

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

RNYC Corp. d/b/a Redneck Yacht Club,)
an Oklahoma Corporation;)
Statmax LLC, d/b/a The Friendly Tavern,)
an Oklahoma Limited Liability Company;)
Doug's Waterin' Hole, LLC d/b/a Doug's Waterin')
Hole, an Oklahoma Limited Liability Company;)
Davis Management, LLC, d/b/a Gold Spur Bar,)
an Oklahoma Limited Liability Company;)
PJ's Pub & Grill LLC, d/b/a PJ's Pub & Grill,)
an Oklahoma Limited Liability Company; and)
Venom 64, Inc. d/b/a Western Nights,)
an Oklahoma Corporation,)
Plaintiffs.)

vs.)

Kevin Stitt, in his official capacity)
as Governor of the State of Oklahoma; and)
Alcoholic Beverage Laws Enforcement)
Commission,)
Defendants.)

CV - 2020 - 2518

Case:

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR
TEMPORARY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to 12 O.S. § 1381 *et seq.*, Plaintiffs move for a temporary restraining order and/or a temporary injunction to enjoin enforcement of Oklahoma Governor Kevin Stitt's COVID-19 executive orders issued on November 16, 2020 and December 14, 2020 (the Orders).

INTRODUCTION

Liberty – freedom from arbitrary or despotic government or control.
— Dictionary.com

Tyranny – arbitrary or unrestrained exercise of power; despotic abuse of authority.
— Dictionary.com

John Adams warned: “But a Constitution of Government once changed from Freedom, can never be restored. Liberty once lost is lost forever.”¹ Plaintiffs bring this action because they reasonably fear that the lawlessness and unrestrained exercise of power by Defendants will, unfortunately, become the “new norm.” It has been said that all tyranny needs to gain a foothold is for people of good conscience to remain silent. The time for good people remaining silent in Oklahoma is over.

This case seeks to protect and vindicate fundamental rights that citizens of Oklahoma enjoy free from government interference. These rights are not conferred or granted by government to then be rescinded at the will and whims of government officials. These God-

¹ JOHN ADAMS TO ABIGAIL ADAMS, 1 JULY 1775, <https://founders.archives.gov/documents/Adams/04-01-02-0160> (last visited Nov. 22, 2020).

given rights are possessed by the people, and they are guaranteed against government interference by the Oklahoma Constitution.

The COVID-19 pandemic has swept across this country. In the interest of public safety, local governments are acting to “save lives.” While public safety is paramount, the Oklahoma Constitution and Oklahoma law must still be honored. A virus does not give the Governor the power to institute any law he wants by fiat.

Governor Stitt and the Alcoholic Beverage Laws Enforcement Commission (ABLE) have violated Oklahoma law and the Oklahoma Constitution by attempting to regulate businesses through COVID-19-related executive orders. Their ridiculously broad overreach has no place in a free society. Plaintiffs have been harmed by credible threats of punishment for non-compliance with the Orders. Absent an order from this Court, Plaintiffs will continue to suffer irreparable injury because they will be deprived of their constitutionally protected right to enjoy the gains of their own industry and be subjected to arbitrary violations of their constitutional rights. Oklahomans trust in their public officials to be honest with them. This case will show that Defendants have broken that trust.

Plaintiffs’ due process rights have been violated because Plaintiffs do not know what law they must act in conformity with, do not know the punishment for violating said law, and do not know how to challenge an accusation of violating said law. Defendants are trampling on Plaintiffs’ constitutional rights as they violate the Oklahoma Constitution’s takings clause, separation of powers clause, and Commander-in-Chief clause. A temporary restraining order, preliminary injunction, and permanent injunction are therefore necessary

to stop Defendants from continuing to violate Plaintiffs' constitutional rights, stop the harm inflicted on Plaintiffs by Defendants, and stop the outrageous abuse of power by Defendants.

The balance of equities favors the Plaintiffs. Businesses that serve food and beverages can operate safely. The requested relief prevents further unlawful threats and harassment by Defendants. Plaintiffs ask that Defendants follow the law and only exercise the power they can legally exercise.

STATEMENT OF FACTS

On March 15, 2020, Governor Stitt declared a state of emergency in response to the COVID-19 pandemic.² Governor Stitt declared the order pursuant to power vested in him by article VI section 2 of the Oklahoma Constitution.³ He stated that "it is now necessary to provide for the rendering of mutual assistance among the State and political subdivisions of the State and to cooperate with the Federal government with respect to carrying out emergency functions during the continuance of the State emergency pursuant to the provisions of the Oklahoma Emergency Management Act of 2003."⁴

On March 24, 2020, Governor Stitt issued his Fourth Amended Executive Order 2020-07.⁵ This order stated the following:

20. Effective at 11:59 p.m. on March 25, 2020, all businesses not identified as being within a critical infrastructure sector as defined by the U.S. Department of Homeland Security and located in a county experiencing community spread of COVID-19, as identified by OSDH on its website, shall close. Additional

² *Executive Order 2020-07*, <https://www.sos.ok.gov/documents/executive/1913.pdf>.

