

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:

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

DEC 17 2020

RICK WARREN
COURT CLERK

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PETITION FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. This case seeks to protect Oklahomans and Oklahoma businesses from a government that is acting outside the scope of its authority. It is an action for declaratory and injunctive relief challenging Governor Stitt's COVID-19 executive orders issued on November 16, 2020 and December 14, 2020 (the Orders). Governor Stitt does not have the authority to regulate businesses by fiat, the Alcoholic Beverage Laws Enforcement Commission (ABLE) does not have the authority to enforce the Orders, and there is no punishment for violating the Orders. ABLE's enforcement of the Orders have been arbitrary, confusing, and without any basis under Oklahoma law.

2. Pursuant to 12 O.S. § 1651, Plaintiffs seek a declaration that the Orders, as they apply to bars, restaurants, and nightclubs, do not contain any legally binding mandates and are merely recommendations. Plaintiffs also seek to have every citation written pursuant to the Orders declared null and void. Pursuant to 12 O.S. § 1381 *et seq.*, Plaintiffs seek a temporary restraining order then a temporary and permanent injunction enjoining the enforcement of the Orders.

JURISDICTION AND VENUE

3. This action arises under the Oklahoma Constitution and laws of the State of Oklahoma. Jurisdiction is conferred on this Court pursuant to 12 O.S. §§ 1651 & 1381 *et seq.*

4. The issues in this case relate to events that occurred and are occurring within Oklahoma County, Oklahoma.

5. Venue and jurisdiction are proper for this Court pursuant to 12 O.S. §§ 133 & 1653.

PARTIES

6. Plaintiff RNYC Corp. d/b/a Redneck Yacht Club is a business located at 4720 W I 40 Service Rd, Oklahoma City, OK 73128. 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." Prior to the Orders, Redneck Yacht Club was open every Wednesday, Friday, and Saturday from 8:00 p.m.–2:00 a.m. 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.

7. Plaintiff Statmax LLC d/b/a The Friendly Tavern is a business located at 120 Main St, Noble, OK 73068. The Friendly Tavern received an ABLE Violation Complaint on November 23, 2020 for committing the following offense: "Title 37A 3-125(A) Allow alcoholic beverages to be served or sold after lawful hours." Prior to the Orders, The Friendly Tavern was open seven days a week. Monday–Thursday and Saturdays, 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. 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%.

8. Plaintiff Doug's Waterin' Hole, LLC d/b/a Doug's Waterin' Hole is a business located at 1912 N Broadway, Poteau, OK 74953. 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." Prior to the Orders, Doug's Waterin' Hole was open seven days a week from 2:00 p.m.–2:00 a.m. 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 because of the Orders.

9. Plaintiff Davis Management, LLC d/b/a Gold Spur Bar is a business located at 2469 Mile, 28th St, Guymon, OK 73942. 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." 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. 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.

10. Plaintiff 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 has lost between \$4,000–\$6,000 per week as a result of their compliance with the Orders.

11. 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 hearing about 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.

12. Defendant Kevin Stitt is the Governor of the State of Oklahoma. He issued the Orders challenged in this lawsuit.

13. Defendant ABLE is an agency of the State of Oklahoma. ABLE has assumed the role of enforcing the Orders and has issued multiple citations to businesses for violating the Orders.

STATEMENT OF FACTS

14. On March 15, 2020, Governor Stitt issued Executive Order 2020-07. He declared an “emergency caused by the impending threat of COVID-19” A true and correct copy of this order is attached as Exhibit 1 and is found at <https://www.sos.ok.gov/documents/executive/1913.pdf>. Governor Stitt declared the order pursuant to power vested in him by article VI section 2 of the Oklahoma Constitution. 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.”

15. On March 24, 2020, Governor Stitt issued his Fourth Amended Executive Order 2020-07. A true and correct copy of this order is attached as Exhibit 2 and is found at <https://www.sos.ok.gov/documents/executive/1919.pdf>. 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 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.

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.

16. On March 26, 2020, Attorney General Mike Hunter issued a press release clarifying the Governor's executive order regarding law enforcement action for noncompliance. A true and correct copy of this press release is attached as Exhibit 3 and is found at <https://oag.ok.gov/articles/attorney-general-hunter-clarifies-governor%E2%80%99s-executive-order-regarding-law-enforcement>. Attorney General Hunter stated that "a violation of an executive order can be a misdemeanor" Attorney General Hunter did not reference any statute to back up this claim.

