 50 patrons or 50% capacity **in total** unless they are an “extra large establishment.”

24. Even if they are an “extra large establishment,” bars and restaurants may not avail themselves of the 100 patron **per room** limit available to indoor venues, and are instead limited to 100 patrons **in total** and only 50 patrons per room.

25. Further, although outdoor venues may accommodate 175 patrons **per designated activity**, bars and restaurants are not permitted to do so. Rather, even if they offer outdoor seating, bars and restaurants may not avail themselves of the 175 patron **per designated activity** limit available to indoor venues.

26. The 50-patron, 100-patron, and 175-patron limits shall be referred to herein collectively as the “Numerical Capacity Limits.”

27. Despite singling out bars and restaurants for these lesser Numerical Capacity Limits, the Order recites as fact that “Multiple sources of data show that COVID-19 transmission and the use of healthcare due to COVID-19 have leveled off in Colorado. Our work to ‘flatten the curve’ appears to be succeeding, and the Governor has ordered some lessening of the current Safer at Home restrictions as a result.” Order, pp. 1-2, Findings ¶ 3.

28. Indeed, bars and restaurants are not even purported to be a major contributor to the spread of COVID-19. Out of 414 outbreaks in Colorado, only 18 were found to come from bars or restaurants. Less than 5% of COVID-19 outbreaks in Colorado are traceable to a bar or restaurant. Denver Post, Locations of coronavirus outbreaks in Colorado, (accessed July 21, 2020), https://extras.denverpost.com/app/coronavirus/tables/outbreak_data.html.

29. Further, the number of hospitalizations from COVID-19 now (July 20, 2020: 275) is below the number it was when bars and restaurants were allowed to reopen (May 27, 2020: 362). Colorado Dept. of Public Health and Environment,

Colorado COVID-19 Hospital Data, (accessed July 21, 2020), <https://covid19.colorado.gov/hospital-data>.

30. The Numerical Capacity Limits are not justified by science or research at all.

31. Nor is there is any evidence that a restaurant's total square footage is irrelevant to COVID transmission. Yet the Numerical Capacity Limits ignore a restaurant's actual size, limiting restaurants to no more than 100 patrons regardless of whether it offers 7,200 square feet or 30,000 square feet. This, too, has no basis in scientific data.

32. The United States Center for Disease Control and Prevention (the "CDC") recommends that capacity in bars and restaurants be limited such that tables may be spaced 6 feet apart and patrons other than household groups may maintain that distance. United States Center for Disease Control and Prevention, Guidance for bars and restaurants, (accessed July 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html>.

33. The CDC does not recommend the Numerical Capacity Limits, instead recommending that a 6-foot buffer zone between non-family groups be maintained. (*Id.*).

34. Other states have sensibly followed these scientifically supported recommendations when reopening dining in their respective states:

a. Alabama's Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19, Amended July 15, 2020 ("AL Order"), only requires bars and restaurants to maintain 6 feet of distance between patrons and does not otherwise set a capacity limit, much less a strict numerical limit. (AL Order, attached as **Exhibit B** at pp. 10-11, ¶ 19).

b. Alaska "does not mandate the general use of masks, limit group size, or business operations" at all at this time. State of Alaska, COVID-19 Health Mandates, (accessed July 19, 2020), <https://covid19.alaska.gov/health-mandates/>.

c. Arkansas' Directive on Resuming Restaurant Dine-In Operations, effective June 15, 2020 ("AR Order"), limits capacity to 66% and requires 6 foot distancing between patrons, but does not set a strict numerical capacity limit. (AR Order, attached as **Exhibit C** at 1).

d. Arizona’s Requirements for Restaurants Proving Dine in Services, updated July 9, 2020 (“AZ Order”) requires that restaurants operate below 50% capacity, but does not set strict numerical patron limits. (AZ Order, attached as **Exhibit D** at 1).

e. When it opened its bars and restaurants, California required only that 6 feet of separation was maintained between patrons of different households. (California COVID-19 Industry Guidance, attached hereto as **Exhibit E** at p. 12).

f. Connecticut’s Sector Rules for June 17 Reopen, issued June 1, 2020 (“CT Order”) limits capacity to 50% of fire code as well, but does not set a strict numerical limit. (CT Order, attached as **Exhibit F** at 5, 7).