³ *Id.*

⁴ *Id.*

⁵ *Fourth Amended Executive Order 2020-07*, <https://www.sos.ok.gov/documents/executive/1919.pdf>.

sectors may be designated as critical by Executive Order or Memorandum. Nothing in this provision shall prevent restaurants and bars from providing pick-up, curbside, and delivery. This shall be effective until April 16, 2020.⁶

The Governor cited article VI section 2 of the Oklahoma Constitution and the Oklahoma Emergency Management Act of 2003 (OEMA) as his authority for issuing this order.⁷

On March 26, 2020, Attorney General Mike Hunter issued a press release clarifying the Governor's executive order regarding law enforcement action for noncompliance.⁸ Attorney General Hunter stated that "a violation of an executive order can be a misdemeanor" Attorney General Hunter does not reference any statute for this claim.⁹

On November 16, 2020, Governor Stitt issued his Seventh Amended Executive Order 2020-20.¹⁰ This order added the following language:

25. Effective November 19, 2020, restaurants and bars shall ensure a minimum of six (6) feet of separation between parties or groups at different tables, booths, or bar tops, unless the tables are separated by properly sanitized glass or plexiglass.

26. Effective November 19, 2020, food or beverages of any kind shall not be sold, dispensed, or served for on-premises consumption by any license holder authorized to make such sales or services after 11:00 P.M. CST daily. The sale and service of food and non-alcoholic beverages for on-premises consumption may resume at 5:00 A.M. CST daily. The sale and service of alcoholic beverages for on-premises consumption may resume at 8:00 A.M. CST daily.¹¹

⁶ *Id.*

⁷ *Id.*

⁸ *Attorney General Hunter Clarifies Governor's Executive Order Regarding Law Enforcement Action for Non-Compliance* (Dec. 16, 2020) <https://oag.ok.gov/articles/attorney-general-hunter-clarifies-governor%E2%80%99s-executive-order-regarding-law-enforcement>.

⁹ *See id.*

¹⁰ *Seventh Amended Executive Order 2020-20*, <https://www.sos.ok.gov/documents/executive/1971.pdf>.

¹¹ *Id.*

The Governor cited article VI section 2 of the Oklahoma Constitution and the OEMA as his authority for issuing this order.¹²

On November 16, 2020, Governor Stitt held a press conference to discuss the latest COVID-19 executive order. A reporter asked the Governor how the order would be enforced. Governor Stitt stated, "The state obviously has the ability to pull licenses from different businesses. We haven't discussed that because, again, we are just rolling this out right now" and that he was "not even thinking about the enforcement at this point."¹³

On December 4, 2020, Counsel for Plaintiffs delivered a letter to the Governor seeking clarification on the November Order. On December 4, 2020 Counsel for Plaintiffs delivered a letter to ABLE demanding they immediately stop threatening and harassing businesses for not complying with the November Order. On December 10, 2020, Counsel for Plaintiffs delivered a letter to the Governor demanding that his administration immediately cease enforcement of the November Order.

On December 10, 2020, Governor Stitt held a press conference to announce a new COVID-19 executive order (the December Order).¹⁴ This order extended the November Order's regulations on bars and restaurants. During the press conference, a reporter asked for clarification on the 11:00 p.m. "shut down" rule. Governor Stitt responded: "I think it was 11 p.m. is when the alcohol would stop and then they would start shutting their doors

¹² *Id.*

¹³ Governor Kevin Stitt, *Governor Stitt Gives Update on the State's Response to COVID-19*, YOUTUBE (Nov. 16, 2020), <https://www.youtube.com/watch?v=Kl2TR4hc5cU>.

¹⁴ Governor Kevin Stitt, *Governor Stitt Provides Update on the State's Response to COVID-19*, YOUTUBE (Dec. 10, 2020), <https://www.youtube.com/watch?v=ffEOnYGDyLQ&t=538s>.

. . . I think we're splitting hairs there on staying in. I don't expect anybody to shove somebody out the door at 11:01 . . . and I'm really not worried about . . . Oklahomans always do the right thing and so just hoping Oklahomans will do the right thing . . . I haven't specifically asked the ABLE commission what they're doing at 11:01 but we can get back with you on that.”¹⁵ The reporter then told the Governor that establishments are being cited for having sold the final drink before 11:00 p.m. but establishments are being cited for having customers still in the establishment after 11:00 p.m.¹⁶ The Governor responded, “I need to check on that . . . we'll go back and try to clarify that.”¹⁷

On December 14, 2020, Governor Stitt issued his Eighth Amended Executive Order 2020-20 (the December Order).¹⁸ Paragraphs 25 and 26 from the November Order remain unchanged. The December Order adds restrictions on social gatherings and indoor sporting activities:

27. Unless otherwise provided herein, public and social gatherings of persons not from the same household shall be limited to fifty percent (50%) of the building or area's permitted occupancy as set forth in the Certificate of Occupancy or other building permit for use and occupancy of the building or area. Public and social gatherings mean a gathering or organized event among persons not part of the same household. This shall not apply to gatherings in a private residence, buildings or businesses providing religious, healthcare, educational, public safety, and childcare services and businesses impacted by Paragraph 26. Exceptions to this prohibition may be granted by the local health authority.

28. Attendance at indoor youth sports and extracurricular activities, including those organized through or sponsored by a public or private school, shall be limited to four spectators per participant up to fifty percent

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Eighth Amended Executive Order 2020-20*,
<https://www.sos.ok.gov/documents/executive/1975.pdf>.

(50%) of the building or area's permitted occupancy as set forth in the Certificate of Occupancy or other building permit for use and occupancy of the building or area.¹⁹

The Governor cited article VI section 2 of the Oklahoma Constitution and the OEMA as his authority for issuing this order.²⁰

ARGUMENT

Plaintiffs seek a temporary restraining order, and thereafter, a preliminary injunction then permanent injunction, to prevent Defendants from inflicting further harm on Plaintiffs. Plaintiffs currently may not operate their businesses or work in a meaningful way after 11:00 p.m. Some of these businesses operate almost exclusively at night, so the impact on them is far greater than a business that is open during both the day and night. Those businesses, and others in the industry, will ultimately decide to not open because patrons will not want to be forced to leave soon after arriving. Customers will simply not visit these establishments. Thus, Defendants have instituted a de-facto shutdown of an entire industry.

