RETURN DATE: AUGUST 4, 2020	:	SUPERIOR COURT
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ROXY NAILS DESIGN LLC, and LUIS RAMIREZ,	:	JUDICIAL DISTRICT OF HARTFORD
	:	
Plaintiffs,	:	
	:	
v.	:	AT HARTFORD
	:	
NED LAMONT, in his Official Capacity as Governor of the State of Connecticut, and DAVID LEHMAN, in his Official Capacity as Commissioner of Economic and Community Development,	:	
	:	
Defendants.	:	JUNE 8, 2020

MEMORANDUM IN SUPPORT OF APPLICATION FOR EX PARTE TEMPORARY INJUNCTION

/s/ John M. Tanski

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INTRODUCTION

Plaintiff Roxy Nails Design LLC (Roxy Nails), a small business in Hartford's Frog Hollow neighborhood, offers nail care services to the public. Like nearly all small businesses, it has struggled to survive during the pandemic in the face of state executive orders shutting down all non-essential businesses. For Roxy Nails' owner, Plaintiff Luis Ramirez, this means continuing to live with no income other than unemployment insurance while his bills continue to mount. Unlike many small businesses in Connecticut that have been permitted to reopen on June 1, 2020—hair salons, for example—under orders of the Governor and the Connecticut Department of Economic and Community Development (DECD), nail salons such as Roxy Nails must remain closed until June 17, 2020. While this may seem like a small amount of time, for a struggling business such as Roxy Nails, it can mean the difference between maintaining a viable business and ultimate bankruptcy.

There is no rational reason that service businesses such as hair salons have been permitted to reopen on June 1, 2020, while nail salons must remain closed. Indeed, Governor Lamont's own "Roadmap for Reopening Connecticut"[1] concludes that hair and nail salons are equally safe to reopen, and Governor Lamont himself determined that personal services businesses could safely reopen last month. According to news reports, it seems the Governor and DECD are making reopening

[1] Roadmap for Reopening Connecticut from Governor Lamont (May 26, 2020) at 27, *available at* https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200526-Governors-Reopen-Report.pdf?la=en. (Complaint Exhibit 16).

decisions based on costs to certain businesses[2] and the alleged consumer demand for a given business.[3] In any event, based on the State's own evidence, there is no health or safety justification for keeping nail salons closed.

Connecticut law gives the Governor significant power to deal with emergencies, but that power is not unlimited. As described more fully below, in keeping nail salons such as Roxy Nail closed while allowing similarly situated businesses to open the Governor and the DECD are exercising powers beyond what the General Assembly has authorized and in ways that are inconsistent with statute, the Connecticut Constitution's separation of powers clauses, and the state and federal constitutions' guarantees of equal protection.

Plaintiffs recognize that the COVID-19 pandemic has created a uniquely difficult situation for Governor Lamont and his administration—indeed, for the entire State of Connecticut. They are not here to gainsay every prior decision the State has made or challenge every executive order. They seek only prospective relief that will permit them to operate on a par with other similarly situated businesses that have been allowed to reopen. This Court should immediately enjoin Executive

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[2] When asked why the reopening date for nail salons was moved, the Governor said that "and there was a sense maybe [the safety equipment required by the state] was too expensive, too much too soon and maybe we should hold back on that for a while." Zinnia Maldonado, Gov. Lamont releases rules for businesses under Phase 1 of Connecticut's reopening plans, Fox 61 (May 8, 2020), https://www.fox61.com/article/news/health/coronavirus/gov-lamont-to-provide-covid-19-update/520-131990ce-efaa-4ea2-973d-efe958d9f69e.

[3] Mark Pazniokas, Lamont delays reopening for hair cutters until June CT Mirror (May 18, 2020) ("Lamont conceded last week that consumer demand was an element of the decision.") https://ctmirror.org/2020/05/18/lamont-delays-reopening-for-hair-cutters-until-june/.

Orders 7G,[4] 7H,[5] and 7PP[6] and other applicable Executive Orders and the DECD's emergency rules to the extent that they prevent Roxy Nails and similarly situated nail salon businesses from reopening in accordance with the state's required safety measures.

STATEMENT OF THE FACTS

On March 10, 2020, Governor Lamont declared a public health emergency and a civil preparedness emergency to respond to the COVID-19 pandemic.[7] Governor Lamont subsequently issued an order requiring all non-essential businesses to shut down on March 20, 2020.[8] DECD was delegated the authority to decide what businesses were essential, and did not include hair or nail salons in its list of essential businesses.[9] Roxy Nails has thus been compelled by government order to remain closed since March 20.

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[4] Executive Order 7G (Mar. 29, 2020), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7G.pdf. (Complaint Exhibit 4).

[5] Executive Order 7H (Mar. 20, 2020), *available at* https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf. (Complaint Exhibit 5)

[6] Executive Order 7PP (May 18, 2020), *available at* https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7PP.pdf?la=en. (Complaint Exhibit 11).