g. Delaware’s requirements are similar: in Delaware’s Reopening, Phase 2, June 15, 2020 (“DE Order”), no strict numerical patron limits are imposed on restaurants and bars. Instead, establishments may operate at 60% of their fire code capacity with 6-foot social distancing in place. (DE Order, attached as **Exhibit G** at 12).

h. Florida’s Executive Order 20-139, June 5, 2020, (the “FL Order”) does not impose strict numerical requirements, instead allowing bars and restaurants to operate “at fifty (50) percent of their indoor capacity[.]” (FL Order **Exhibit H** at 3).

i. Hawai’i’s Guidance for Reopening Food Service Sector, May 21, 2020 (the “HI Order”) currently allows for 50% capacity for bars and restaurants, increasing to 75% in the next phase of reopening. (HI Order, attached as **Exhibit I** at 1, 5).

j. Idaho instructs bars and restaurants to “[l]imit capacity, as necessary to maintain six feet physical distancing” in its Stage 4: Protocols for Bars, Breweries, Wineries, Distilleries, and Nightclubs, updated for Stage 4 June 11, 2020 (the “ID Order” attached as **Exhibit J** at 1).

k. Iowa’s Proclamation of Disaster Emergency, June 25, 2020 (the “IA Order”) requires only that 6 feet of separation be maintained between patrons at a bar or restaurant and does not impose strict numerical limits. (IA Order attached as **Exhibit K**, at 2, § 2.A).

l. Illinois’s Executive Order 2020-43, June 26, 2020 (the “IL Order”) requires only that bar and restaurant establishments limit capacity to the extent that they can comply with maintaining feet of distance between patrons from different households. (IL Order, attached as **Exhibit L** at pp. 5-6, § 3.f).

m. Indiana’s Executive Order 20-32, June 11, 2020 (the “IN Order”) allows restaurants to operate at 75% and bars to operate at 50% capacity in those counties still subject to stricter requirements but sets no strict numerical capacity limits for bars and restaurants. (IN Order, attached as **Exhibit M** at p. 6, ¶ 10).

n. Kansas’ COVID-19 Guidance, Re-Opening Food Service Establishments, May 1, 2020 (the “KS Order”) allows restaurants to reopen provided they maintain six feet of separation between groups of patrons from different households. (KS Order, attached as **Exhibit N** at 1).

o. Kentucky’s Healthy at Work, Requirements for Restaurants and Bars, June 29, 2020 (the “KY Order”) allows bars and restaurants to continue business at 50% of capacity. (KY Order, attached as **Exhibit O** at 1).

p. Louisiana’s guidance for bars and restaurants, Stay Safe Against the Coronavirus, July 12, 2020 (the “LA Order”) allows for restaurants to reopen at 50% capacity with physical separation in place between patrons of different households. (LA Order, attached as **Exhibit P** at pp. 3-4).

q. Maine allows restaurants to open with six feet of distance between patrons of different households and only imposes numerical requirements on individual rooms, which cannot exceed 50 patrons, but does not impose limits on total capacity, much less disregarding square footage. Maine Department of Economic & Community Development, COVID19 Prevention Checklist Industry Guidance, (accessed July 19, 2020), <https://www.maine.gov/decd/checklists/restaurantsMaine>.

r. Maryland’s Directive and Order Regarding Food Service Establishments, June 10, 2020 (the “MD Order”) allows indoor food establishments to operate at 50% occupancy with physical separation in place between patrons of different households. (MD Order, attached as **Exhibit Q** at 2).

s. Massachusetts allows indoor seating at restaurants so long as six feet of distance between patrons of different households is maintained, or otherwise allows operation at 50% of capacity with distancing measures in place. State of Massachusetts, Safety Standards and Checklist: Restaurants, (accessed July 19, 2020), <https://www.mass.gov/info-details/safety-standards-and-checklist-restaurants#social-distancing->; State of Massachusetts, Safety Standards and Checklist: Sectors Not Otherwise Addressed, (accessed July 19, 2020) <https://www.mass.gov/info-details/safety-standards-and-checklist-sectors-not-otherwise-addressed>.