To issue a temporary injunction, the following factors must weigh in Plaintiffs' favor: "1) the likelihood of success on the merits; 2) irreparable harm to the party seeking injunction relief if the injunction is denied; 3) his threatened injury outweighs the injury the opposing party will suffer under the injunction; and 4) the injunction is in the public interest."²¹ Under Oklahoma law, "[t]he right to injunctive relief must be established by clear and convincing evidence and the nature of the injury must not be nominal, theoretical or speculative."²²

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Dowell v. Pletcher*, 2013 OK 50, ¶ 7, 304 P.3d 457, 460, *as corrected* (July 15, 2013).

²² *Id.*

The irony of this situation is that what Governor Stitt has effectively done is issue an unlawful injunction on restaurants and bars. Oklahoma law defines an injunction as “a command to refrain from a particular act.”²³ This is precisely what Governor Stitt has done, except Governor Stitt did not see a judge and prove why the above four factors weigh in his favor. And if someone disobeys Governor Stitt’s injunction, ABLE can supposedly fine them and take away their ability to earn a living.²⁴ Plaintiffs believe it is Defendants who should prove why an injunction should exist—not the other way around. Plaintiffs have been afforded zero due process in the shutting down of their businesses and elimination of their opportunity to work. Defendants have taken Plaintiffs’ liberty without ever having to explain why they are justified in taking that liberty and where that authority comes from. Instead, Plaintiffs are now in the unenviable position of having to explain why their liberty *should not* be taken. Justice has been turned completely upside down here.

A temporary restraining order is controlled by 12 O.S. § 1384.1.²⁵ This Court may issue a temporary restraining order if “it clearly appears from specific facts shown by affidavit or by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the attorney for the adverse party can be heard in opposition”²⁶ Before the Orders went into effect, all Plaintiffs operated their businesses after 11:00 p.m. Each Plaintiff earns a significant amount of revenue after 11:00 p.m.

²³ tit. 24 § 1381.

²⁴ Josh Dulaney, *Closing time: Oklahoma bars face suspension for curfew noncompliance*, THE OKLAHOMAN (Dec. 14, 2020) <https://oklahoman.com/article/5677836/closing-time-oklahoma-bars-face-suspension-for-curfew-noncompliance>.

²⁵ tit. 12 § 1384.1.

²⁶ *Id.*

Defendants' actions have caused Plaintiffs to close at 11:00 p.m. The early closure has caused Plaintiffs to lose a significant amount of revenue. This lost revenue is gone forever. The harm inflicted on Plaintiffs by Defendants cannot be more clear, immediate, and irreparable.

A. Plaintiffs are Substantially Likely to Succeed on the Merits of Their Due Process Claims, Takings Claim, Separation of Powers Claim, and Commander-in-Chief Claim.

This case hinges on whether the Governor has the authority to make law through his Orders, whether ABLE has the authority to enforce the Orders, and whether any punishment exists for violating the Orders. Defendants lose on all of those issues. A governor cannot issue a "mandate" then cite any law to give it the patina of legality.²⁷ What is happening is that Governor Stitt and his administration are throwing out incomplete, confusing, false, and contradictory information to keep the charade going that the Orders have the effect of law.²⁸ They know that the Orders cannot be enforced.²⁹ This is why Governor Stitt has repeatedly said that he is relying on voluntary compliance.³⁰

²⁷ See generally *In re Initiative Petition No. 112, State Question No. 167*, 1932 OK 79, 154 Okla. 257, 7 P.2d 868, 872 ("Before a Governor by executive order or proclamation can properly prescribe and enforce any act upon the body of the people of this state, he must have specific authority of law.").

²⁸ See generally *id.* at 871 (quoting Edmond Burke, "The vice of ancient democracies, and one of the causes of their ruin: that they ruled by occasional decrees, which broke in upon the tenor and consistency of their laws.").

²⁹ See generally *id.* (quoting William Pitt, "Where the law ends Tyranny begins.").

³⁰ Governor Kevin Stitt, *Governor Stitt Provides Update on the State's Response to COVID-19*, YouTube (Dec. 10, 2020), <https://www.youtube.com/watch?v=ffEOnYGDyLQ&t=538s>.

Defendants have yet to point to a law or administrative rule that allows them to punish businesses for not complying with the Orders.³¹ The only two references to legal authority in the Orders, article VI section 2 of the Oklahoma Constitution and the OEMA, give neither the Governor the ability to regulate businesses nor ABLE the power to enforce such a regulation.

Plaintiffs have given Defendants ample opportunity to inform the public of their authority. Despite multiple letters and numerous stories in the media, Defendants have failed to tell anyone a single thing about where their authority comes from. Their silence speaks volumes.

Defendants' lack of authority has caused them to violate multiple other constitutional provisions. If Defendants were acting pursuant to a valid law, then there would be no violations of the Oklahoma Constitution's takings clause, separation of powers clause, and commander-in-chief clause. The violation of these other clauses is the direct result of Defendants' lawless behavior.

The laws ABLE has cited Defendants for violating would be laughable if this situation did not concern people losing their livelihood. Section 2-158 of Title 37A of the Oklahoma Statutes confers power on a governor.³² It does not regulate the operations of businesses.³³ It is impossible for a business to violate this law because it does not command a business to

³¹ See generally *id.* at 872 ("The Governor is bound by the law, as enacted by the people and as interpreted by their courts.").

³² tit. 37A § 2-158.