[7] Declaration of Civil Preparedness and Public Health Emergencies (Mar. 10, 2020), *available at* https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200310-declaration-of-civil-preparedness-and-public-health-emergency.pdf?la=en. (Complaint Exhibit 1)

[8] Executive Order 7H (March 20, 2020), *available at* https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf?la=en. (Complaint Exhibit 5)

[9] Department of Economic and Community Development, Essential Business – Executive Order 7H, *available at* https://portal.ct.gov/DECD/Content/Coronavirus-Business-Recovery/Business-Exemptions-for-Coronavirus. (Complaint Exhibit 12)

By early May, Governor Lamont announced that businesses in the state would begin to be allowed to open up. The first phase of reopening was slated for May 20, 2020. According to Governor Lamont's public statements at the time, both hair and nail salons were slated to reopen on that date because he had determined that they could do so safely.[10] On around May 8, 2020, DECD determined without any public explanation that nail salons would not be allowed to reopen on May 20, 2020, but would be part of the next reopening phase which was planned for no earlier than June 20, 2020.[11] The Governor explained in a press conference that the DECD commissioner thought that because the safety precautions might be too expensive for some nail salons that they should all be held back from reopening.[12]

On May 18, 2020, Governor Lamont authorized DECD to issue rules for different business sectors or types that were slated to reopen.[13] The DECD issued those sector rules that same day, including guidelines for the safe reopening of hair

[10] Shaynah Ferreira, Hair Salons Prepping for possible May 20 reopening, News 8, (May 1, 2020), https://www.wtnh.com/news/health/coronavirus/hair-salons-prepping-for-possible-may-20-reopening/.

[11] DECD released rule for hair salons and barbershops but not nail salons. *See* Sector Rules for May 20th Reopen, Hair Salons & Barbershops (May 8, 2020), *available at* https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery/CTReopensHairBarbershopsC4V1.pdf?la=en. (Complaint Exhibit 14).

[12] Zinnia Maldonado Gov. Lamont releases rules for businesses under Phase 1 of Connecticut's reopening plans, Fox 61 (May 8, 2020), https://www.fox61.com/article/news/health/coronavirus/gov-lamont-to-provide-covid-19-update/520-131990ce-efaa-4ea2-973d-efe958d9f69e.

[13] Executive Order 7PP (May 18, 2020), *available at* https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7PP.pdf?la=en. (Complaint Exhibit 11).

salons and barbershops—which Roxy Nails is prepared to meet.[14] That same day, DECD also decided without explanation that hair salons could not reopen as planned on May 20, 2020, but would have to wait until June 1, 2020.

On May 26, 2020, Governor Lamont issued his "Roadmap for Reopening Connecticut" which details his plan for reopening and explains why certain industries were allowed to open earlier than others. According to that roadmap, hair and nail salons featured an identical risk and benefit to reopening.[15] Nevertheless, on May 29, 2020, Governor Lamont issued an executive order allowing hair salons (but not nail salons) to open on June 1.[16] On June 5, 2020, the Governor announced that the second phase of reopening (which includes nail salons) would take place on June 17, 2020 rather than June 20, 2020, not for public health reasons, but because June 20, 2020 was on a busy holiday weekend.[17] Because the Governor and DECD have repeatedly shifted around the reopening dates, without any underlying public health reason, there is no guarantee that nail salons will be allowed to open on June 17, 2020—and also no health reason that they cannot safely open sooner. On June 7, 2020, DECD

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[14] Department of Economic and Community Development, Sector Rules and Certification for Reopen, https://portal.ct.gov/DECD/Content/Coronavirus-Business-Recovery/Sector-Rules-and-Certification-for-Reopen

[15] Roadmap for Reopening at 27 (Complaint Exhibit 16).

[16] Executive Order 7TT (May 29, 2020), *available at* https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7TT.pdf. (Complaint Exhibit 17).

[17] Ken Dixon, Indoor dining, gyms, movie theaters, small weddings and events to reopen June 17, three days early, CT Post (June 5, 2020), https://www.ctpost.com/news/coronavirus/article/Phase-2-including-indoor-dining-to-start-June-17-15319552.php (quoting Governor Lamont saying "To avoid having Phase 2 of Connecticut's reopening efforts take effect during a busy Father's Day weekend, we're going to move it up a few days earlier to June 17").

issued sector rules featuring the safety precautions that nail salons would be required to employ to reopen on June 17, 2020.[18]

Roxy Nails has been closed since March 20, 2020. Luis Ramirez Affidavit ¶ 4. Mr. Ramirez has been unable to pay rent for several months and is in imminent danger of eviction or financial ruin if he is not allowed to reopen. Luis Ramirez Affidavit ¶ 16. Based on the Governor's public pronouncements, Mr. Ramirez understood that he could open Roxy Nails on either May 20 or June 1, 2020. Luis Ramirez Affidavit ¶ 14. Accordingly, he made extensive preparations to be sure that Roxy Nails was ready, willing and able to comply with all state issued safety guidelines for businesses like his. Luis Ramirez Affidavit ¶¶ 15, 17. He installed acrylic shields to protect the nail technicians and took out the waiting room so that only one client could be in the business at a time. Luis Ramirez Affidavit ¶ 15. He also purchased hand sanitizer for his customers and nail technicians and masks for his nail technicians. Luis Ramirez Affidavit ¶ 15. The funds for these changes came from his already dwindling savings. Luis Ramirez Affidavit ¶ 15. Mr. Ramirez is ready to immediately comply with the sector rules that DECD issued on June 7, 2020 to ensure that he can reopen safely. Luis Ramirez Affidavit ¶ 17.

[18] Department of Economic and Community Development, Sector Rules for Reopen, Personal Services, https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery-Phase-2/Prsnl-Srvcs_C3_v1.pdf. (Complaint Exhibit 15).