17. On November 16, 2020, Governor Stitt issued his Seventh Amended Executive Order 2020-20 (the November Order). A true and correct copy of this order is attached as Exhibit 4 and is found at <https://www.sos.ok.gov/documents/executive/1971.pdf>. This executive order contained 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.

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

18. 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."¹

19. On December 4, 2020, Counsel for Plaintiffs delivered a letter to Governor Stitt that sought clarification on the November Order. This is attached as Exhibit 5.

20. 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. This is attached as Exhibit 6.

21. On December 10, 2020, Counsel for Plaintiffs delivered a letter to the Governor demanding that his administration immediately cease enforcement of the November Order. This is attached as Exhibit 7.

22. On December 10, 2020, Governor Stitt held a press conference to announce a new COVID-19 executive order (the December Order).² 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 . . . 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

¹ 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>.

² 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>.

get back with you on that.” The reporter then told the Governor that establishments are being cited for having sold the final drink before 11:00 p.m. with customers still in the establishment after 11:00 p.m. The Governor responded, “I need to check on that . . . We’ll go back and try to clarify that.”

23. On December 14, 2020, Governor Stitt issued his Eighth Amended Executive Order 2020-20 (the December Order). A true and correct copy of this order is attached as Exhibit 8 and is found at <https://www.sos.ok.gov/documents/executive/1975.pdf>. Lines 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 (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.

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

FIRST CAUSE OF ACTION Procedural Due Process

24. Plaintiffs hereby incorporate by reference all stated paragraphs.

25. Plaintiffs seek a judicial declaration that the Orders violate procedural due process because the authority to issue and enforce the Orders is unclear, the punishment for violating the Orders is unknown, and the Orders are void for vagueness. Plaintiffs also seek a temporary restraining order and/or temporary injunction to stop Defendants from enforcing the Orders.

26. Article 2 section 7 of the Oklahoma Constitution states that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” OKLA. CONST. art. II, § 7. The Oklahoma Supreme Court has held that “The touchstone of due process is protection of the individual against arbitrary action of government.” *Taylor v. City of Bixby*, 2018 OK CIV APP 18, ¶ 31, 415 P.3d 537, 546. It has further held that “statutes that work an arbitrary forfeiture of property rights are unconstitutional as violations of due process.” *Steed v. Bain-Holloway*, 2015 OK CIV APP 68, ¶ 16, 356 P.3d 62, 67. The Oklahoma Constitution’s due process clause also affords protection against arbitrary and unreasonable administrative actions. *Lindsey v. State ex rel. Dep’t of Corr.*, 1979 OK 35, 593 P.2d 1088, 1092.

27. When determining whether someone has been denied procedural due process, Oklahoma courts engage in a two-step inquiry: “1) whether the individual possessed a protected interest to which due process protection applies; and 2) whether the individual was afforded an appropriate level of process.” *Hill v. Am. Med. Response*, 2018 OK 57, ¶ 43, 423 P.3d 1119, 1134, *reh’g denied* (July 25, 2018).

28. The ability to sell alcohol pursuant to a license issued by ABLE is a property right that must be afforded due process. *See Oklahoma Alcoholic Beverage Control Bd. v. Seely*,

1980 OK 189, 621 P.2d 534, 536. The Oklahoma Supreme Court has held that “it should also be recognized that in the licensing procedure considerations of fundamental fairness and justice comporting with due process should be evident even though this is a business which is subject to a high degree of supervision and regulation in the interest of the public welfare. *Id.* It has further held that “any restriction as to places or areas for sale of beer is purely a legislative function.” *Allison v. Howell*, 1951 OK 120, 204 Okla. 404, 407, 230 P.2d 706, 709. Therefore, Plaintiffs have a property interest protected by Oklahoma’s due process clause. Not only have Plaintiffs not been afforded the appropriate level of procedural due process, but due process has been nonexistent from top to bottom.

Unclear Authority

29. Notice and an opportunity to be heard are the core elements of procedural due process. *Hill*, 423 P.3d at 1135. Notice includes knowing what activity is prohibited by law. *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 13, 46 P.3d 123, 128.