³³ See *id.*

do anything.³⁴ Section 3-125(A) of Title 37A of the Oklahoma Statutes sets the closing time of bars at 2:00 a.m.³⁵ Period.³⁶ It does not also say anything along the lines of “unless changed by the Governor pursuant to an executive order declared during an emergency.”³⁷ Section 1321.4 of Title 21 of the Oklahoma Statutes is located in the Riot Control and Prevention Act (RCPA) portion of Oklahoma’s *criminal* code, yet the ABLE agent gave Doug’s Waterin’ Hole a date for a hearing in front of an ABLE hearing officer.³⁸ Apparently, ABLE is unaware that crimes are to be prosecuted by the district attorney—not ABLE. ABLE also is unaware that the Governor has never invoked the RCPA. Referring to three different laws to cite people for the same “prohibited behavior”? Really? That alone tells you that ABLE has no idea what they are doing. It does not get more arbitrary than this.

Plaintiffs also challenge the capacity restrictions in paragraphs 27 and 28 of the December Order. They are arbitrary, illegal, and unenforceable. The arguments against the portions of the Orders targeting bars and restaurants also apply to these paragraphs.

The actions by Defendants can only be described as tyrannical. The due process violations are off the charts. It is outrageous to coerce businesses into “voluntary compliance” through phony threats of punishment. People expect a government not to lie to them, so generally people will comply with what a government official says. However, a simple examination of the laws referenced in the Orders, Title 45 of the Oklahoma Administrative

³⁴ *See id.*

³⁵ *Id.* § 3-125(A).

³⁶ *See id.*

³⁷ *See id.*

³⁸ tit. 21 § 1321.4.

Code, Title 37A of the Oklahoma Statutes, and the Oklahoma Constitution reveals that the “mandates” on businesses in the Orders are nothing but recommendations.

Plaintiffs are substantially likely to win on all claims because Defendants simply have no response to the issues Plaintiffs have raised. Why is ABLE referencing three different laws for the same “prohibited activity”? Where is the administrative rule that allows ABLE to enforce something said in an emergency declaration by a governor? How do article VI section 2 of the Oklahoma Constitution and the OEMA give the Governor the power to regulate businesses? What is the punishment for not complying with the Orders and what is the statutory reference for that punishment? The fact that these questions are still being asked this far into the COVID-19 emergency shows the degree of lawlessness by Defendants.

ABLE has grossly misinterpreted the Governor’s Orders. Their attempt to punish businesses for violating the order is a ridiculously broad overreach. Plaintiffs will succeed on all of their claims because it is clear that Defendants are abusing their power and acting ultra vires in their efforts to mislead Oklahomans into complying with unenforceable Orders.

B. Plaintiffs Will Suffer Irreparable Harm if the Orders Continue to be Enforced.

Plaintiffs will suffer serious and irreparable harm in the absence of a temporary restraining order and temporary injunction. The Orders have been in effect for a month, and Plaintiffs have already been significantly harmed. The harm is not nominal, theoretical, or speculative. Each Plaintiff has suffered harm in the thousands of dollars that is directly attributable to the Orders. The harm involves real people and businesses suffering real financial loss. Any assertion that Plaintiffs have not suffered harm as a result of the Orders

flies in the face of all logic and common sense. This is not complicated. Plaintiffs are normally open past 11:00 p.m. Plaintiffs earn money after 11:00 p.m. Plaintiffs want to stay open after 11:00 p.m. Plaintiffs now cannot stay open after 11:00 p.m. because of Defendants' actions. The money Plaintiffs would have earned past 11:00 p.m. is gone forever because of Defendants' actions. As is clear from the harm detailed below, the damage and loss are immediate and irreparable.

Prior to the Orders, Redneck Yacht Club was open every Wednesday, Friday, and Saturday from 8:00 p.m.–2:00 a.m. Redneck Yacht Club received an ABLE Violation Complaint on December 4, 2020 for committing the following offense: "Title 37A 2-158 Sale consume during prohibited hours."³⁹ After receiving a citation from ABLE and being threatened with fines and loss of liquor license, Redneck Yacht Club has closed significantly earlier than its normal closing time. As a direct result of the Orders, revenue on beverage sales at Redneck Yacht Club has decreased by over 30%. Redneck Yacht Club opened one hour earlier for the last three weeks, but the impact this made on revenue was negligible.

Statmax LLC, LLC d/b/a The Friendly Tavern is a business located at 120 Main St, Noble, OK 73068. Prior to the Orders, The Friendly Tavern was open seven days a week. Saturday–Thursday, The Friendly Tavern was open from 2:00 p.m.–12:00 a.m. If there were still patrons inside, The Friendly Tavern would remain open until 2:00 a.m. on those days. The Friendly Tavern was open from 2:00 p.m.–2:00 a.m. on Fridays. The Friendly Tavern received an ABLE Violation Complaint on November 23, 2020 for committing the following

³⁹ Plaintiffs' ABLE Violation Complaints are attached as Exhibit 1.

offense: "Title 37A 3-125(A) Allow alcoholic beverages to be served or sold after lawful hours." After receiving a citation from ABLE and being threatened with fines and loss of liquor license, The Friendly Tavern has closed significantly earlier than its normal closing time. As a direct result of the Orders, revenue on beverage sales at The Friendly Tavern has decreased by over 25%.