ARGUMENT

I. STANDARD FOR TEMPORARY RESTRAINING ORDERS AND TEMPORARY INJUNCTIONS

When it is in the interest of justice, this Court may grant an ex parte injunction[19] immediately when "it clearly appears from the specific facts shown by affidavit or by verified complaint that irreparable loss or damage will result to the plaintiff before the matter can be heard on notice." Conn. Gen. Stat. Ann. § 52-473.[20]

The same criteria used for the granting of a temporary injunction are employed in an application for a temporary restraining order. *Olcott v Pendleton*, 128 Conn. 292, 295 (1941) A party seeking a temporary restraining order must demonstrate that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm without an injunction; (3) it is likely to prevail on the merits; and (4) the balance of equities tips in its favor. *Aqleh v. Cadle Rock Joint Venture II, L.P.*, 299 Conn. 84, 97–98 (2010) (citing *Waterbury Teachers Ass'n v. Freedom of Information Commission*, 230 Conn. 441, 446 (1994)). In this case each of the four elements for a temporary restraining order are satisfied, and the Court should return Roxy Nails to the status quo of being

[19] This brief uses the terminology temporary restraining order and ex parte temporary injunction synonymously, as has the Supreme Court of Connecticut. *Feehan v. Marcone*, 331 Conn. 436, 444 n.7 (2019).

[20] Plaintiffs provided notice of their plan to file an application for an ex parte temporary injunction to the Attorney General on June 5, 2020 via email and a phone call. Plaintiffs followed up with an additional phone call in the morning of June 8, 2020. As of the time of filing, the Attorney General has not responded.

able to offer its nail care services safely to the public. Any additional delay will result in further irreparable harm. Roxy Nails's application should be granted.[21]

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

Even during an emergency, the executive branch's power is limited to those granted by the General Assembly and further limited by the protections of the Connecticut and United States Constitutions. Even under the broadest interpretation of those emergency powers, they are still limited to dealing with public health and safety concerns and the immediate effects of an actual emergency. Indeed, the precise power the Governor possesses that is most analogous to shutting down businesses is the power to quarantine and isolate, which the General Assembly saw fit to limit with various procedural safeguards. Conn. Gen. Stat. Ann. § 19a-131(6)-(9), 19a-131b. The General Assembly did not grant Governor Lamont and DECD the discretion to keep businesses such as nail salons closed down while allowing similarly situated businesses to open when the State itself recognizes that there are no public health or safety reasons for the disparity and nail salons such as Roxy Nails are able to follow all State safety guidelines for reopening. And if such power were to be found in the statutes that grant the Governor emergency powers, they would be so vague and open

[21] When warranted by weighing the applicable factors and need for expediency, Connecticut trial courts routinely grant applications for ex parte temporary injunctions. *See, e.g.*, *New London Maritime Society, Inc. v. Ring*, 2018 WL 2418936, at *1 (Conn. Super., 2018); *Saksa v. Isabelle*, 2018 WL 7360642, at *1 (Conn. Super., 2018); *KX Industries, L.P. v. Saaski*, 1997 WL 583629, at *1 (Conn. Super.,1997); *Waterbury Firefighter Ass'n Local 1339, IAFF AFL-CIO v. City of Waterbury*, 1991 WL 135425, at *1 (Conn. Super.,1991).

ended as to constitute an unconstitutional delegation of law making power to the Governor and/or the DECD.

Finally, even if DECD and the Governor had the authority to shut down businesses, the decision to continue to order Roxy Nail to shutdown while allowing similarly situated businesses such as hair salons to reopen is irrational and this unequal treatment violates the Equal Protection Clauses of the Connecticut and United States Constitutions

A. Neither the Governor Nor the DECD Has the Power to Prevent Roxy Nails from Reopening

Under the Connecticut Constitution, the Governor is vested with "the supreme executive power of the state." Conn. Const. art. IV, § 5. But the Connecticut Supreme Court has held that this "provision vests little or no inherent power in the governor." *City of Bridgeport v. Agostinelli*, 163 Conn. 537, 546 (1972). Accordingly, "[t]he governor is authorized to see that the laws are faithfully executed, but the remainder of the governor's authority must be found in other constitutional provisions and in the statutes." *Id*. *Accord* Connecticut Attorney General's Opinion 2001-006 (explaining that "[i]t is a general principle of law that "emergencies do not create power or authority in a governor, as the executive, but they may afford occasions for the exercise of powers already existing.")[22]; Connecticut Attorney General's Opinion 2002-013 ("As a fundamental principle of law, an Executive Order may not contradict

[22] *Available at* https://portal.ct.gov/AG/Opinions/2001-Formal-Opinions/Honorable-George-Jepsen-State-Capitol-2001006-Formal-Opinion-Attorney-General-of-Connecticut.

or supersede a statute or constitutional provision, and may not suspend, modify or revoke any statutory provision enacted by the General Assembly.")[23]

The same is even more plainly true of executive agencies as "[t]he power of an administrative agency to prescribe rules and regulations under a statute is not the power to make law, but only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute." *Sams v. State, Dep't of Envtl. Prot.*, No. CV084016517, 2009 WL 1057064, at *12 (Conn. Super. Ct. Mar. 26, 2009), aff'd sub nom. *Sams v. Dep't of Envtl. Prot.*, 308 Conn. 359 (2013). *See also La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it").

Any unauthorized exercise of executive authority is invalid and constitutes an improper attempt to "usurp powers belonging to another branch." *Honulik v. Town of Greenwich*, 293 Conn. 641, 669–70 (2009). Executive actions that encroach on the power of other branches will be invalidated if they "constitute: (1) an assumption of power that lies exclusively under the control of another branch; or (2) a significant interference with the orderly conduct of the essential functions of another branch." *Seymour v. Elections Enforcement Commission*, 255 Conn. 78, 107 (2000).