30. Governor Stitt afforded Plaintiffs zero procedural due process before issuing the Orders. A month has gone by, and still, nobody knows what law gives Governor Stitt the authority to regulate businesses by fiat. Additionally, Plaintiffs still do not know what law controls ABLE’s actions or what law governs the process to challenge a violation issued pursuant to the Orders. The Orders do not provide any mechanism for meaningful post-deprivation review. Plaintiffs with citations received hearing dates months into the future. True and correct copies of Plaintiffs’ citations are attached as Exhibit 9. Under the current conditions, Plaintiffs would be out of business by the time the hearing date arrived. Also,

due to the laws cited and vagueness of some of the citations, Plaintiffs are unable to mount a defense to the accusations.

31. An analysis of procedural due process typically begins with a statute, ordinance, or regulation. Here, we have executive orders. Executive orders typically direct the executive branch to operate in a certain way. *CompSource Mut. Ins. Co. v. State ex rel. Oklahoma Tax Comm'n*, 2018 OK 54, ¶ 44, 435 P.3d 90, 105, *reh'g denied* (Jan. 28, 2019) (“The Governor has the power to issue executive orders to *executive officials* directing them to faithfully execute the law”) (emphasis added). The executive orders at issue in this case regulate the operation of businesses—not the operation of the executive branch. An executive order regulating the operation of a business when no disaster, riot, or civil disorder exists in Oklahoma is unprecedented. In any action, the Governor must adhere to article VI section 8 of the Oklahoma Constitution, which provides that “[t]he Governor shall cause the *laws* of the State to be faithfully *executed*” OKLA. CONST. art. VI, § 8 (emphasis added). Note that the Oklahoma Constitution does not allow the Governor to make laws—only execute them. *See id.* The Governor’s power is not limitless. All actions are still subject “to other provisions of our Constitution such as the due process clause.” *CompSource*, 435 P.3d at 105. A “Governor’s executive power concerning a matter beyond the scope of one of the Governor’s express constitutional powers does not supersede the authority of statute which has been created by the legislature and approved by a governor.” *Id.*

32. An executive order is not a law. *Russell Petroleum Co. v. Walker*, 1933 OK 75, 162 Okla. 216, 19 P.2d 582, 587 (noting that [u]nder the provisions of article 6, and

section 1, article 4, of the Constitution, no order, proclamation, or decree of the Governor of the state, as the chief executive thereof, has the force of law; the lawmaking power of the state being vested exclusively else-where.”). The question of the legality of the Governor’s ability to regulate businesses through executive orders should end here, but Plaintiffs will thoroughly address Defendants’ lawless behavior.

33. The situation in *Russell* is analogous to this case. In *Russell*, the Governor issued executive orders calling out the state militia to take possession of oil wells and enforce laws relating to the prevention of waste. *Russell*, 19 P.2d at 585–87. The corporation commission did not allege that the plaintiff broke any law. *Id.* at 584. In response to the defendants’ assertion that the courts were without authority to enjoin the militia, the court said the following:

If this extreme position could be deemed to be well taken, it is manifest that the fiat of the chief executive of Oklahoma, and not the Constitution of the State of Oklahoma, would be the supreme law of Oklahoma. The Constitution, and not an order of the chief executive, is the supreme law of Oklahoma. The due process clause of the Constitution guarantees protection to the owner of property against deprivation by the Militia as much as it guarantees protection to him against deprivation by any other person.

Id. at 588.

The court held that the taking of the plaintiffs’ property by the militia under the authority of executive orders was done “without due process of law in violation of the Constitution of Oklahoma and without authority of law.” *Id.* at 589. *Russell* is analogous to this case because 1) it involved the taking of property 2) pursuant to executive orders 3) that are “legislative in character” 4) when the plaintiffs did not violate any law 5) and the executive orders violated the due process clause of the Oklahoma Constitution. *Id.* at 587. *Russell* differs from this case on some critical facts, however. In *Russell*, the Governor

clearly directed the militia, which was directly under his control, to act. *Id.* In this case, it is unclear whom—if anyone—in the executive branch the Governor is ordering to enforce the Orders. The court in *Russell* referenced a statute that gave the corporation commission jurisdiction to “impose and enforce reasonable regulations” *Id.* at 583. In this case, there is no statute giving the Governor the power to regulate businesses through executive fiat, and there is no statute or administrative rule that allows ABLE to enforce such a fiat. Under article VI section 6 of the Oklahoma Constitution, the Governor clearly had the authority to command the militia in *Russell*. OKLA. CONST. art. VI, § 6. Here, the Governor’s authority to regulate restaurants and bars is nonexistent.

