DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8301 **JONATHAN CHRISTIAN, DEWAYNE RODGERS, BART STARK, RICH ZIEGLER, NICK ELLIOTT, DAVID CURTIS, LES TUCKER**, Plaintiffs, v. **MICHAEL B. HANCOCK**, in only his official capacity as Mayor of the City of Denver, **DENVER DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, ROBERT M. MCDONALD**, in only his official capacity as Executive Director of Denver Department of Public Health and Environment, **PAUL M. PAZEN**, in only his official capacity as Chief of the Denver Police Department, Defendants.	DATE FILED: September 23, 2021 6:02 PM FILING ID: 2BB677DB1D74C CASE NUMBER: 2021CV33007 ▲**COURT USE ONLY**▲
ATTORNEYS FOR PLAINTIFFS: Law Offices of Randy B. Corporon, P.C. Randy B. Corporon, #29861 Beth Chambers, #53474 2821 S. Parker Road, Suite 555 Aurora, CO 80014 Phone Number: 303-749-0062	Case No.: Division:
PLAINTIFF'S VERIFIED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	

Plaintiffs, Jonathan Christian, Dewayne Rodgers, Bart Stark, Rich Ziegler, Nick Elliott, David Curtis, Les Tucker (collectively, the "Plaintiffs") by and through their undersigned counsel, hereby request a Temporary Restraining Order and Preliminary Injunction pursuant to C.R.C.P. 65(a) & (b), to maintain the status quo until this Court can conduct judicial review of the August 2, 2021 Order mandating the COVID inoculation issued by Robert McDonald, Executive Director of the

Denver Department of Public Health and Environment ("August 2nd Order"), and in support thereof, state as follows:

I. FACTUAL BACKGROUND

On July 8, 2021, Governor Polis issued Executive Order 2021-122. That order is called the "Colorado COVID-19 Disaster Recovery Order." That order provides in part as follows:

> "Thanks to the tremendous efforts of all Coloradans, the moment for extraordinary executive action has passed. I no longer need to use much of the temporary authorities granted to the Governor under the Act. The State has made tremendous progress in terms of containing and treating infection and distributing the COVID-19 vaccine. Over seventy percent of adults have now received at least one dose of the lifesaving COVID-19 vaccine, and we are beginning to see life return to a new normal. I am therefore rescinding all previous Executive Orders issued due to COVID-19 and amending and restating this Executive Order to focus only on those measures related to the State's recovery from the COVID-19 pandemic emergency."

While the Governor rescinded the state of emergency primarily because of the high numbers of Coloradoans having received at least one dose of a COVID inoculation, nevertheless on August 2, 2021, Robert McDonald, the Executive Director of the Denver Department of Public Health and Environment, issued a sweeping public health order requiring personnel in ten categories of employment to be fully vaccinated by September 30, 2021, along with any new hires in the same ten categories. The following areas of employment were targeted in the August 2nd Order: (a) the City and County of Denver; (b) care facilities; (c) hospitals; (d) clinical settings; (e) limited healthcare settings; (f) homeless shelters; (g) schools; (h) childcare centers and services; (i) any entity providing home care to patients; and (j) any entity providing first responder services.

The legal basis for the August 2nd Order was a declaration of local disaster emergency, which Mayor Hancock declared on March 12, 2020. Soon after the August 2nd Order was issued, Defendant Pazen, Chief of the Denver Police Department, communicated to the Denver Police

Officers that they are required to comply with the order. While the statute is silent as to how long the city council may consent to a local declaration of emergency, the intent of C.R.S. § 24-33.5-709 certainly cannot be an indefinite declaration of emergency. Presently, the City of Denver has attempted to declare an emergency for 18 months notwithstanding the fact that Governor Polis rescinded his emergency declaration regarding the spread of COVID. Defendants' Hancock and McDonald actions are contrary to law and this Court should promptly enjoin them to comply with state law.