1. The Governor Lacks the Power to Keep Roxy Nails Shut Down

The General Assembly has by statute defined two types of emergencies that a Governor can declare: First, a "public health emergency" Under Connecticut General

[23] *Available at* https://portal.ct.gov/AG/Opinions/2002-Formal-Opinions/Honorable-Kevin-Sullivan-Legislative-Office-Building-2002013-Formal-Opinion-Attorney-General-of-Conn.

Statues § 19a-131, applies to "an occurrence or imminent threat of a communicable disease … or contamination caused or believed to be caused by … an epidemic or pandemic disease." Connecticut General Statues § 19a-131(8). Pursuant to this power, the Governor may, among other things, authorize the Commissioner of Public Health to isolate, quarantine, and vaccinate individuals, suspend certain licensing requirements, apply for federal assistance, and seize property as long as the State pays compensation. General Statues §§ 19a-131—19a-131k

Second a "Civil Preparedness Emergency" under Connecticut General Statutes § 28-9. applies "[i]n the event of serious disaster, enemy attack, sabotage or other hostile action or in the event of the imminence thereof." Connecticut General Statutes § 28-9(a). A serious disaster is defined as any "catastrophe" such as a "hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm or drought." Connecticut General Statutes § 28-(1). The powers in this act are therefore designed "to deal with the *immediate emergency conditions* which would be created by any such attack, major disaster or emergency." Conn. Gen. Stat. § 28-1(4) (emphasis added).

Governor Lamont has invoked both provisions during the COVID-19 crisis. Whether or not it was valid for him to do so and to shut down businesses throughout the state, the fact remains that both emergency statutes are designed to give him the power to address public health issues and the immediate exigencies of an emergency. They do not grant the Governor or the DECD the power to keep businesses shut down despite the state's own recognition that those businesses pose no threat to public

health or the spread of infectious disease relative to other similarly situated businesses. That is so for two reasons. First, the specific grant of authority in a statute controls the general, meaning that the emergency statutes the Governor has invoked cannot extend to granting either him of the DECD the authority to keep Plaintiffs shut down when they pose no public health threat. Second, if these statutes can be read to grant the Governor or the DECD this power, they violate the nondelegation principle.

a. The General Assembly Did Not Grant the Governor the Power to Keep Businesses Shut Down When They Pose no Threat to Public Health

Under common principles of statutory interpretation, the specific controls the general. *See, e.g.*, *Gaynor v. Union Tr. Co.*, 216 Conn. 458, 476 (1990) ("It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."); *Galvin v. Freedom of Info. Comm'n*, 201 Conn. 448, 456 (1986) ("It is an accepted principle of statutory construction that, if possible, the component parts of a statute should be construed harmoniously in order to render an overall reasonable interpretation. Where statutes contain specific and general references covering the same subject matter, the specific references prevail over the general.").

The most analogous power to shutting down businesses that the Governor possesses under either emergency statute is the power of quarantine and isolation. Conn. Gen. Stat. Ann. § 19a-131(6)-(9), 19a-131b. Whether or not shutting down

businesses initially could be construed as an instance of quarantine or isolation, plainly keeping them shut down when they pose no greater threat than other businesses that are allowed to open is not a proper exercise of these powers.

Quarantine allows the Governor "to isolate individuals who are exposed to a communicable disease or are contaminated, or whom the commissioner [of public health] reasonably believes have been exposed to a communicable disease or to be contaminated, ... to prevent transmission to the general public." Conn. Gen. Stat. Ann. § 19a-131(9). Isolation is the "physical separation and confinement of an individual, group of individuals or individuals present within a geographic area who are infected with a communicable disease or are contaminated, or whom the commissioner reasonably believes to be infected with a communicable disease or to be contaminated, in order to prevent or limit the transmission of the disease to the general public." *Id.* § 19a-131(6). Section 19a-131b imposes rigorous procedural safeguards on the use of quarantine and isolation in recognition of what a grave deprivation of liberty these acts are. Among other things, these include the requirement of a written order, a finding that quarantine or isolation are the least restrictive means of addresses the threat, the right to a hearing for affected individuals, the right to appeal an order, frequent health monitoring, and immediate release when the quarantined or isolated individuals are no longer infectious.

Plainly, neither of these powers justify the continued closure of Roxy Nails, where, as here, the State itself recognizes that nail salons pose no greater health threat than hair salons and other businesses that have been allowed to open and all

such businesses can follow State-mandated safety guidelines. Indeed, an Ohio Court recently came to the same conclusion in issuing a preliminary injunction against the Director of the Ohio Department of Health. *See Rock House Fitness v. Acton*, Case No. 20CV000631, Order Granting Preliminary Injunction (Court of Common Pleas, Lake County, Ohio) (issued May 20, 2020).[24] There, the Director of Health claimed the authority to shut down non-essential businesses, notwithstanding her narrower power to quarantine and isolate. The Court concluded that the specific power controlled, however, and thus the director had no authority to "quarantine[] the entire people of the state of Ohio for much more than 14 days," or "to close all businesses … which she deems non-essential for a period of two months." *Id.* at 6. Here, Plaintiffs are making much more modest argument. They seek only to invalidate the Governor's and the DECD's effort to keep them closed when the State admits that there is no public health justification for doing so.