34. The legislature has not conferred power upon the Governor to enact and enforce a legally-binding mandate on businesses through his Orders. Governor Stitt stated that he issued the Orders pursuant to article VI section 2 of the Oklahoma Constitution. The purpose of this section is to merely state who has the supreme executive power. It vests that power in the Governor—as opposed to the Lieutenant Governor, Speaker of the House, or anyone else. It does not give the Governor extraordinary powers to make whatever laws he wants. If that were the case, then a legislature would be irrelevant.

35. The OEMA does not give the Governor the authority to regulate businesses through the Orders. No part of the OEMA authorizes the Governor to regulate what food or drinks businesses can serve and when they can serve them. No part of the OEMA authorizes punishment for non-compliance with such a regulation. Under the emergency powers of the OEMA, the Governor may “perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of

the civilian population and to carry out the provisions of the Emergency Operations Plan in a national or state emergency.” OKLA. STAT. tit. 63 § 683.9 (OSCN 2020). This does not give the Governor the power to do anything he wants. The OEMA is administrative in nature. It covers how the executive branch will coordinate internally and externally to handle an emergency. Regulating the operation of private businesses is not within the scope of the Governor’s powers during an emergency declared pursuant to the OEMA. Furthermore, the “violations” section of the OEMA lists the penalties for violating rules, regulations, or orders of the Oklahoma Department of Emergency Management. *Id.* § 683.23. It says nothing about violations of an executive order issued pursuant to the OEMA. *See id.*

36. ABLE does not have the authority to enforce the Governor’s Orders. There is no administrative rule that allows ABLE to act pursuant to a governor’s emergency declaration. Despite being a month into the Orders and being repeatedly questioned about their authority, ABLE still has yet to inform the public what agency rule gives them the power to punish businesses for not complying with the Orders. This is a gross abuse of power and is not something that should be tolerated in a republic. If an agency has any doubt about their power, none should be exercised. This behavior is reckless and unethical—at best.

37. The evidence presented by Plaintiffs shows that ABLE has referenced no less than three different laws to cite licensees for the same “prohibited” behavior. If ABLE does not know what law licensees are supposed to follow, then how are licensees supposed to know what law to follow? Clearly, ABLE has no clue what they are doing. If they did, then

each citation would reference the same law. This gross violation of due process affords Plaintiffs zero ability to know what behavior is prohibited.

38. Defendants have yet to reference any law that gives them the authority to regulate and punish Plaintiffs pursuant to the Orders. This is a violation of due process because Plaintiffs have no ability to understand the scope of the regulatory power bearing down on them. Government power is not limitless. A government acting with unrestrained power is lawless, which is what is happening in this case.

Unknown Penalty

39. Nobody knows what the penalty is for violating the Orders. This is because there is no penalty for violating the Orders. The most obvious indicator of there being no penalty is that no penalty is listed in the Orders. Despite being asked multiple times, Governor Stitt has never told Oklahomans the penalty for violating his Orders. Instead, he says that he is just “hoping Oklahomans will do the right thing” and is “not worried about the compliance.” If the Governor is relying on voluntary compliance with his Orders, then he clearly knows that his Orders cannot be enforced. The fact is that Plaintiffs—and other similarly situated businesses—do not want to comply with the Orders. The Governor has put Plaintiffs in an no-win position. If they comply with the Orders, then they will go out of business. If they do not comply with the Orders, then they will potentially be subject to fines and loss of license. The fact that the Governor continues this fan dance of threatening punishment when no punishment exists is reprehensible. Businesses will go out of business because they took ABLE’s threats seriously. Allowing businesses to go under due to phony threats of punishment is executive malfeasance.