II. FACTUAL BACKGROUND

1. Denver County's August 2nd Vaccine Mandate Order.

On August 2, 2021, Defendant Robert McDonald issued a public health order which mandated the 10 categories of employees described above to be fully vaccinated by September 30, 2021 or have a medical or religious exemption on file with their place of employment. While the August 2nd Order does not demand these personnel be terminated, the implication is there.

2. Denver Police Department's Progressive Discipline Policy.

Defendant Pazen has put forth a progressive discipline policy at the Denver Police Department for those employees who do not receive a COVID inoculation or have their request for exemption granted. On October 1st, these employees are subject to an immediate 10-day non-paid suspension. After the 10-day suspension, if the employee remains noncompliant, he or she will be terminated. *See* Exhibit A, a true and correct copy of the Denver Police Department's Progressive Discipline Policy. If the employee is granted an exemption to the COVID inoculation, he or she is subject to workplace requirements which are subject to the same progressive discipline policy.

3. Plaintiffs Complaint Requesting Judicial Review Of The August 2nd Order.

Plaintiffs have filed a Complaint requesting judicial review challenging the August 2nd Order, and Plaintiffs hereby incorporate the allegations and arguments of that Complaint as if set forth fully herein. The Plaintiffs seek immediate judicial relief from the August 2nd Order and Denver Police Department's actions to enforce it.

III. ARGUMENT

1. **Legal Standards**.

Colorado Rule of Civil Procedure 65 governs temporary restraining orders ("TRO") and preliminary injunctions. To issue a TRO the court must first find that it "clearly appears … that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard." C.R.C.P. 65(b). Next, the court must determine that there are sufficient reasons to proceed without notice (if notice has not or cannot been given). Generally, temporary restraining orders are designed to prevent immediate and irreparable harm to a party. *City of Golden v. Simpson*, 83 P.3d 87 (Colo. 2004).

Because neither the grant nor denial of a TRO is ordinarily appealable, the standard for grant of a TRO has been described as "discretionary," and counsel are left primarily to the express language of the rule. *Kourlis v. District Court, El Paso County*, 930 P.2d 1329 (Colo. 1997).

In Colorado, a trial court may enjoin action by the executive branch when the injunctive relief "is necessary to protect existing fundamental constitutional rights." *Evans v. Romer*, 854 P.2d 1270, 1273 & n.4 (Co. 1993) (citing *Rathke v. MacFarlane*, 648 P.2d 648, 653- 654 (Colo. 1982)), cert. denied sub nom *Romer v. Evans*, 510 U.S. 959 (1993).

The purpose of the preliminary injunction is to preserve the status quo or to protect rights pending the final determination of a case. *City of Golden v. Simpson*, 83 P.3d 87 (Colo. 2004). A

preliminary injunction will be used to prevent further harm from occurring to the applicant where harm is alleged, or to grant emergency relief where a hearing on the merits at a later date is contemplated. *Graham v. Hoyl*, 402 P.2d 604 (1965). When considering a motion for a preliminary injunction the court must weigh 6 factors, commonly referred to as the *Rathke* factors: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction, and; (6) that the injunction will preserve the status quo pending a trial on the merits. *Rathke v. McFarlane*, 648 P.2d 648, 654 (Colo. 1982).

As discussed below, the clear, immediate threat of irreparable harm to Plaintiffs regarding compliance with an unlawful public health order which mandates a medical procedure, including the punitive nature of the "reasonable accommodations" – coupled with the strong public interest of retaining adequate numbers of police officers – weigh heavily in favor of the requested injunctive relief.

2. Plaintiffs Are Reasonably Likely To Prevail on Their Argument That Director McDonald Does Not Have The Authority To Issue The Rules Set Forth In The August 2nd Order.