Doug's Waterin' Hole, LLC d/b/a Doug's Waterin' Hole is a business located at 1912 N Broadway, Poteau, OK 74953. Prior to the Orders, Doug's Waterin' Hole was open seven days a week from 2:00 p.m.–2:00 a.m. Doug's Waterin' Hole received two ABLE Violation Complaints on November 23, 2020. Complaint number 40225 was for committing the following offense: "Title 21-1321.4 Violation of Governor's Executive Order." Complaint number 40224 was for committing the following offense: "Title 37A 3-125(A) Allow alcoholic beverages to be served or sold after lawful hours." After receiving citations from ABLE and being threatened with fines and loss of liquor license, Doug's Waterin' Hole has closed significantly earlier than its normal closing time. Since the November Order went into effect, Doug's Waterin' Hole has lost over \$12,000 as a direct result of the Orders.

Davis Management, LLC, d/b/a Gold Spur Bar is a business located at 2469 Mile, 28th St, Guymon, OK 73942. Prior to the Orders, Gold Spur Bar was open seven days a week—from 11:00 a.m.–1:00 a.m. Sunday–Thursday and 11:00 a.m.–2:00 a.m. Friday & Saturday. Gold Spur Bar received two ABLE Violation Complaints on December 5, 2020. Complaint number 37216 was for committing the following offense: "Allow AB to be sold after hours." Complaint number 37215 was for committing the following offense: "Violation of ABC Act." After receiving citations from ABLE and being threatened with fines and loss of liquor license,

Gold Spur Bar has closed significantly earlier than its normal closing time. Since the start of the November Order, revenue at Gold Spur Bar is down 30–40%. Approximately 35–45% of sales on the weekend occur after 11:00 p.m. Approximately 25–35% of sales on weekdays occur after 11:00 p.m.

PJ's Pub & Grill LLC, d/b/a PJ's Pub & Grill is a business located at 9999 South Mingo Rd Ste Y, Tulsa, OK 74133. Prior to the Orders, PJ's was open seven days a week from 11:00 a.m.–2:00 a.m. Due to credible threats of fines and losing their liquor license, P.J.'s has closed at 11:00 p.m. every night while the Orders have been in effect. PJ's revenue has decreased between \$4,000.00–\$6,000 per week since the November Order went into effect.

Plaintiff Venom 64, Inc. d/b/a Western Nights is a business located at 1164 N MacArthur Blvd, Oklahoma City, OK 73127. Western Nights closed at 11:00 p.m. on November 20, 2020 and has closed each night at 11:00 p.m. since the Orders have been in effect. This business decision was based on threats from ABLE via the Oklahoman and the experiences of other bar owners. On November 20, 2020, the number of patrons at Western Nights was down 80% from a typical Friday night at this time of the year. This resulted in Western Nights losing income and suffering harm. This damage cannot be undone. Approximately 75% of beverage sales at Western Nights come after 11:00 p.m. Closing each night at 11:00 p.m. will cause Western Nights to lose at least that percentage in sales every night. Since the start of the Orders, Western Nights has seen a 98% decrease in revenue.

The loss in revenue that Plaintiffs have suffered actually happened, and it was directly attributable to the actions of Defendants through the Orders. Any allegation that the loss in revenue “might have” come from bad management decisions or “other things” is

disingenuous and shows a complete lack of understanding of how businesses work. A basic knowledge of subtraction is all that is needed to understand why every single Plaintiff lost a significant amount of revenue immediately upon the imposition of the Orders. The trend Plaintiffs are experiencing will continue each day that the Orders remain in effect. Therefore, the sooner the Orders end, the sooner the bleeding will stop. Plaintiffs' losses are irreplaceable. Defendants have neither a plan nor the ability to reimburse Plaintiffs for these losses.

C. The Balance of Harms and Public Interest Support Injunctive Relief.

Plaintiffs' requested relief will "preserve the status quo," tipping the balance of equities toward Plaintiffs and serving the public interest. The "status quo" is "the last actual, peaceable, noncontested status which preceded the pending controversy"⁴⁰ The status quo in this case would be the situation before Governor Stitt issued the November Order.⁴¹ Furthermore, the Tenth Circuit has made clear that "it is always in the public interest to

⁴⁰ *Dusbabek v. Local Bldg. & Loan Ass'n*, 1936 OK 769, 178 Okla. 592, 63 P.2d 756, 759; *Waveland Drilling Partners III-B, LP v. New Dominion, LLC*, 2019 OK CIV APP 8, ¶ 17, 435 P.3d 114, 120, *reh'g denied* (Sept. 13, 2018).

⁴¹ *See id.*

prevent the violation of a party's constitutional rights."⁴² A temporary restraining order will preserve the status quo.⁴³

The harm to Plaintiffs, if an injunction is not granted, greatly outweighs the harm to Defendants if it is granted because there is no way to give someone back constitutionally protected rights. Once a due process right has been violated, it cannot be undone. There is also no way to make up for the income Plaintiffs will lose. Defendants have no plan to reimburse Plaintiffs for their lost income. Defendants are completely unaffected by the imposition of the Orders. None of them work in the food service industry, so they will neither be harmed from the effects of the Orders nor the absence of the Orders. Plaintiffs will lose income, not be able to pay rent, not be able to pay utility bills, not be able to pay for food, not be able to provide for their families, and not be able to do many of the things Defendants will be able to do with zero problems. The money from Defendants' government jobs will continue to roll in while Plaintiffs will be left out in the cold—literally.

Even non-Plaintiffs are harmed by Defendants' actions because countless other restaurants, bars, waiters, waitresses, bartenders, security guards, entertainers, and other people are suffering the negative effects of the Orders. The relief Plaintiffs seek will serve as

⁴² *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012); *Planned Parenthood of Ark. & E. Okla. v. Cline*, 910 F. Supp. 2d 1300, 1308 (W.D. Okla. 2012) ("The public has an interest in constitutional rights being upheld and in unconstitutional decisions by the government being remedied."); *BNSF Railway Co. v. City of Edmond, Okla.*, No. CIV-19-769-G, 2019 WL 5608680, at *3 (W.D. Okla. 2019) ("Oklahoma does not have an interest in enforcing a law that is likely constitutionally infirm. Moreover, the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law.") (quoting *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010)).