For similar reasons, the Governor cannot invoke the provisions of section 28-9 for a "Civil Preparedness Emergency" as a justification for keeping Plaintiffs shut down. While section 28-9 gives the Governor the power to take "steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state, to prevent or minimize loss or destruction of property and to minimize the effects of hostile action," on its face this provision only permits the Governor to take actions to address the exigencies of an emergency as

[24] Opinion *available at* https://ohioconstitution.org/wp-content/uploads/2020/05/20CV000631-Rock-House-Fitness-Inc.-v-Amy-Acton-Director-ODOH-order-granting-preliminary-

defined in section 28-9 *et seq*. That section does not include pandemics, and, in any event, the State's own findings make clear that opening nail salons would not create any emergency of threat to public health at all. Complaint Exhibit 16 at 27. Connecticut Attorney General's Opinion 2001-006 (concluding that the Governor's authority under a different statute to call out the national guard to respond to an emergency "must be limited to those [actions] necessary to the protect the lives, health and safety of the residents of the nursing homes from direct, imminent danger, and such actions must be narrowly tailored to meet those objectives. They must be based on a factual showing or determination supported by substantial, reliable evidence.")[25]

If this catch-all provision in section 28-9 were interpreted to allow the Governor to keep businesses such as Plaintiffs' shut down during a pandemic despite State's admission that they pose no greater threat than other businesses, the Governor's power under section 28-9 would nullify the provisions of section 19a-131 *et seq* for public health emergencies. The Governor would, in effect, be empowered to shut down businesses, keep individuals confined to their homes, and institute any other restrictions on the grounds that they were designed to "protect the health, safety and welfare of the people," notwithstanding the narrower provisions for quarantine and isolation contained in Sections 19a-131(6)-(9) and 19a-131b. But this would not be in accord with the principle that only the General Assembly may

[25] *Available at* https://portal.ct.gov/AG/Opinions/2001-Formal-Opinions/Honorable-George-Jepsen-State-Capitol-2001006-Formal-Opinion-Attorney-General-of-Connecticut.

empower the executive to act, *see City of Bridgeport*, 163 Conn. at 546, and that laws must interpreted in harmony with one another. *See Thomas v. Dep't of Developmental Servs.*, 297 Conn. 391, 403 (2010) ("We are further guided ... by the presumption that the legislature, in amending or enacting statutes, always [is] presumed to have created a harmonious and consistent body of law."). *See also Elkhorn Baptist Church, et al. v. Katherine Brown Governor of the State of Oregon*, Case # 20CV1 7482, 2020 WL 2532528 (Or. Circ. Ct. May 18, 2020) (Opinion on Temporary Injunctive Relief) (emphasizing that Oregon's more specific public health act controlled the more general emergency provisions and set limits on the powers of the Oregon governor during the Covid-19 pandemic) [26].

b. An Expansive Reading of the Governor and DECD's Powers Is Contrary to the Non-delegation Doctrine

If this court were to interpret the Governor's power under section 28-9 for civil preparedness emergencies to allow him to keep Plaintiffs' business shut down, the statute would constitute an unconstitutional delegation of power to the Governor.

Under article second of the Connecticut Constitution, the General Assembly is tasked with the law-making authority. Conn Const. Art II. While the General Assembly may authorize the executive branch to fill in the details of a statue, it cannot delegate core lawmaking authority to the executive. Instead, a statute delegating authority must "declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative

[26] This decision is currently on appeal to the Oregon Supreme Court.

officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits." *State v. Stoddard*, 126 Conn. 623, 628–29 (Conn. 1940). *See also Univ. of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386, 397, 512 A.2d 152, 158 (1986); *Bottone v. Town of Westport*, 209 Conn. 652, 660, 553 A.2d 576, 580 (1989). *Accord People v. Wright*, 30 Cal. 3d 705, 712, 639 P.2d 267, 271 (1982) ("An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency *unrestricted authority to make fundamental policy decisions*."); *Boreali v. Axelrod*, 71 N.Y.2d 1, 9, 517 N.E.2d 1350, 1353 (1987) (""Even under the broadest and most open-ended of statutory mandates, [the executive] may not use its authority as a license to correct whatever societal evils it perceives."); *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (describing the historical significance of the non-delegation doctrine and emphasizing that "[r]estricting the task of legislating to one branch characterized by difficult and deliberative processes was also designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules."). In Connecticut these "principles are well established." *Hogan v. Dep't of Children & Families*, 290 Conn. 545, 572, 964 A.2d 1213, 1228 (2009). The same limits apply to the authority granted to executive agencies. *Sonn v. Planning Comm'n of City of Bristol*, 172 Conn. 156, 159 (1976) (the authority given to an agency "must contain known and fixed standards applying to all cases of a like nature, and must conform to the principle

that a regulation, like a statute, cannot be too general in its terms"); *Campion v. Bd. of Aldermen of City of New Haven*, 278 Conn. 500, 526 (2006).

Because the residual clause is an open-ended grant of authority, it must have limiting principles or else it is invalid. As already discussed above, there are several important limiting principles that could prevent the residual clause from violating the non-delegation doctrine. First, the residual clause is narrowly tied to the immediacy of the emergency contemplated by the civil preparedness emergency law. Second, the residual clause is limited because the power it bestows cannot be exercised contrary to the other provisions of the civil preparedness and public health emergency acts such as the limits on the Governor's power to quarantine and isolate discussed above. Finally, the residual clause must be read in harmony with the constitutional limits of the non-delegation doctrine. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality) (warning that a statutory construction that affords a "sweeping delegation of legislative power" could be unconstitutional and that "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored."). This narrower interpretation is most consistent with the legislature's overall statutory scheme and with the Connecticut Constitution.