t. Missouri has no statewide health orders currently in place, and instead directs businesses to consider the CDC's guidance. Missouri Dept. of Health and Senior Services, Businesses, (accessed July 19, 2020), <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/businesses.php>.

u. Michigan's Safe Start: Restaurants and Bars, June 10, 2020 (the "MI Order") encourages restaurants and bars to seat patrons from different households six feet from one another with no numerical capacity restrictions. (MI Order, attached as **Exhibit R** at 4).

v. Mississippi's Executive Order 1492, May 28, 2020 (the "MS Order") allows restaurants and bars to operate at 50% of capacity with six feet of distancing in place and no numerical capacity limitations. (MS Order, attached hereto as **Exhibit S** at p. 3, I.f.vi-vii).

w. As of June 1, 2020, Montana increased capacity limits for bars and restaurants from 50% to 75%, with no numerical capacity limits. (State of Montana, Reopening the Big Sky, attached hereto as **Exhibit T** at 16).

x. Starting July 13, 2020, Nebraska allows bars and restaurants to operate at 100% of capacity. (Nebraska Department of Health and Human Services, Outline of Changes to Upcoming DHM Phase III, attached as **Exhibit U** at 1).

y. Nevada's governor allowed bars and restaurants to operate at 50% capacity, with no numerical restrictions, starting on May 29, 2020. (Governor Sisolak Prepared Remarks, Guidance for Phase 2 Reopening, May 26, 2020, attached as **Exhibit V** at 7).

z. New Hampshire's Safer at Home: Food Service Industry, updated June 29, 2020, (the "NH Order") similarly allows bars and restaurants to operate with physical distancing measures in place at 50% capacity or more, depending on the county, and no numerical restrictions. (NH Order, attached as **Exhibit W** at 3).

aa. Prior to closing all indoor seating in mid-July, New Mexico's Public Health Emergency Order Clarifying that Current Guidance Documents, Advisories, and Emergency Public Health Orders Remain in Effect (the "NM Order") allowed bars and restaurants to provide indoor dining provided that 6 feet of distance is maintained between tables and they do not exceed 50% capacity. (NM Order, attached as **Exhibit X** at p.5, § 1.u).

bb. As part of its Phase II Reopening under Executive Order No. 141, May 20, 2020 (the "NC Order"), North Carolina restaurants may operate at 50%

capacity with no numerical capacity limit. (NC Order, attached as **Exhibit Y** at p.8, § 6.C).

cc. North Dakota's Industry Standards: Restaurants, Bars, Breweries, Distilleries, Food Trucks, updated July 7, 2020 (the "ND Order") allows bars and restaurants to allow indoor dining and determine their risk level based on establishment size, after which they may choose to operate at 50% or 75% of capacity with no numerical limit. (ND Order, attached as **Exhibit Z** at 4).

dd. Ohio's Responsible Restart Ohio: Restaurants, Bars, and Banquet & Catering Facilities/Services, updated June 16, 2020 (the "OH Order") requires restaurants and bars to post their maximum occupancy with tables distanced 6 feet apart, but does not set a numerical occupancy limit. (OH Order, attached as **Exhibit AA** at 2).

ee. In Oklahoma, a bar or restaurant may choose to implement social distancing measures, but they are not required to do so, and there are no additional capacity limits due to COVID-19. (Employer Guidance for Oklahoma's Open Up and Recover Safely Plan, Full Service and Quick Service restaurants offering in-restaurant dining, attached as **Exhibit BB** at 1); (Guidance for Oklahoma's Open Up and Recover Safely Plan: Bars, attached as **Exhibit CC** at 1).

ff. The Governor of Pennsylvania's business guidance for bars and restaurants does not impose numerical caps, instead varying the percentage capacity limits by the severity of COVID-19 outbreaks in a particular county, ranging from closing entirely at the beginning to opening at between 50-75% capacity. Gov. Tom Wolf, COVID-19 Guidance for Businesses, (accessed July 20, 2020), <https://www.governor.pa.gov/covid-19/business-guidance/>.

gg. Rhode Island's Phase III Guidelines for Restaurants, June 30, 2020, (the "RI Order") limits capacity to 66% of normal indoor seating capacity but does not impose a numerical capacity limit. (RI Order, attached hereto as **Exhibit DD** at 1).

