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9 *Counsel for Plaintiffs, Central Cinema of Ely, Inc., and Don & Shirley Purinton*

10 **IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
11 **IN AND FOR THE COUNTY OF WHITE PINE**

12 CENTRAL CINEMA OF ELY, INC,  
13 a Nevada Corporation; DON  
14 PURINTON, an individual; and  
15 SHIRLY PURINTON, an individual,

16 Plaintiffs/Petitioners,

17 vs.

18 THE HONORABLE STEPHEN F.  
19 SISOLAK, as Governor of the State  
20 of Nevada,

21 Defendant/Respondent.

Case No.: CV-2011117

Dept. No.: 1

22 **PLAINTIFFS’ BRIEF IN RESPONSE TO COURT’S ORDER**

23 **COMES NOW**, Plaintiffs, Central Cinema of Ely, Inc., Don Purinton and Shirley  
24 Purinton’s (collectively, “Central Cinema” or “Plaintiffs”), by and through their counsel of  
25 record, Joseph S. Gilbert, Esq., and Roger M. O’Donnell, Esq., of Joey Gilbert Law, and hereby  
26 files Plaintiffs’ Brief In Response To Court’s Order.

27 **I. Legal Argument**

28 In its Order filed January 22, 2020, this Court stated it was not convinced that Plaintiffs’  
case law supported their argument that irreparable harm is presumed if a separation of powers  
violation is found. Specifically, the Court stated that “nearly every case cited involves

1 individuals or businesses alleging the denial of a specific individual constitutional right flowing  
2 to that party such as a violation of the First Amendment, Fourth Amendment, or right to  
3 privacy.” This Court then indicated, however, that it is receptive to further briefing and  
4 argument on this point before entering a final decision.

5  
6 Plaintiffs assert that the manner in which the Governor interpreted the word “emergency”  
7 was misguided, and that his emergency regulations exceed the scope of his legislatively  
8 delegated powers pursuant to the provisions of Chapter 414 of Nevada’s Revised Statutes. If this  
9 Court finds that they are likely to succeed on the merits of this Separation of Powers claim, then  
10 it should presume irreparable injury and grant its request for a preliminary injunction. For  
11 example, in their Reply to the State’s Opposition, Plaintiffs cited to City of Sparks v. Sparks  
12 Mun. Court, 129 Nev. 348, 302 P.3d 1118 (2013). In that case, the Nevada Supreme Court held  
13 that the City of Sparks’ interference with the inherent rights of the Sparks Municipal Court to  
14 hire, manage, and direct its own employees violated the Separation of Powers doctrine codified  
15 at Article 3, Section 1 of the Nevada Constitution. The Court further held that the harm from this  
16 type of constitutional violation was irreparable, as it would be difficult, if not impossible, to  
17 assign a monetary value to remedy the violation. Notably, in City of Sparks, the plaintiff did not  
18 assert any violation of an individual constitutional right, as it was not a person but rather a  
19 governmental entity. This alone overcomes the notion that irreparable harm can only be  
20 presumed if an individual constitutional right such as free speech or a violation of privacy is  
21 violated.  
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23  
24 Many other courts have presumed irreparable harm upon a separation of powers  
25 violation. For example, in County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 537 (N.D. Cal.  
26 2017) the County of Santa Clara, California, challenged executive orders signed by President  
27 Trump that forced it to either execute federal immigration enforcement policies by changing  
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1 their own local policies relating to immigration, or else suffer overwhelming financial penalties  
2 through the loss of substantial federal funding. The County argued that these executive orders  
3 were unconstitutional under separation of powers principles. The County moved for a  
4 preliminary injunction enjoining enforcement of the executive order. In granting the injunction,  
5 the court recognized “[t]he Ninth Circuit has repeatedly held that ‘the deprivation of  
6 constitutional rights unquestionably constitutes irreparable injury.’” *Id.* at 537 (citing Melendres  
7 v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012); Rodriguez v. Robbins, 715 F.3d 1127, 1144–45  
8 (9th Cir. 2013) (internal quotation omitted). “A plaintiff can suffer a constitutional injury by  
9 being forced to comply with an unconstitutional law or else face financial injury or enforcement  
10 action.” *Id.* at 538 (citing Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046,  
11 1058–59 (9th Cir. 2009)). And “[a]here an executive action causes constitutional injuries,  
12 injunctive relief is appropriate.” *Id.* (citing Washington v. Trump, 847 F.3d 1151, 1169 (9th Cir.  
13 2017)). Constitutional injuries, as recognized by the Ninth Circuit in this context, refers to being  
14 forced to comply with an unconstitutional order or regulation enacted by the executive branch.