⁴³ *Morse v. Earnest, Inc.*, 1976 OK 31, 547 P.2d 955, 957.

a benefit to all whose work is related to the food-service industry in Oklahoma. The impact of the Orders is not just on workers in the affected industry. The families of everyone affected by the Orders will suffer. Children may go homeless or hungry because their parent(s) lost their job as a direct result of the Orders.

The impact of the Orders on the goal Defendants are trying to achieve, stopping the spread of COVID-19, will be negligible—at best. The vast majority of businesses can operate as normal all day and night. What is so special about 11:00 p.m.? Why not 10:59 p.m.? Or 11:01 p.m.? Defendants have presented zero evidence that 11:00 p.m. is some magical time when COVID-19 *really* begins to spread—and only in bars and restaurants. The capacity restrictions in the December Order are arbitrary. People can pack in like sardines in some places, but others must adhere to a capacity limit? Regardless, the issue is not whether Defendants' actions will help some people. The issue is whether Defendants have the authority to take those actions.

The negative impact of the Orders on Plaintiffs, people situated similarly as Plaintiffs, and the people that rely on Plaintiffs for support will be immense and certain. The only thing that is speculative is the lives that will be saved by the unlawful regulation of businesses through the Orders.

The interest of the public will be served by granting the injunction because Defendants, as well as state and national governing bodies, already have protective measures in place to combat the spread of COVID-19. Any establishment is still free to enact their own

policies on things such as social distancing, mask wear, and capacity. All Plaintiffs follow the CDC guidance for their industry.

The public is suffering greatly by Defendants' outrageous abuse of power. The public does not benefit when a government acts outside the scope of its authority. Private property is being seized for public use without just compensation, the Governor has assumed legislative powers, and ABLE has seemingly been deputized as a militia. The violation of civil liberties through these actions is off the charts. While the intention to "save lives" is noble, it should not be done at the sacrifice of Oklahomans' God-given rights. It has been said that the road to hell is paved with good intentions. Allowing Defendants to continue with their unlawful acts sets a dangerous precedent. If Defendants can continue to use executive orders to issue legally-binding fiats for the COVID-19 pandemic, then they will be given the green light to move farther from liberty and closer to tyranny. It is time for Defendants to follow the law.

D. A Bond is Not Necessary in This Case.

A temporary restraining order does not require the posting of a bond.⁴⁴ No bond will be necessary to issue a temporary injunction because the relief sought will result in no monetary loss to Defendants.⁴⁵

E. A Temporary Restraining Order and/or Temporary Injunction Should be Granted Even if the December Order is Repealed Prior to a Hearing.

⁴⁴ tit. 12 § 1392.

⁴⁵ *Id.*

This Court is well-within its authority to hear this case if the challenged provisions in the December Order are no longer in effect. Oklahoma follows the “likelihood-of-recurrence” exception to the mootness doctrine.⁴⁶ This exception occurs when the challenged event is “capable of repetition, yet evading review.”⁴⁷ A claim does not become moot just because the challenged party voluntarily ceased their illegal activity.⁴⁸ This exception applies when “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.”⁴⁹

If the December Order is repealed prior to a hearing on its validity, it is highly likely that another similar order could be issued at a later date. Indeed, the Governor has issued no less than 25 executive orders covering COVID-19.⁵⁰ In March, the Governor issued an executive order more restrictive than either of the Orders, so he has familiarity with imposing even more oppressive measures on Oklahomans.⁵¹ The December order comes on the heels of the November Order and is more restrictive than the November Order. COVID-19 continues to spread, so there does not appear to be any end in sight to these orders. It is perfectly reasonable to expect the Governor to issue more COVID-19-related executive orders.

⁴⁶ *State ex rel. Oklahoma Firefighters Pension & Ret. Sys. v. City of Spencer*, 2009 OK 73, ¶ 4, 237 P.3d 125, 130.

⁴⁷ *Id.* at 129 (internal quotations omitted).

⁴⁸ *Id.*

⁴⁹ *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 349, 46 L. Ed. 2d 350 (1975).

⁵⁰ Executive Orders, Oklahoma Secretary of State, (Dec. 15, 2020) <https://www.sos.ok.gov/gov/execorders.aspx>.

⁵¹ <https://www.sos.ok.gov/documents/executive/1919.pdf>.

The U.S Supreme Court recently addressed this issue in *Roman Catholic Diocese of Brooklyn v. Cuomo*. In that case, Governor Cuomo of New York issued an executive order that used color coded zones to impose varying levels of restrictions.⁵² When the plaintiff filed the lawsuit, they were in an orange zone.⁵³ During the pendency of the case, Governor Cuomo downgraded the plaintiff's zone to yellow.⁵⁴ Despite the change materially affecting the relevant circumstances of the case, the Court did not find the matter moot.⁵⁵ The Court held that "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange."⁵⁶ Justice Gorsuch eloquently stated the following in his concurrence:

It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again.⁵⁷

Plaintiffs are concerned that Defendants will attempt to thwart the opportunity for judicial review of their unlawful activities—only to restart them later. With no end in sight to COVID-19, it is only a matter of time until the Governor issues another executive order. Plaintiffs respectfully ask this Court to apply the likelihood-of-recurrence exception to the

⁵² *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354, at *1 (U.S. Nov. 25, 2020).