hh. South Carolina's Department of Health and Environmental Control, in conjunction with South Carolina Restaurant and Lodging Association, issued its Opening Restaurants Phase Two Recommendations, June 9, 2020 (the "SC Order"), as part of Governor Henry McMaster's COVID-19 Task Force, which includes a 50% indoor occupancy limit but no numerical limits. (SC Order, attached as **Exhibit EE** at 2, 4).

ii. South Dakota's Executive Order 2020-08, March 23, 2020 (the "SD Order") did not shut down bars and restaurants or impose numerical (or

percentage) capacity restrictions, instead encouraging bars and restaurants to incorporate practices that maintained distance between patrons in accordance with CDC recommendations. (SD Order, attached hereto as **Exhibit FF** at ¶¶ 11-13).

jj. As of April 24, 2020, Tennessee restaurants may operate at 50% capacity with no numerical capacity restrictions. Tennessee Office of the Governor, Gov. Lee Issues Guidelines for Restaurants, Retail Stores to Reopen Early Next Week in 89 Counties, (accessed July 20, 2020), <https://www.tn.gov/governor/news/2020/4/24/gov--lee-issues-guidelines-for-restaurants--retail-stores-to-reopen-early-next-week-in-89-counties.html>.

kk. Texas's Dept. of State Health Services issued its Checklist for Restaurants, June 29, 2020 (the "TX Order"), which includes a 50% occupancy restriction but no numerical cap. (TX Order, attached as **Exhibit GG** at 1).

ll. Utah's most stringent requirements, currently applicable to only one county, have no numerical capacity restrictions and only require that patrons are seated 6 feet apart. (Utah Governor's Restaurants, Food Service Establishments, Bars, Food Trucks, Convenience Stores: Utah's Moderate Risk Phase Guidelines, attached as **Exhibit HH** at 1).

mm. Virginia's Safer at Home: Phase Three Guidelines for all Business Sectors, July, 2020 (the "VA Order") removed its prior 50% occupancy cap and allowed bars and restaurants to operate at full capacity, limiting party size to 250 patrons. (VA Order, attached as **Exhibit II** at 5).

nn. Washington's Phase 2 and Phase 3 Restaurant and Tavern COVID-19 Requirements, updated July 2, 2020 (the "WA Order") allows bars and restaurants to operate at 50% during phase 2 of its plan and at 75% during phase 3 of its plan with no numerical capacity limits. (WA Order, attached as **Exhibit JJ** at 1-2).

oo. West Virginia's The Comeback: A Guide to Safely Reopening Bars and Restaurants, updated July 8, 2020 (the "WV Order"), allows bars and restaurants to operate to 50% capacity with no numerical capacity limits. (WV Order, attached at **Exhibit KK** at 1-2).

pp. Wisconsin's Guidance for Preparing Workplaces for COVID-19: Restaurants, Food Service and Bars. June 9, 2020 (the "WI Order") encourages establishments to reduce capacity to ensure appropriate distance between patrons, but does not set a numerical capacity limit. (WI Order, attached as **Exhibit LL** at 2).

qq. Wyoming’s Eighth Continuation, and Modification of Statewide Public Health Order, effective July 16, 2020 (the “WY Order”), does not impose capacity requirements except to ensure that patrons are placed at least 6 feet from one another. (WY Order, attached as **Exhibit MM** at §§ 1.c, 1.e).

35. Few states like Colorado refuse to follow the CDC’s guidance:

a. Georgia’s COVID-19 Guidance for Restaurants and Establishments That Meet the Definition of a “Bar” per O.C.G.A. § 3-1-2(2.1), June 30, 2020 (the “GA Order”) only imposes a strict numerical cap (50) on establishments that derive greater than 75% of their gross revenue from alcohol, and otherwise leaves establishments—including restaurants—to implement 6 feet of distance between patrons. (GA Order, attached as **Exhibit NN** at 4).

b. Minnesota’s Industry Guidance for Safely Reopening: Bars and Restaurants, June 15, 2020 (the “MN Order”) sets a numerical capacity limit for bars and restaurants that is more than twice Colorado’s, allowing indoor dining up to a cap of 250 patrons. (MN Order, attached as **Exhibit OO** at 5).