40. Plaintiffs—and Defendants—do not know whether a violation of the Orders is a crime or a civil infraction. In March, Attorney General Hunter said that a violation of an executive order “may” be a misdemeanor. The executive orders prior to that statement and the orders challenged in this lawsuit reference the same statutory and constitutional provisions. In Governor Stitt’s November 16 press conference, he referenced the suspension of licenses—a civil matter. A ticket received by Doug’s Waterin’ Hole referenced the Riot Control and Prevention Act, which is a criminal statute in Title 21. The tickets that reference statutes in Title 37A are probably (?) civil penalties. What has changed since the Attorney General’s statement and November 16? The Attorney General owes Oklahomans an explanation. He did not cite a law in his press release. Surely, he came to that conclusion by looking at an actual statute. If the Attorney General made that statement with the intent to frighten Oklahomans into complying with the Governor’s executive orders—knowing that it was a baseless claim—then he should explain to Oklahomans why he did this.

41. ABLE cited Redneck Yacht Club for violating 37A O.S. § 2-158. This law states, “In case of natural disaster or civil disturbance the Governor may, for the duration of such natural disaster or civil disturbance thereof, immediately suspend without notice any license granted under the provisions of the Oklahoma Alcoholic Beverage Control Act.” tit. 37A § 2-158. COVID-19 certainly does not constitute a “civil disturbance.” Governor Stitt has never declared COVID-19 a “natural disaster,” so this law is inapplicable from the start. President Trump’s disaster declaration is irrelevant. ABLE is an agency of the State of Oklahoma—not the federal government. ABLE acts pursuant to Oklahoma law.

Additionally, this law does not regulate the actions of license holders. It is impossible for anyone to violate this law. All this law does is grant limited authority to the Governor under specified conditions. Furthermore, nothing was said in the Order about a *license* being *suspended*. ABLE's citing businesses for violating this law demonstrates a significant misunderstanding of Oklahoma law and statutory interpretation.

42. ABLE cited The Friendly Tavern for 37A O.S. § 3-125(A). This law states: "No alcoholic beverages may be sold, dispensed, served or consumed on the premises of a mixed beverage, caterer, public event, charitable event, special event, on-premises beer and wine, small brewer or brewpub licensee between the hours of 2:00 a.m. and 8:00 a.m. Municipalities may enact ordinances requiring such premises to be closed to the public between the hours of 2:00 a.m. and 6:00 a.m." *Id.* § 3-125A. This law says nothing about a governor's order or an emergency. How anyone can connect the Orders to enforcement action using this statute defies all logic and common sense.

43. ABLE's articulation of the penalty for violating the Orders has shifted over time. On December 2, 2020, ABLE said that operators could face "penalties and the suspension of their license if the allegations are proven." Josh Dulaney, *OKC ends COVID curfew enforcement on bars, but legal battle continues*, THE OKLAHOMAN (Dec. 14, 2020) <https://oklahoman.com/article/5677384/mayor-holt-walks-back-covid-curfew-enforcement-on-bars-as-legal-battle-continues>. On December 8, 2020, ABLE claimed that licensees faced "a general violation penalty of a 30-day suspension and \$3,000 fine." 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. ABLE has yet to tell anyone where this comes from. There is no punishment listed in ABLE's penalty violation schedules for 37A O.S. § 2-158. See Oklahoma Administrative Code Title 45 Chapter 10, http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00_. This makes sense because it is impossible for a licensee to violate that law. There is a penalty for violating 37A O.S. § 3-125(A), and it is not a 30-day suspension and \$3,000 fine. If ABLE was operating on solid legal grounds, then, on day one, they would have been able to tell the public the punishment for noncompliance and where that punishment came from. ABLE has not notified the public because they have been operating on anything but solid legal grounds.

Void for Vagueness

44. The Orders are unconstitutionally vague. The Oklahoma Constitution's due process clause "requires statutory prohibitions to be clearly defined." *In re Initiative Petition No. 366*, P.3d at 128. Prohibited conduct must be defined with sufficient precision that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983).

45. The Oklahoma Court of Criminal Appeals held that due process "requires that an enactment be voided for vagueness if its prohibitions are not clearly defined." *Pegg v. State*, 1983 OK CR 26, 659 P.2d 370, 372. While Plaintiffs are not challenging a statute, Plaintiffs are challenging something that places a prohibition on their conduct. Thus, the

same principles of due process would apply to this case. *See In re Initiative Petition No. 366*, 46 P.3d at 128.