If on the other hand the residual clause of section 28-9(7) were read to authorize the Governor to keep Plaintiffs' business closed despite the State's admission that it poses no greater threat to public health than other businesses, this would constitute an interpretation of section 28-9 that would abrogate the public

health provisions of sections 19a-131(6), (9) and 19a-131b By simply declaring an emergency, the governor could adopt any policies that are in any way connected with "health, safety, and welfare" without any legislative accountability. But that is not Connecticut law. *See Office of Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 587 (2004) ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?'(quoting *Marbury v. Madison*, 5 U.S. 137, 176 (1803)).

2. DECD Has No Power to Order Roxy Nails to Shut Down

For all of the same reasons that the Governor lacks the authority to keep Plaintiffs' business shut down, the DECD lacks that power as well. In addition, the DECD has no independent authority to keep Plaintiffs shut down.

While the Legislature has given the Governor authority to take certain actions during an emergency, it has given DECD *absolutely no emergency authority*. Indeed, it has not even authorized the governor to delegate his emergency authority to DECD—there is not a single reference to the DECD in either the public health emergency or civil preparedness emergency statutes. This is unsurprising. DECD is an agency that was created to "encourage and promote the development of industry and business in the state," and to provide financial assistance directed towards attracting business into Connecticut. Conn. Gen. Stat. Ann. § 32-1c. None of its powers even remotely touch upon being put in charge of the state's response to pandemic. Its commissioner is a former investment banker; none of its leadership are

doctors or have any public health training.[27] Nor is DECD given the authority in any statute to decide which businesses are "essential" in the state, or to establish occupational health and safety requirements which will govern businesses in the state. The DECD has been improperly tasked with adopting regulations that fall far outside of the scope of any "positive statutory authorization" that it has been given. *Sonn*, 172 Conn. at 159.

Even if the Governor has been given the emergency power to order Roxy Nails to shut down, he is not entitled to delegate that power to an agency that has not been given any emergency authority. *See Application of N. Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167, 206 (App. Div. 1980) ("Under our law a power or duty delegated by statute to an administrative agency cannot be subdelegated in the absence of any indication that the Legislature so intends."). When the General Assembly intended for the Governor or other public health officials to be able to delegate their emergency power, they granted that delegation power expressly, mentioning specific officials who are expected to play a role in emergency preparedness and response. *See e.g.* Conn. Gen. Stat. Ann. § 19a-131a *("*The commissioner [of public health] may delegate to an employee of the Department of Public Health or any local health director, as much of the authority of the commissioner described in this section as the commissioner determines appropriate. Such authorized employee or director shall act as an agent of the commissioner.").

[27] DECD, Meet the Commissioners, https://portal.ct.gov/DECD/Content/About_DECD/About-DECD-Office/About-DECD/Commissioner.

But there is no authorization to delegate such authority to DECD. Accordingly, DECD was not allowed to issue regulations preventing Roxy Nails from reopening.

Furthermore, even if DECD were properly delegated emergency rulemaking authority, it has not gone through the proper rulemaking steps. Under the Uniform Administrative Procedure Act, government agencies must go through a formal rulemaking process before they promulgate binding regulations. This process includes public notice and an opportunity for comment. Conn. Gen. Stat. §§ 4-168, 4-169, 4-170. DECD did not employ this rulemaking process. While the UAPA contains a provision for emergency regulations, DECD has also not complied with its requirements. Conn. Gen. Stat. §§ 4-168 (g)-(h). DECD's rules are accordingly null and void and of no effect. See, e.g., *Breiner v. State Dental Com'n* 57 Conn.App. 700 (2000) (Administrative rules are considered invalid and of no effect where they are not adopted and promulgated pursuant to applicable provisions of UAPA).

The Wisconsin Supreme Court similarly invalidated emergency rules and orders issued by a state agency in response to COVID-19 because the agency failed to engage in proper rulemaking. The Wisconsin Supreme Court emphasized that "[r]ulemaking exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official," and that the rulemaking process was necessary "to give the people faith in the justness of the regulation." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶¶ 28, 31. The Court noted that "[r]ulemaking provides the ascertainable standards that hinder arbitrary or oppressive conduct by an agency."

These ascertainable standards were wholly absent from DECD's unlawful actions and they are accordingly invalid.

III. THE GOVERNOR AND DECD'S ACTIONS VIOLATE EQUAL PROTECTION

Beyond violating Connecticut law as recounted above, the Governor and DECD's actions also violate the Equal Protection Clauses of the Connecticut and United States Constitutions by arbitrarily allowing hair salons and other retail businesses to reopen while requiring nail salons to remain closed despite the State's admission that the two types of businesses pose the same risk profile. "To determine whether a particular classification violates the guarantees of equal protection, the court must consider the character of the classification; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *State v. Wright*, 246 Conn. 132, 139 (1998) (citing *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972)). If the classification the government has made does not bear a rational relationship to a legitimate government purpose, then it violates equal protection. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). This is particularly true when government officials are given "a naked and arbitrary power to give or withhold consent" and exercise that power in a seemingly discriminatory or arbitrary fashion. *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886). Though deferential, rational basis scrutiny requires courts to make "a serious and genuine judicial inquiry" into whether the classifications are rationally related to the state's goal. *See Walgreen Co. v. City and County of San Francisco*, 185 Cal. App. 4th 424, 436 (Cal. App. 2010)

Here, the State cannot justify treating nail salons differently from hair salons and other similarly situated businesses because the evidence that the State itself has relied on shows that the two types of businesses pose the same risk to public health.[28] Nevertheless, despite the clear data showing that hair and nail salons were identical to each other and should be allowed to reopen, Governor Lamont and DECD decided that hair salons could reopen on June 1 but nail salons could not.