Plaintiffs are reasonably likely to prevail on the unlawful basis for Defendant Robert McDonald's August 2nd Order. Defendants' Hancock and McDonald had no legal basis to issue the August 2nd Order, and Defendant Pazen has no legal basis to enforce the Order. The August 2nd Order cites the Colorado Disaster Emergency Act ("CDEA"), or C.R.S. §§24-33.5-701, *et seq*. for its legal authority. C.R.S. § 24-33.5-709 is the only section of the CDEA that applies to Mayor Hancock, yet this statute does not give Mayor Hancock the legal authority to issue rules of general

applicability to address COVID-19. While Defendant Hancock declared a local state of emergency pursuant to C.R.S. § 24-33.5-709, Defendants' Hancock and McDonald are unable to argue that the CDEA allows them to distort a 7-day grant of executive power to 18 months, all the while circumventing the rule making sections of the Administrative Procedures Act. Moreover, the CDEA is unable to provide support for Defendants' enforcement of the August 2 nd Order. This is because the remaining sections of the CDEA speak solely to the Governor's powers pursuant to a declaration of emergency. *See* C.R.S. § 24-33.5-701 *et seq.* Perhaps that is why Mayor Hancock directed Director McDonald to issue the August 2nd Order, figuring the Director must have the authority to issue a public health order full of rules without going through the rulemaking procedures set forth in C.R.S. §24-4-103. Additionally, if Director McDonald had wanted to deal with COVID 19 as an "epidemic disease" or "communicable disease" pursuant to C.R.S. §25-1.5-102, he was required by C.R.S. § 25-1.5-102(1)(a)(II) to go through rulemaking.

Orders which affect the public at large, such as the August 2nd Order, must be "based upon the presence of some constitutional or statutory provision, which authorizes the executive order either specifically or by way of necessary implication." *Scope of Governor's Power to Issue Executive Orders*, September 7, 2018, prepared by the Office of Legislative Legal Services, citing *Shapp v. Butera*, 348 A. 2d 910, 913 (1975). The CDEA, specifically § 24-33.5-709, does not grant Defendants' Hancock and McDonald general power to mandate an experimental inoculation as a condition of both private and public employment. The egregious nature of the August 2nd Order and the actions it compels require this Court to restrain the Order's deadlines until proper judicial review is had.

3. Plaintiffs Will Suffer Real, Immediate, And Irreparable Injury Which Would Be Prevented by Injunctive Relief.

Plaintiffs have filed a Verified Complaint which requests judicial review of the August 2nd Order pursuant to C.R.S. § 25-1-515. Because Plaintiffs must comply with the unlawful August 2nd Order by September 30th, or suffer progressive discipline, an injunction is necessary to prevent such injury or damage. Moreover, as part of the termination associated with the August 2nd Order, Plaintiffs are unable to be re-hired by the Denver Police Department for a period of 5 years post termination. The United States Supreme Court has held being subject to an unconstitutional statute, for even minimal periods of time, unquestionably constitutes irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion)). Moreover, because the termination will likely occur prior to this Court conducting judicial review of the August 2nd Order, a TRO or preliminary injunction is necessary to prevent such injury and damage to the Plaintiffs. *Am. Invs. Life Ins. Co. v. Green Shield Plan, Inc.*, 358 P.2d 473, 475 (1960).

The August 2nd Order created new and punitive Denver Police Department policy for those officers who are granted an exemption. If an exemption is granted, the unvaccinated officers are subject to the following workplace requirements, which include: (1) wearing a mask at all times except when eating or drinking; and (2) a requirement to PCR test every 5 days, outside of working hours, even while on accrued leave, which includes PTO/vacation/sick time. The first violation of these new workplace requirements is a 10-day suspension without pay. The second violation is termination. These new workplace requirements will go into effect on October 1, 2021.

4. Due To the Time Sensitive Nature Of The August 2nd Order, Plaintiffs Have No Plain, Speedy and Adequate Remedy At Law.