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17 In response, the Government argued that while a “deprivation of constitutional rights  
18 unquestionably constitutes irreparable injury,” the Counties have not alleged a “deprivation” of  
19 their constitutional rights but have instead alleged a violation of the constitutional structures that  
20 govern relationships among the branches of the Federal Government. It asserts that there is a  
21 distinction between violations of personal constitutional rights and violations of structural  
22 provisions. *Id.* at 538. The Ninth Circuit rejected the Government’s argument for numerous  
23 reasons. First, and most importantly as it relates to the instant case, the court held that this  
24 distinction between personal and structural constitutional rights is not recognized by the Ninth  
25 Circuit. *Id.* The court recognized that while the Government cited to American Trucking Ass'ns  
26 v. City of Los Angeles, 577 F.Supp.2d 1110, 1127 (C.D. Cal. 2008) for the proposition that “in  
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1 the case of Supremacy Clause violations,” the presumption of irreparable harm “is not  
2 necessarily warranted,” that case was reversed by the Ninth Circuit. **Even where the**  
3 **constitutional injury is structural, “the constitutional violation alone, coupled with the**  
4 **damages incurred, can suffice to show irreparable harm.”** American Trucking, 559 F.3d at  
5 1058.

6  
7 Like in County of Santa Clara, where a plaintiff must comply with a regulation that  
8 violates the structural provisions of the constitution separating the branches of government into  
9 three distinct branches, or otherwise violates federalism principles, or be faced with potential  
10 sanctions, fines, penalties and forfeitures that flow from violating those executive regulations, a  
11 constitutional injury has been established for which irreparable injury may be presumed. Thus, if  
12 this Court finds that the Governor’s emergency regulations challenged by Plaintiffs’ are unlawful  
13 in violation of the Nevada Constitution’s Separation of Powers doctrine, then it may also  
14 presume irreparable injury. While the Plaintiffs’ may not have alleged what appears to be  
15 another specific violation of constitutionally guaranteed rights in their Complaint, they have  
16 unquestionably alleged harm caused by these unlawful regulations issued by the Governor, and  
17 these harms directly result from the constitutional violations of the emergency regulations  
18 themselves. Thus, like in County of Santa Clara and the cases it cites to and recognizes, this  
19 constitutional injury alone is sufficient for a presumption of irreparable injury and the issuance of  
20 a preliminary injunction.

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23 It should also be noted that the Separation of Powers doctrine itself, as codified in the  
24 Nevada Constitution, is specifically intended to ensure that the constitutional rights guaranteed to  
25 the citizens and businesses of Nevada are not interfered with by the exercise of unlawful  
26 governmental actions that deny the availability of due process flowing from the proper  
27 administration of three separate and coequal branches of a tripartite government. And the  
28

1 Nevada Supreme Court has previously recognized that the Nevada Constitution embraces  
2 separation of powers to an even greater extent than the United States Constitution. Berkson v.  
3 LePome, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010). The separation of powers doctrine **is the**  
4 **most important foundation** for preserving and protecting liberty by preventing the  
5 accumulation of power in any one branch of government. See Secretary of State v. Nevada State  
6 Legislature, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004) (“As we have previously recognized,  
7 separation of powers is probably the most important single principle of government declaring  
8 and guaranteeing the liberties of the people. It works by preventing the accumulation of power in  
9 any one branch of government.”) (citations and internal quotations omitted).

11 As argued in Plaintiffs’ briefs and motions, by usurping the power of the legislature to  
12 regulate the spread of infectious disease, specifically COVID-19, and by unlawfully interpreting  
13 his emergency management powers to include disease within the meaning of “natural  
14 emergency” the Governor has unlawfully acted in excess of his specific powers under the  
15 Nevada Constitution. In doing so, the Governor has removed the rights of Plaintiffs to notice  
16 and an opportunity to be heard before and after their business was shut down completely, and  
17 then permitted to open with unlawful restrictions. Plaintiffs have lost substantial revenue from  
18 ticket sales and food sales, and have been forced to spend a great deal of money complying with  
19 these unlawful regulations and faced with serious financial penalties. Plaintiffs’ have lawful  
20 licenses to conduct their business and absent these emergency orders issued by the Governor  
21 they would be entitled to administrative hearings before being forced to comply with any of  
22 these types of rules. They would then be entitled to appeal in a court of law. These regulations  
23 have effectively amounted to seizures of their business licenses issued by the County and the  
24 State, and deprivations of their rights to notice and an opportunity to be heard. They have had no  
25 rights to challenge these orders or require the state to prove that these orders are appropriate or  
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1 narrowly tailored. All of these negative consequences, harms and injuries have been directly  
2 caused by the unlawful emergency orders issued by the Governor, which have been in effect in  
3 some fashion restricting their operations, imposing costs and reducing revenues since March 12,  
4 2020, and continue now. This is exactly what the Separation of Powers doctrine and specific  
5 language of the Nevada Constitution was enacted to prevent.  
6