This decision is not only contrary to the Governor's own internal metrics, it is illogical and arbitrary. Because nail technicians are not required to make close contact with the face of a customer, it is easier to employ more extensive safety mechanisms for nail salons and nail services. As Plaintiff Luis Ramirez attests, nail salons can install acrylic face shield for nail technicians, a precaution that is not available for hair services since hair stylists must get much close to the face of their customers. Affidavit of Luis Ramirez at ¶ 15. Because nail salons could employ the same or even more extensive safety precautions as hair salons and offer an identical risk/reward based on the state's own metrics, there can be no rational public health related rationale for this arbitrary treatment. *See, e.g.*, *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1179 (11th Cir. 2020) (holding that when making decisions using emergency public health and safety powers, a state agency must base its decision on legitimate public health and safety concerns, and cannot improperly use its emergency authority as "an absolute blank check for the exercise of governmental

[28] Roadmap for Reopening at 27 (showing that hair and nail salons have an *identical* public health risk and economic benefit from reopening) (Complaint Exhibit 16).

power"). *See also Romer v. Evans*, 517 U.S. 620, 632 (1996) (emphasizing that "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained)*; Walgreens Co.*, 185 Cal. App. 4th at 442 (noting that while lawmakers can address problems incrementally, they "may not do so wholly at [their] whim"). And the defendants have not offered any such rationale in any of their many public statements about their plans for reopening Connecticut

Rather than relying solely on public health and safety, the Governor and DECD relied on a variety of improper factors like whether the equipment needed to reopen might be costly for some nail salons, or how busy the targeted opening date would be. These considerations "rest[] on grounds wholly irrelevant to the achievement of the State's objective." *City Recycling, Inc. v. State*, 257 Conn. 429, 446, (2001). Because of this, the Governor and DECD arbitrarily distinguished between two business activities that are nearly identical according to the state's own health and safety standards for determining who can reopen. That is incompatible with the guarantee of equal protection under the law.

IV. ROXY NAILS HAS NO ADEQUATE LEGAL REMEDY

Roxy Nails has no adequate remedy other than for it to re-open its doors because "there is no other relief the court could afford [it] that would compensate for the alleged interference with [it] rights." *See Antezzo v. Harkins*, 2015 WL 3974679, at *4 (Conn. Super., 2015) (granting temporary injunction for deprivation of civil rights under Connecticut Constitution). Roxy Nails does not seek monetary relief in

this case, but rather purely equitable remedies for the interference with its civil rights under Connecticut law, the Connecticut Constitution, and United States Constitutions. Nothing other than re-opening will end the injuries caused by the continuing violations of its statutory and constitutional rights. And nothing else will remove uncertainty about whether this small business will be forced to close by the debts that continue to mount while it is prohibited from safely serving its clientele.

In short, Roxy Nails and its owner seek to pursue their livelihood free from arbitrary and discriminatory interference. That is a right that this Court must protect, as other courts have similarly protected it and other constitutional rights even during the COVID-19 pandemic.[29]

V. ROXY NAILS IS SUFFERING IRREPARABLE HARM

"The [party] seeking injunctive relief bears the burden of proving facts which will establish irreparable harm as a result of the violation." *Karls v. Alexandra Realty Corp.,* 179 Conn. 390, 401 (1980). Roxy Nails has carried this burden for two reasons.

[29] Courts across the United States have granted temporary restraining orders enjoining state officials acting unconstitutionally in response to COVID-19, *see Rock House Fitness v. Acton*, Case No. 20CV000631, Order Granting Preliminary Injunction (Court of Common Pleas, Lake County, Ohio) (issued May 20, 2020) (granting a preliminary injunction on behalf of a gym forced to shutdown due to COVID-19). *See also Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Elkhorn Baptist Church v. Brown*, No. 20CV17482, 2020 WL 2532528, at *4 (Or. Cir., 2020); *Bailey v. Pritzker*, 2020 WL 2116566, at *1 (Ill. App. 5 Dist., 2020); *First Baptist Church v. Kelly*, 2020 WL 1910021, at *9 (D. Kan., 2020); *On Fire Christian Center, Inc. v. Fischer*, 2020 WL 1820249, at *6 (W.D. Ky., 2020); Other Courts have declared COVID-based regulations unconstitutional in their entirety, *see Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 58 (Wis., 2020).

First, it is well established that the deprivation of constitutional rights for even a short period of time constitutes irreparable harm. *Elrod v. Burns,* 427 U.S. 347, 373. *See also Doe v. Cortright*, No. CV084009094S, 2008 WL 1823089 at *3 (Conn. Super. Ct. Apr. 2, 2008) (holding that a party alleging that their constitutional rights have been violated is not required to show any further irreparable harm); *Oshno Int'l Found. v. O'Neill*, No. FSTCV106004365S, 2010 WL 3960802, at *7 (Conn. Super. Ct. Sept. 8, 2010) (holding that irreparable harm means that the harm cannot be compensated or measured by pecuniary standards).