46. The question of whether the Orders are enforceable makes this entire situation perplexing. Adding to the vagueness of what is going on is whether the Governor has the authority to make the Orders and whether ABLE has the ability to punish businesses for not complying with the Orders. A punishment and reference for that punishment is unknown. Answers by Defendants to questions about these issues are vague or nonexistent.

47. Governor Stitt does not even know how his Orders operate. For example, ABLE is writing citations to bars that have stopped serving at 11:00 p.m. and still have customers consuming their beverages on-premises. The Orders clearly do not prohibit consumption of beverages sold before 11:00 p.m., but ABLE is reading the word “consumption” into “served.” This defies all logic and reason. The terms “sold,” “dispensed,” and “served” apply to what cannot be done after 11:00 p.m. ABLE apparently believes that nothing may be sold, dispensed, or served that could possibly be consumed after 11:00 p.m. How is an establishment supposed to know how long it will take a person to consume their food or beverage? This puts bar and restaurant owners in an impossible position. The language in the Orders differs from that in 37A O.S. § 3-125(A), which states: “No alcoholic beverages may be sold, dispensed, served or consumed on the premises . . . between the hours of 2:00 a.m. and 8:00 a.m.” tit. 37A § 3-125(A). If the intent of the Orders was to prohibit the consumption of beverages on-premises beyond 11:00 p.m., then the language in the Orders would mirror the language in § 3-125(A). When asked for clarification on this at

his December 10, 2020 press conference, Governor Stitt had no clue what ABLE was up to and could not clarify anything.

48. The citations Gold Spur Bar received are unconstitutionally vague. This is essentially like prosecuting someone for “violating the law.” How is a business supposed to defend against that? How is ABLE supposed to prosecute that?

49. ABLE is threatening and harassing businesses in Oklahoma with no authority to do so. The Orders are not law, there is no administrative rule that allows ABLE to enforce the Orders, and there is no penalty for violating the Orders. Succinctly, ABLE has gone rogue. They have grossly misinterpreted the Governor’s Orders and are making things up as they go along. Their behavior is antithetical to the principles embodied by a free society. It is time for their unconstrained power grab to be reined in.

50. In summary, Defendants are assuming powers they do not have, spreading confusion, and misleading Oklahomans to coerce businesses into complying with non-enforceable orders. This is an affront to due process and the rule of law. This Court is well within its authority to issue a temporary restraining order and/or injunction and declare that the Order, as it applies to businesses, is nothing more than a recommendation.

SECOND CAUSE OF ACTION

Substantive Due Process

51. Plaintiffs hereby incorporate by reference all stated paragraphs.

52. Substantive due process provides “that all governmental actions have a fair and reasonable impact on the life, liberty, or property of the person affected.” *Braitsch v. City of Tulsa*, 2018 OK 100, ¶ 7, 436 P.3d 14, 19, *as corrected* (Dec. 19, 2018), *reh'g denied* (Feb. 4, 2019). Arbitrary action is prohibited. *Id.*

53. Plaintiffs have a protected liberty interest in the right to live without arbitrary governmental interference with their liberty and property interests. *See County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1988). The Oklahoma Constitution enshrines the rights protected by substantive due process: “All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry. OKLA. CONST. art. II, § 2.

54. The Orders shock the conscience, interfered with, and continue to interfere with Plaintiffs’ deeply-rooted liberty and property rights, including the right to work, right to contract, and right to engage in commerce. Preventing Plaintiffs from exercising their right to enjoy the gains of their own industry through lawless and arbitrary enforcement of Governor Stitt’s fiats is a clear violation of the Oklahoma Constitution.

55. Each Plaintiff could and can conduct business in full compliance with CDC recommendations and other safe measures tailored to the unique nature of their operations. Indeed, most businesses in Oklahoma are free to operate however they want after 11:00 p.m. There is no restriction on grocery stores or convenience stores selling food or beverages. The mandates in the Orders lead to truly bizarre outcomes. Under the Orders, strip clubs can stay open and continue to provide lap dances to patrons. That means it is illegal for an Oklahoman to pay a bartender for a drink in a bar at midnight, yet it is perfectly legal to pay a stripper for a lap dance. This is illogical, arbitrary, and in no way furthers the goals Defendants are purportedly seeking to achieve.