7 As stated above, the Nevada Supreme Court's holding in City of Sparks v. Sparks Mun.  
8 Court, 129 Nev. 348, 302 P.3d 1118 (2013) establishes that irreparable harm may be presumed  
9 where a constitutional injury has been alleged and is likely to be established on the merits.  
10 Likewise, in Eaves v. Board of Clark County Com'rs, 96 Nev. 921, 620 P.2d 1248 (1980) the  
11 Nevada Supreme Court held that where a statute was unconstitutional the lower court was  
12 ordered to impose a preliminary injunction without reaching the irreparable harm requirement  
13 argument at all.  
14

15 When the Governor issues emergency regulations, bypassing the legislative process and  
16 effectively amending the process that was previously enacted by the legislature, the rights and  
17 remedies of those adversely affected by those regulations are restricted or eliminated altogether.  
18 Nevada's Legislature has the plenary, exclusive authority to regulate the outbreak of infectious  
19 disease. The Legislature delegated this authority to the State Board of Health, and it is limited  
20 by statute concerning the actions it may take, and the rights of those affected by these  
21 regulations. The Governor's unlawful emergency regulations removed this authority and all of  
22 the lawful regulations attendant thereto from the proper executive agency of this state and  
23 unlawfully diverted this authority to the Department of Public Safety under its authority of  
24 emergency management, which is meant for emergencies such as earthquakes, floods, wildfires,  
25 mass shootings and similar events. In doing so, the Governor eliminated all of the due process  
26 rights that a business-like Plaintiffs' would normally enjoy and ensured that their injuries would  
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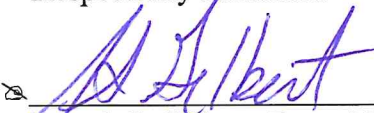
1 not be able to be redressed in an administrative hearing with the right of judicial appeal. This is  
2 precisely the type of structural constitutional violation that intrinsically establishes irreparable  
3 injury and warrants a preliminary injunction.

4 **III. Conclusion**

5 This Court should enjoin the Governor's emergency regulations of the Governor because  
6 they violate the Separation of Powers doctrine of the Nevada Constitution.  
7

8 **DATED** this 4<sup>th</sup> day of February, 2021.

9  
10 Respectfully submitted

11 

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18 **AFFIRMATION PURSUANT TO NRS 239B.030**

19 The undersigned does hereby affirm that the preceding document does not contain the  
20 social security number of any person.

21 **DATED** this 4<sup>th</sup> day of February, 2021.

22   
23 Joseph S. Gilbert, Esq.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify I am an employee of JOEY GILBERT LAW,  
3 and on the below date, I served the foregoing document on the parties set forth below by:

- 4  via the Court’s Electronic Filing Service;
- 5  by placing the original, or a true copy thereof, in a sealed envelope placed for  
6 mailing in the USPS, in Reno, NV, postage prepaid, following ordinary business  
7 practices;
- 8  via facsimile (Fax) to – (702) 486-3773
- 9  via email to [cnewby@ag.nv.gov](mailto:cnewby@ag.nv.gov), [sshevorski@ag.nv.gov](mailto:sshevorski@ag.nv.gov) & [kireland@ag.nv.gov](mailto:kireland@ag.nv.gov)
- 10  via overnight delivery
- 11  personal delivery

12 to the following:

13 Aaron D. Ford, Attorney General  
 14 Craig Newby, Deputy Solicitor General  
 15 Steve Shevorski, Chief Litigation Counsel  
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20 **DATED** this 4<sup>th</sup> day of February, 2021

21 **JOEY GILBERT LAW**

22   
 23 \_\_\_\_\_  
 24 Employee