The continued shut down of Roxy Nails violates it and Mr. Ramirez's liberty by violating the separation of powers and by violating their right to equal protection of the laws. The purpose of the separation of powers is not only to preserve the proper structure of government, but also to protect individual liberty by "prevent[ing] commingling of different powers of government in the same hands" and "ensur[ing] the independent exercise of that power." *State v. McCahill*, 261 Conn. 492, 505 (2002). As the U.S. Supreme Court has repeatedly held, "[t]he declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). *See also Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (stating that the separation of powers "serves not only to make Government accountable but also to secure individual liberty"); *Freytag v. Comm'r*, 501 U.S. 868, 870 (1991) ("The leading Framers of our Constitution viewed the principle of separation of powers as the

central guarantee of a just government."). This is particularly true during an emergency as "the separation of powers machinery is placed under great strain" and "the deliberate balance between the legislative and executive branch is uniquely vulnerable to severe and irreparable harm," *Office of Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 589 (2004).

And, of course, a primary purpose of the equal protection clauses of both the Connecticut and U.S. Constitutions is to protect individual rights. *See United States v. Windsor*, 570 U.S. 744, 774 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws"). Accordingly, Roxy Nails has shown that it has suffered irreparable injury as a result of the Governor's and the DECD's orders preventing the business from reopening.

Second, even if Roxy Nails's harm is measured by financial loss, it is still suffering an irreparable harm, because it forces the business and Mr. Ramirez to make a Hobson's choice—if he opens, he risks fines and perhaps even jail time.[30] If

[30] In Connecticut, violating an executive order made pursuant to the civil preparedness and emergency services statutes is a Class D felony. 28 CT ST Ch. 517 § 28-22. A Class D felony carries up to a five-year prison sentence, § 53a-35a, and fine of up to $5,000, § 53a-41. While state officials have encouraged municipalities to charge individuals violating COVID-19 based orders with misdemeanors,[1] which carry up to a year in prison, § 53a-36, and $1,000 fine, § 53a-42, there is no guarantee individuals will face this lesser charge. In any event, they face criminal penalties for violations. *See* Emily Bradley & Jesse Leavenworth, How are towns enforcing Gov. Lamont's executive orders? It depends where you live, Hartford Courant, (May 4, 2020), *available at* https://www.courant.com/coronavirus/hc-news-coronavirus-town-enforcement-executive-orders-20200504-zcojeck3cbaf5kdflxtvyrlqka-story.html

he does not open, Roxy Nails is threatened with financial ruin. The U.S. Supreme Court has held that this sort of choice constitutes irreparable harm. In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380–381 (1992), the Court explained that injunctive relief is available and irreparable harm shown where "respondents were faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review". This is the posture Roxy Nails and Mr. Ramirez finds themselves in today. *See Toy Mfrs. Of America, Inc. v. Blumenthal*, 806 F.Supp. 336, 340-41 (D. Conn. 1992) (explaining that irreparable harm prong is met when plaintiff faces "Hobson's Choice" of violating law and risking certain enforcement and huge liability, or suffering the illegal and unconstitutional injury during the pendency of court proceedings); *Brainard v. Town of West Hartford*, 18 Conn. Supp. 218, 223 (Conn. Super. Ct. 1953) (explaining that an irreparable injury justifying injunction was shown when government actions alleged to violate constitutional rights cannot be undone and plaintiff cannot be made whole unless the complained-of government actions are enjoined). Accordingly, Roxy Nails has met its burden of establishing irreparable harm.

VI. THE BALANCE OF EQUITIES WEIGHS IN ROXY NAILS'S FAVOR

In determining whether an injunction should be issued, a court must balance the competing interests of the parties to insure that the relief contemplated is

equitable. *Waterbury Teachers Assn. v. Freedom of Information Commission*, 230 Conn. at 446.

As already noted, the harm of not being able to reopen to Roxy Nails is profound. Moreover, the relief Roxy Nails is requesting is narrowly tailored to remedy the ongoing injury against Roxy Nails and Mr. Ramirez. Roxy Nails seeks only an injunction that will prohibit the state from forcing the continued closure of nail salons that can meet the standards the state has already prescribed for the safe operation of businesses. This injunction will not allow the reopening of any businesses that the governor has determined cannot safely operate. Nor will it authorize nail salons to ignore the state's General Business Rules[31] or salon-specific rules[32] for safe operation.

In stark contrast, there is no harm to the State in allowing Roxy Nails and other nail salons that are prepared to comply with the safe reopening guidelines to reopen immediately. The Governor has already determined that nail salons pose no greater threat to public health than hair salons and other businesses that have been permitted to reopen. It appears that the primary reason nail salons have been kept closed is concerns that some of them cannot afford to implement safety measures or

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[31] Department of Economic and Community Development, Sector Rules for May 20th Reopen, General Business Rules, https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery/general-reopen-051920.pdf.

[32]Department of Economy and Community Development, Sector Rules for May 20th Reopen, Hair Salons & Barbershops, https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery/CTReopensHairBarbershopsC5V051220.pdf (Exhibit 14); Department of Economic and Community Development, Sector Rules for Reopen, Personal Services, https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery-Phase-2/Prsnl-Srvcs_C3_v1.pdf. (Exhibit 15).

that the State believes other businesses are more important to the economy. Neither is an adequate justification for forcing all nail salons to remain closed and neither reason constitutes "harm" to the State. Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir.1994); *Preminger v. Prin*cipi, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding" constitutional protections).

CONCLUSION

For the above reasons, the Court should grant Roxy Nails's request for entry of temporary restraining order without delay.

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Respectfully submitted,

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