c. Similarly, Oregon’s Phase Two Reopening Guidance: Specific Guidance for Restaurants, Bars, Breweries, Brewpubs, Wineries, Tasting Rooms and Distilleries, June 30, 2020 (the “OR Order”) imposes a maximum capacity limit of 250 patrons in bars and restaurants. (OR Order, attached as **Exhibit PP** at 1).

d. Vermont’s Agency of Commerce and Community Development restricts bars and restaurants to a maximum of 75 patrons indoors and 150 patrons outdoors up to their maximum capacity, for a total capacity limit of 225 patrons. State of Vermont, Agency of Commerce and Community Development, Update On New Work Safe Additions To The Be Smart, Stay Safe Order, (accessed July 20, 2020), <https://accd.vermont.gov/news/update-new-work-safe-additions-stay-home-stay-safe-order#restaurants-catering-food-service-and-bars> at § 7.5.

36. No other state has imposed restrictions on bars and restaurants that mirror Colorado’s.

37. The Numerical Capacity Restrictions are the biggest barrier to the ongoing viability of the Tavern League members: 80% of restaurants in Colorado are currently operating at less than 50% of capacity because of the Numerical Capacity Restriction; 16% of restaurants are forced to operate below 20% because of that restriction; and only 5% of restaurants in Colorado can reach 75% of their capacity utilizing outdoor seating. (Colorado Restaurant Association, Restaurant Impact Survey – June, attached as **Exhibit QQ**).

38. The Tavern League's members do not challenge Colorado's remaining requirements for their establishment (save for the Last Call Order), which appear to be grounded in scientific research and supported. Those requirements, with which the Tavern League's members comply, include requirements such as the following:

- a. Posting signage to notify patrons of hygiene requirements;
- b. Maintaining 6 feet of distance between patrons of different parties;
- c. Limiting party sizes to 8 patrons or fewer;
- d. Cleaning and disinfecting all shared surfaces between uses;
- e. Requiring employees to wear masks;
- f. Eliminating self-service stations;
- g. Encouraging frequent breaks for employees to wash their hands;
- h. Blocking off bathroom stalls and urinals to maintain 6 foot distancing requirements;
- i. Requiring patrons to wear masks when not eating or drinking; and
- j. Ensuring proper ventilation per OSHA guidance.

[Order, pp. 42-43, Appendix I; Bars and Restaurants]

RELEVANT LAST CALL ORDER PROVISIONS

39. Governor Jared Polis announced on July 21, 2020 that establishments serving alcohol for consumption are prohibited from continuing alcohol service after 10 p.m., summarily stating that service of alcohol after 10 p.m. is inconsistent with social distancing.

40. A true and accurate copy of the Last Call Order is attached hereto as **Exhibit RR** and is hereby incorporated by reference as though fully set forth herein.

41. The Last Call Order, in relevant part, provides as follows:

Effective 9:00 A.M. MDT on Thursday July 23, 2020, Pursuant to Colorado Revised Statute § 24-33.5-704(7)(h), C.R.S., all licensees contained in Articles 3, 4, and 5 of Title 44 of the Colorado Revised Statutes must cease alcohol beverage sales to end consumers at 10:00 P.M. MDT each day.

42. The Last Call Order does not reference any supporting research or studies that tie its requirements to preventing the spread of COVID-19. Instead, it simply dictates that establishments serving alcohol are prohibited from doing so after 10 p.m.

43. Of the 49 states surveyed above, only 2 of the various orders and guidance documents appear to have any mandated bar and restaurant closure times. Oregon closes all restaurants down at midnight, (**Ex. PP** at 2), and Mississippi closes its bars entirely at 10 p.m. (**Ex. S** at 3).

GENERAL ALLEGATIONS

44. The Tavern League is comprised of 200 bars and restaurants that serve alcohol for on-premises consumption, ranging in size from small to large establishments.

45. Many members of the Tavern League will not be able to continue their business if forced to comply with the Numerical Capacity Limits.

46. For example, Tavern League member Blake Street Tavern has an establishment comprising 18,000 square feet and has a fire code capacity of 900. Under the Order, Blake Street Tavern may only accommodate a maximum of 100 patrons. Blake Street Tavern cannot pay its fixed costs under such an occupancy restriction.