⁵³ *Id.* at *3.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

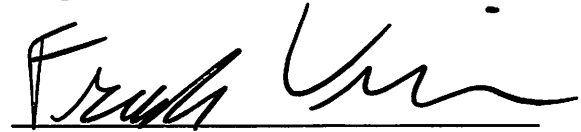
⁵⁷ *Id.* at *6.

mootness doctrine in the event Defendants rescind the challenged provisions of the December Order before this Court has an opportunity to rule on this case.

CONCLUSION

For all the foregoing reasons, Plaintiffs' motion for a temporary restraining order and/or temporary injunction should be granted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Frank Urbanic', written over a horizontal line.

Frank A. Urbanic, OBA No. 32528

The Urbanic Law Firm, PLLC

1211 N Shartel Ave Ste 906

Oklahoma City, OK 73103

Phone: (405) 633-3420;

Email: Frank@Urbanic.Law

Attorney for Plaintiffs

**ALCOHOLIC BEVERAGE LAWS
ENFORCEMENT (ABLE) COMMISSION
ADMINISTRATIVE VIOLATION COMPLAINT**

STATE OF OKLAHOMA

NOTICE OF VIOLATION _____

COUNTY OF Oklahoma

NOTICE OF WARNING _____

CITY/TOWN OF OKC

COMPLAINT - INFORMATION

NO. 28055

the undersigned, being duly sworn upon his oath deposes and says that:

on or about (date) 12/4/20 at (time) 11:00pm at or near (location) 4720 W F-40

License Number CMB-602044 d/b/a Name Paul M. Smith

within city, county and state aforesaid:

Name (last, first, middle) RN/C Phone number 942 2006

Address 4720 W F-40 S.W. - OKC

City OKC State OK Zip 73108

Birthdate (mo., day, yr.) _____ Height _____ Weight _____ Race _____ Sex _____ Eye _____ Hair _____

Driver License Number/SSN _____ Month/year _____ State _____

and did then and there commit the following offense:

3 M 2 118
Supervision of License - Sale/Consumption
During Prohibited hrs

The undersigned further states that he/she has just and reasonable grounds to believe the person named above committed the offense herein set forth contrary to law.

Signature of Officer [Signature]

Badge # 8

District 7P

You must either appear at the ABLE Commission, 4545 N. Lincoln Blvd., Ste. 270, OKC, OK 73105 on:

Hearing Date Jan 21, 2021

Time 12:00

or contact the Legal Division at 1-866-894-3517, option #4 prior to the above date.

This is not admission of guilt, rather a promise to contact the ABLE Commission prior to the hearing date or to appear on the date and time listed above.

Signature: _____

Remarks: _____

Plaintiffs' Exhibit

ALCOHOLIC BEVERAGE LAWS
ENFORCEMENT (ABLE) COMMISSION
ADMINISTRATIVE VIOLATION COMPLAINT

STATE OF OKLAHOMA
COUNTY OF MCCLAIN
CITY/TOWN OF MOORE

NOTICE OF VIOLATION ☒
NOTICE OF WARNING ☐

COMPLAINT - INFORMATION

NO. **38082**

the undersigned, being duly sworn upon his oath deposes and says that:

on or about (date) 9 DEC 2020 at (time) 1248AM at or near (location) 1205 MAIN
License Number MXB 904076 d/b/a Name FRIENDLY
within city, county and state aforesaid: TAVERN

Name (last, first, middle) STATMAX LLC Phone number

Address P.O. BOX 285

City MOORE State OK Zip 73068

Birthdate (mo., day, yr.) Height Weight Race Sex Eye Hair

Driver License Number/SSN Month/year State

and did then and there commit the following offense:

37A: 5-125. A Sell/Dispense
BEFORE AB AFTER 11 PM
GOV MANDATE

The undersigned further states that he/she has just and reasonable grounds to believe the person named above committed the offense herein set forth contrary to law.

Signature of Officer [Signature]

Badge # 40

District 0

You must either appear at the ABLE Commission, 3812 N. Santa Fe, Ste. 200, OKC, OK 73118 on:

Hearing Date FEB 23, 2021

Time 1030AM

or contact the Legal Division at 1-866-894-3517, option #4 prior to the above date.

This is not admission of guilt, rather a promise to contact the ABLE Commission prior to the hearing date or to appear on the date and time listed above.

Signature: [Signature]

Remarks:

ALCOHOLIC BEVERAGE LAWS
ENFORCEMENT (ABLE) COMMISSION
ADMINISTRATIVE VIOLATION COMPLAINT

STATE OF OKLAHOMA

COUNTY OF

CITY/TOWN OF

NOTICE OF VIOLATION ☒

NOTICE OF WARNING

COMPLAINT - INFORMATION

NO. 40225

the undersigned, being duly sworn upon his oath deposes and says that:
on or about (date) at (time) at or near (location)

11-28-2020

0006

1312 N. BROADWAY

License Number

d/b/a Name

MRB 931189

DONALD

WATERLIN' HOLE

within city, county and state aforesaid.

Phone number

Name (last, first, middle)

Don's Waterlin' Hole

918-649-5147

Address

C/O Doug Percefield

State

Zip

Birthdate (mo., day, yr.)

Height

Weight

Race

Sex

Eye

Hair

Driver License Number/SSN

Month/year

State

and did then and there commit the following offense:

Title 21-1321.4

Violate Governor's Executive Order

The undersigned further states that he/she has just and reasonable grounds to believe the person named above committed the offense herein set forth contrary to law.