Equity must intervene when a plaintiff does not have a plain and adequate remedy at law. *Am. Invs. Life Ins. Co. v. Green Shield Plan, Inc.*, 358 P.2d at 476. The August 2nd Order mandates Plaintiffs take the inoculation. Simply put, this is a bell that cannot be un-rung. In most cases, "an

adequate remedy at law" is a suit for monetary damages. *Fortner v. Cousar*, 992 P.2d 697 (Colo. App. 1999). Because Denver Police Department has instituted a 5-year ban on re-hiring terminated personnel, this constitutes an irreparable injury sufficient to support imposition of preliminary injunction. *Gitlitz v. Bellock*, 171 P.3d 1274 (Colo. App. 2007).

5. Injunctive Relief Will Maintain The Status Quo As Well as Balance The Equities.

Injunctive relief is appropriate when "the action complained of has caused or has threatened to cause imminent injury to an interest protected by law." *Anderson v. Applewood Water Ass'n, Inc.*, 409 P.3d 611, 617 (2016) (quoting *Bd. of Cty. Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1054 (Colo. 1992)). The court's injunctive power should be utilized to keep matters as they were before the dispute arose and not to change the balance during the pendency of litigation. *Anderson v. Applewood Water Ass'n, Inc.*, 409 P.3d at 616. Thus, a party who seeks an injunction must show that the injunction will maintain the pre-litigation posture of the parties. A preliminary injunction preserves the status quo or protects a party's rights pending the final determination of a cause. *Id.* (citing *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004)).

Here, the deadline of September 30, 2021, is fast approaching. Non-compliance with the August 2nd Order will result in a 10-day non-paid suspension for Plaintiffs. By contrast, an injunction preventing the enforcement of the August 2nd Order, which has been unlawfully promulgated, will impose no cognizable injury or prejudice on Defendants. Defendants have no valid interest in enforcing an unlawful mandate on Plaintiffs, especially when Plaintiffs have worked for almost 18 months on the frontlines of a global pandemic without a vaccination requirement. Moreover, Governor Polis rescinded the emergency based on the reduced spread of COVID, signaling a departure from concerns regarding COVID-19.

6. Public interests are undoubtedly served by injunctive relief.

Finally, the unilateral actions of executive officials whose proper role is to enforce the law, not to make it, are never in the best interest of the public, and decisively favor an injunction. There are hundreds of Denver Police Officers who reached out to undersigned counsel to be included in this litigation. Many of these officers are considering resigning their posts with Denver Police Department. Undoubtedly, the public would be adversely affected by a sudden mass migration of police officers. For these reasons, the public interest favors invalidating the Defendants unlawful actions and enjoining them from enforcing the invalid, defunct, and unconstitutional August 2nd Order.

7. A Temporary Restraining Order Is Necessary to Prevent Immediate And Irreparable Harm.

Temporary restraining orders are designed to prevent immediate and irreparable harm to a party. *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004); *Mile High Kennel Club v. Colo. Greyhound Breeders Ass'n*, 559 P.2d 1120, 1122 (Colo. App. 1977). A court may issue a temporary restraining order "if it clearly appears from the facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result." C.R.C.P. 65(b)(1). To obtain a restraining order, a plaintiff need only show the requisite risk of harm and need not satisfy all of the requirements for a preliminary injunction. *City of Golden*, 853 P.3d at 96 (distinguishing between the types of preliminary relief available).

Here, the deadline to show proof of COVID inoculation was September 15, 2021. This earlier deadline factors in the 2 weeks to be deemed fully vaccinated. As argued *supra*, there can be no doubt that Plaintiffs are standing on the cliff of immediate and irreparable harm. Plaintiffs'

termination will adversely affect their ability to be rehired by Denver Police Department, or any police department around the country.

RELIEF REQUESTED

WHEREFORE, each Plaintiff respectfully prays that this Court enter an order:

A. granting Injunctive Relief pursuant to C.R.C.P. 65(a);
B. granting a temporary restraining order pursuant to C.R.C.P. 65(b); and
C. any other Relief this Court deems just and proper.

Respectfully submitted via CCEF on September 23, 2021.

LAW OFFICES OF

RANDY B. CORPORON, P.C.

/s/ *Randy B. Corporon*

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ATTORNEYS FOR PLAINTIFFS