47. For example, Tavern League member X-Bar has an establishment comprising 2,000 square feet and has a fire code capacity of 479 with its patio bar. Under the Order, X-bar may only accommodate a maximum of 100 patrons. X-bar cannot pay its fixed costs under such an occupancy restriction.

48. For example, Tavern League member Lucky Mutt has an establishment comprising 4,195 square feet and has a fire code capacity of 168. Under the Order, Lucky Mutt may only accommodate a maximum of 50 patrons. Lucky Mutt cannot pay its fixed costs under such an occupancy restriction.

49. The Order thus threatens the economic viability of the Tavern League's members, who will not be able to continue business under the onerous and arbitrary Numerical Capacity Limits.

50. Compliance with the Order thus imposes a *de facto* revocation or suspension of Tavern League members' liquor licenses because the licenses cannot be used within the rigid confines of the Numerical Capacity Limits.

51. Compliance with the Order imposes such a regulatory burden on the Tavern League members that their licenses and establishments are no longer economically viable.

52. Many of the Tavern League's members host patrons to watch professional sports in their establishments. Patrons attend to watch the sporting events because of alcohol service in conjunction with the broadcast of sporting events.

53. Compliance with the Last Call Order virtually eliminates the desirability of the Tavern League member's establishments for the purposes of watching professional sports. Many professional sporting events start at or around 8:00 p.m. and continue beyond 10:00 p.m. Any patron who wishes to consume alcohol during the length of the event must do so from home or an unregulated private gathering.

54. The Last Call Order thus effectively shuts down the Tavern League's members at 10 p.m., if not entirely, because patrons attend Tavern League member establishments to consume alcohol while watching sporting events and will not be able to do so under the Last Call Order.

55. Instead, those patrons wishing to view professional sports games will likely not attend bars or restaurants at all during those events because of the Last Call Order. The Tavern League members will instead be completely without patrons during the times when they would normally enjoy the bulk of their business.

56. The Last Call Order thus threatens the economic viability of the Tavern League's members, who will not be able to continue business under the onerous and arbitrary time limit established by the Last Call Order.

57. Compliance with the Last Call Order thus imposes a *de facto* revocation or suspension of Tavern League members' liquor licenses because the licenses cannot be used within the rigid confines of the Last Call Order.

58. Compliance with the Last Call Order imposes such a regulatory burden on the Tavern League members that their licenses and establishments are no longer economically viable.

FIRST CLAIM FOR RELIEF
(Judicial Review of Order and Last Call Order Pursuant to C.R.S. § 25-1-113(1) – CDPHE and Ms. Ryan)

59. The Tavern League incorporates all prior allegations by reference as though fully set forth herein.

60. The Tavern League is a person aggrieved or affected by the Order as promulgated by Ms. Ryan and the CDPHE.

61. The Numerical Capacity Limitations should be reversed for the following reasons:

a. The Numerical Capacity Limitations are arbitrary and capricious, without basis in science;

b. The Numerical Capacity Limitations are unsupported by substantial evidence;

c. The Numerical Capacity Limitations are contrary to constitutional rights and privileges; and

d. The Numerical Capacity Limitations are not similarly applied to similarly situated establishments.

62. The Order's Numerical Capacity Limits are contrary to the Tavern League members' constitutional rights and privileges because the Numerical Capacity Limits represent a taking of the Tavern League's members' licenses without just compensation or due process, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

63. Further, because the Order's Numerical Capacity Limits are applied unequally to similarly situated persons they are contrary to and a violation of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

SECOND CLAIM FOR RELIEF
(Declaration Pursuant to C.R.S. §§ 13-51-106, et seq. that The Last Call Order Violates U.S. Const., amend. XIV – Mr. Polis)

64. The Tavern League incorporates all prior allegations by reference as though fully set forth herein.

65. The Last Call Order should be reversed for the following reasons:

a. The Last Call Order's requirements are arbitrary and capricious, without basis in science;

b. The Last Call Order's requirements are unsupported by substantial evidence;

c. The Last Call Order's requirements are contrary to constitutional rights and privileges; and

d. The Last Call Order's requirements are not similarly applied to similarly situated establishments.