Signature of Officer

Badge #

District

You must either appear at the ABLE Commission, 3812 N. Santa Fe, Ste. 200, OKC, OK 73118 on:

Hearing Date

Time

or contact the Legal Division at 1-866-894-3517, option #4 prior to the above date.

This is not admission of guilt, rather a promise to contact the ABLE Commission prior to the hearing date or to appear on the date and time listed above.

Signature

Remarks:

ALCOHOLIC BEVERAGE LAWS
ENFORCEMENT (ABLE) COMMISSION
ADMINISTRATIVE VIOLATION COMPLAINT

STATE OF OKLAHOMA

COUNTY OF LeFlore

CITY/TOWN OF Poteau

NOTICE OF VIOLATION X

NOTICE OF WARNING _____

COMPLAINT - INFORMATION

NO. 40224

the undersigned, being duly sworn upon his oath deposes and says that:

on or about (date) _____ at (time) _____ at or near (location) _____

11-23-2020 0006 1912 N. Broadway
License Number d/b/a Name

MXB 931189 Doug's Watering Hole
within city, county and state aforesaid:

Name (last, first, middle) _____ Phone number _____

Doug's Watering Hole LLC 918-649-5147

Address _____

110 Doug Percifield _____
City State Zip

Birthdate (mo., day, yr.) _____ Height _____ Weight _____ Race _____ Sex _____ Eye _____ Hair _____

Driver License Number/SSN _____ Month/year _____ State _____

and did then and there commit the following offense:

Title 37A-3-125A
Allow alcoholic beverages to be served
or sold after lawful hours

The undersigned further states that he/she has just and reasonable grounds to believe the person named above committed the offense herein set forth contrary to law.

Ray Ellis
Signature of Officer

30
Badge #

McAlester
District

You must either appear at the ABLE Commission, 3812 N. Santa Fe, Ste. 200, OKC, OK 73118 on:

MARCH 16, 2021
Hearing Date

1:30 PM
Time

or contact the Legal Division at 1-866-894-3517, option #4 prior to the above date.

This is not admission of guilt, rather a promise to contact the ABLE Commission prior to the hearing date or to appear on the date and time listed above.

Signature: Doug Percifield

Remarks: _____

**ALCOHOLIC BEVERAGE LAWS
ENFORCEMENT (ABLE) COMMISSION
ADMINISTRATIVE VIOLATION COMPLAINT**

STATE OF OKLAHOMA

NOTICE OF VIOLATION ☒

COUNTY OF TY

NOTICE OF WARNING ☐

CITY/TOWN OF Guyman

COMPLAINT - INFORMATION

NO. **37216**

the undersigned, being duly sworn upon his oath deposes and says that:

on or about (date)	at (time)	at or near (location)
--------------------	-----------	-----------------------

12/5/2010	11:30 pm	2469 Mile 28 Rd
-----------	----------	-----------------

License Number

d/b/a Name

MXB 883006

Gold Spur/Copper Centine

within city, county and state aforesaid:

Name (last, first, middle)

Phone number

Gold Spur/Copper Centine

Address

2469 Mile 28 Rd.

City

State

Zip

Guyman

OK

73942

Birthdate (mo., day, yr.)

Height

Weight

Race

Sex

Eye

Hair

Driver License Number/SSN

Month/year

State

and did then and there commit the following offense:

Allow AB to be sold after hours

The undersigned further states that he/she has just and reasonable grounds to believe the person named above committed the offense herein set forth contrary to law.

Signature of Officer [Signature]

Badge # 11

District OKC

You must either appear at the ABLE Commission, 3812 N. Santa Fe, Suite 200, OKC, OK 73118 on:

Hearing Date

Time

2/9/2011

1:30 pm

or contact the Legal Division at 1-866-894-3517, option #4 prior to the above date.

This is not admission of guilt, rather a promise to contact the ABLE Commission prior to the hearing date or to appear on the date and time listed above.

Signature: [Signature]

Remarks:

**ALCOHOLIC BEVERAGE LAWS
ENFORCEMENT (ABLE) COMMISSION
ADMINISTRATIVE VIOLATION COMPLAINT**

STATE OF OKLAHOMA
COUNTY OF TY
CITY/TOWN OF Lawton

NOTICE OF VIOLATION ☒
NOTICE OF WARNING ☐

COMPLAINT - INFORMATION

NO. **37215**

the undersigned, being duly sworn upon his oath deposes and says that:

on or about (date) <u>12/5/2020</u>	at (time) <u>11:30 pm</u>	at or near (location) <u>2469 mile 28 Rd</u>
License Number <u>SS3000 MVB</u>		d/b/a Name <u>Carl S. / Cooper Centine</u>

within city, county and state aforesaid:

Name (last, first, middle) Carl S. / Cooper Centine Phone number _____

Address

2469 mile 28 Rd.
City Lawton State OK Zip 73942

Birthdate (mo., day, yr.)	Height	Weight	Race	Sex	Eye	Hair

Driver License Number/SSN	Month/year	State

and did then and there commit the following offense:

Violation of ABC Act.

The undersigned further states that he/she has just and reasonable grounds to believe the person named above committed the offense herein set forth contrary to law.

Signature of Officer [Signature]

Badge # 71

District OKC

You must either appear at the ABLE Commission, 3812 N. Santa Fe, Suite 200, OKC, OK 73118 on:

2/9/2021
Hearing Date

1:30 pm
Time

or contact the Legal Division at 1-866-894-3517, option #4 prior to the above date.

This is not admission of guilt, rather a promise to contact the ABLE Commission prior to the hearing date or to appear on the date and time listed above.

Signature: _____

Remarks: _____