66. The Last Call Order's requirements are contrary to the Tavern League members' constitutional rights and privileges because they represent a taking of the Tavern League's members' licenses without just compensation or due process, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

67. Further, because the Last Call Order's requirements are applied unequally to similarly situated persons they are contrary to and a violation of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF

(Declaration Pursuant to C.R.S. §§ 13-51-106, et seq. that the Order and The Last Call Order Violate U.S. Const., amend. XIV – All Defendants)

68. The Tavern League incorporates all prior allegations by reference as though fully set forth herein.

69. A real and actual controversy exists between the Tavern League, on the one hand, and Defendants, on the other hand, concerning the constitutionality of the Order and the Last Call Order.

70. This Court should enter an order to relieve the parties of uncertainty.

71. This Court should declare that the Order and Last Call Order, both facially and as applied to the Tavern League's members, violate the Fourteenth Amendment of the United States Constitution.

72. Pursuant to C.R.S. § 38-1-101, Colorado law provides for due process when private property is taken for public use.

73. The Order's Numerical Capacity Requirements and the Last Call Order are, *inter alia*, a taking of the Tavern League members' property rights in their licenses and establishments.

74. Defendants have not complied with the process provided by Colorado law for taking private property for public use.

75. Neither the Order nor the Last Call Order provide for due process or just compensation for the taking of the Tavern League members' private property.

76. Accordingly, Defendants have denied the Tavern League's members due process as required by law, in violation of U.S. Const., amend. XIV.

77. As a direct and proximate result of the unconstitutional aspects of the Order and the Last Call Order's requirements and the Defendants' and their delegates' application of the Order and the Last Call Order against the Tavern League's members, the Tavern League's members have suffered and will continue to suffer irreparable injuries, including, but not limited to, financial ruin, business ruination, and the violation of the rights protected by the Fourteenth Amendment of the United States Constitution.

FOURTH CLAIM FOR RELIEF

(Declaration Pursuant to C.R.S. §§ 13-51-106, et seq. that the Order and The Last Call Order Violate U.S. Const., amend. XIV – All Defendants)

78. The Tavern League incorporates all prior allegations by reference as though fully set forth herein.

79. The Order and the Last Call Order's requirements violate the Fourteenth Amendment of the United States Constitution both facially and as applied to the Tavern League's members for numerous and various reasons including, but not limited to, the facts that:

a. The Order and the Last Call Order's requirements deprive Tavern League members of property rights in their liquor licenses and establishments without notice and the opportunity to be heard;

b. The Order and the Last Call Order's requirements impose requirements on Tavern League members that are unreasonable, arbitrary, capricious, and bear no relation to the ends Defendants seek;

c. The Order imposes requirements on Tavern League members that are not imposed in the same manner on similarly situated persons, including indoor and outdoor venues.

80. As a direct and proximate result of the unconstitutional aspects of the Order and the Last Call Order's requirements and the Defendants' and their delegates' application of the Order and the Last Call Order against the Tavern League's members, the Tavern League's members have suffered and will continue to suffer irreparable injuries, including, but not limited to, financial ruin, business ruination, and the violation of the rights protected by the Fourteenth Amendment of the United States Constitution.

81. A real and actual controversy exists between the Tavern League, on the one hand, and Defendants, on the other hand, concerning the constitutionality of the Order and the Last Call Order.

82. This Court should enter an order to relieve the parties of uncertainty.

83. This Court should declare that the Order and Last Call Order, both facially and as applied to the Tavern League's members, violate the Fourteenth Amendment of the United States Constitution.

FIFTH CLAIM FOR RELIEF

(Declaration Pursuant to C.R.S. §§ 13-51-106, et seq. that the Order and the Last Call Order Violate U.S. Const., amend. V)

84. The Tavern League incorporates all prior allegations by reference as though fully set forth herein.

85. The Order and the Last Call Order violate the Fifth Amendment of the United States Constitution, as incorporated and applied to the State of Colorado through the Fourteenth Amendment, both facially and as applied to the Tavern League's members for numerous and various reasons including, but not limited to, the facts that:

a. The Order and the Last Call Order imposes such requirements that Tavern League members are deprived of the beneficial use of their licenses and establishments;

b. The Order and the Last Call Order imposes forces the Tavern League members to bear the costs of the public good the Order and the Last Call Order seek to bring about when, in fairness and justice, those costs should be borne by the public as a whole;

c. The Order and the Last Call Order do not provide for compensating Tavern League members for the taking of their licenses and the use of their establishments.

86. As a direct and proximate result of the unconstitutional aspects of the Order and the Last Call Order and the Defendants' and their delegates' application of the Order against the Tavern League's members, the Tavern League's members have suffered and will continue to suffer irreparable injuries, including, but not limited to, financial ruin, business ruination, and the violation of the rights protected by the Fifth Amendment of the United States Constitution.

87. A real and actual controversy exists between the Tavern League, on the one hand, and Defendants, on the other hand, concerning the constitutionality of the Order and the Last Call Order.

88. This Court should enter an order to relieve the parties of uncertainty.

89. This Court should declare that the Order and the Last Call Order, both facially and as applied to the Tavern League's members, violates the Fifth Amendment of the United States Constitution.

SIXTH CLAIM FOR RELIEF

(Declaration Pursuant to C.R.S. §§ 13-51-106, et seq. that the Order and the Last Call Order Violate Colo. Const. Art. 2, § 25 – All Defendants)

90. The Tavern League incorporates all prior allegations by reference as though fully set forth herein.

91. Article 2, Section 25 of the Colorado Constitution provides that “[n]o person shall be deprived of life, liberty or property, without due process of law.”

92. The Order and the Last Call Order violates Article 2, Section 25 of the Colorado Constitution both facially and as applied to Plaintiff for numerous and various reasons including, but not limited to, the facts that:

a. The Order and the Last Call Order impose such requirements that Tavern League members are deprived of the beneficial use of their licenses and establishments;

b. The Order and the Last Call Order deprive Tavern League members of property rights in their liquor licenses and establishments without notice and the opportunity to be heard;

c. The Order and the Last Call Order impose requirements on Tavern League members that are unreasonable, arbitrary, capricious, and bear no relation to the ends Defendants seek;

93. As a direct and proximate result of the unconstitutional aspects of the Order and the Last Call Order and the Defendants' and their delegates' application of the Order, or threatened application, against Tavern League members, the Tavern League members have suffered and will continue to suffer irreparable injuries, including, but not limited to, financial ruin, business ruination, and the violation of the rights protected by Article 2, Section 25 of the Colorado Constitution.

94. A real and actual controversy exists between the Tavern League members, on the one hand, and Defendants, on the other hand, concerning the constitutionality of the Order and the Last Call Order.

95. This Court should enter an order to relieve the parties of uncertainty.

96. This Court should declare that the Order and the Last Call Order, both facially and as applied to Plaintiff, violates Article 2, Section 25 of the Colorado Constitution.

WHEREFORE, the Tavern League respectfully prays that this Court enter an order:

A. Reversing the Numerical Capacity Limits pursuant to C.R.S. § 25-1-113(1).

B. Entering Declaratory Relief pursuant to C.R.S. §§ 13-51-106, *et seq.*, and C.R.C.P. 57.

C. Entering Injunctive Relief pursuant to C.R.S. §§ 13-51-106, *et seq.*, and C.R.C.P. 65.

D. Striking those portions of the Order imposing Numerical Capacity Limits on Colorado's bars and restaurants.

E. Striking the Last Call Order.

F. Awarding Plaintiff its Costs and Fees.

G. Any other Relief this Court deems just and proper.

DATED this 22nd day of July, 2020.

Respectfully Submitted,

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By: *s/ Jordan Factor*

A handwritten signature in black ink, appearing to be 'J Factor', written over a horizontal line.

Jordan Factor

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ATTORNEYS FOR THE PLAINTIFF

Plaintiff's Address:

496 S. Broadway,
Denver, CO 80209

VERIFICATION

I, Stephanie Fransen, do hereby swear or affirm under penalty of perjury that the information contained in this Amended Verified Complaint for Declaratory and Injunctive Relief is true and correct.

By:
Stephanie Fransen 
Executive Director, Tavern League of Colorado

STATE OF COLORADO

COUNTY OF

Subscribed and sworn before me this 22nd day of July, 2020 by Stephanie Fransen.

Witness by hand and official seal

My commission expires

1/28/2022

[SEAL]

CHRISTINA A. CLERIHUE
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20144003640
MY COMMISSION EXPIRES 01/28/2022



Notary Public