56. Thus, the Orders are not narrowly tailored to achieve a compelling governmental interest. There is also no rational basis to deprive Plaintiffs of their liberty

and property interests in performing services for willing customers when they can do so safely and in the same (or reasonably safe equivalent) manner as other businesses allowed to operate. In the alternative, the Orders are not reasonably related to a legitimate governmental interest.

57. Plaintiffs seek a declaration that the Orders violate the substantive component of the due process clause and an injunction against further infringements of their rights under this clause.

THIRD CAUSE OF ACTION The Takings Clause of the Oklahoma Constitution

58. Plaintiffs hereby incorporate by reference all stated paragraphs.

59. Defendants have seized, without any compensation, Plaintiffs' real and personal property by forcing material limitations on their businesses. These uncompensated seizures violate the takings clause of the Oklahoma Constitution, which states "Private property shall not be taken or damaged for public use without just compensation." OKLA. CONST. art. II, § 24. The U.S. Supreme Court has held that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895, 120 L. Ed. 2d 798 (1992). Oklahoma Courts construe eminent domain provisions "strictly in favor of the owner and against the condemning party." *City of Muskogee v. Phillips*, 2015 OK CIV APP 57, ¶ 9, 352 P.3d 51, 54.

60. The Oklahoma Constitution's takings clause does not prohibit the government's authority to interfere with private property, but it does require the government to pay

adequate compensation for a taking. OKLA. CONST. art. II, § 24. The State cannot “transform private property into public property without compensation.” *Id.* at 1031; *State ex rel. Dep't Of Transp. v. Post*, 2005 OK 69, ¶ 11, 125 P.3d 1183, 1187 (“It is the payment of just compensation that allows the taking.”).

61. The takings clause applies to permanent as well as temporary interference with private use of personal and real property. OKLA. CONST. art. II, § 24. The validity of the exercise of police power does not preclude compensation for property damaged or taken by such exercise. *Mattoon v. City of Norman*, 1980 OK 137, 617 P.2d 1347, 1349.

62. The Orders state that the resources of Oklahoma are committed “to protect the health and safety of the public.” Therefore, the regulation was clearly done for public use. This regulation of businesses caused a de facto shutdown of Plaintiffs’ businesses at 11:00 p.m. Defendants have placed the cost of any public benefit of the Orders on the shoulders of private businesses like Plaintiffs and have failed to offer appropriate compensation for these takings. This is a complete taking of Plaintiffs’ property because it has rendered Plaintiffs’ property useless after 11:00 p.m.

63. The Orders materially and substantially jeopardize the sustainability of Plaintiffs’ businesses and Plaintiffs’ rights to property ownership. As a result of the Orders, Plaintiffs, and those similarly situated, will at lose the economically beneficial use of their real and personal property. The Orders effect an unconstitutional taking without just compensation.

FOURTH CAUSE OF ACTION
Violation of the Oklahoma Constitution – Separation of Powers

64. Plaintiffs hereby incorporate by reference all stated paragraphs.

65. The Orders are unconstitutional and unenforceable against Plaintiffs because they rest on an impermissible assumption of legislative authority by the executive branch, which violates the Oklahoma Constitution.

66. The separation of powers clause in the Oklahoma Constitution provides, “The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.” OKLA. CONST. art. IV, § 1. The legislative power in the State of Oklahoma is explicitly vested in the Oklahoma Legislature. OKLA. CONST. art. V, § 1.

67. Governor Stitt issued the Orders pursuant the OEMA. The Governor’s powers pursuant to the OEMA should be interpreted as being narrow in scope. The legislature would never give the Governor a blank check in any legislation. Under an emergency, the Governor may “perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population and to carry out the provisions of the Emergency Operations Plan in a national or state emergency.” tit. 63 § 683.9. This just means that the Governor may exercise “other” power that comes from somewhere else. It does not give the Governor power beyond the OEMA or any other law. If the legislature wanted to give the Governor the ability to do whatever he wanted, this provision would allow the Governor to perform and exercise “any such other functions, powers, and duties” It does not say “any” because the legislature obviously does not want the Governor to exercise “any” power.

68. Since the Governor is conjuring up legislative authority where none exists, he is violating the Oklahoma Constitution. A temporary restraining order and temporary injunction should be issued to stop the Governor from continuing to illegally exercise legislative power.

FIFTH CAUSE OF ACTION
Violation of the Oklahoma Constitution – Commander-in-Chief of the Militia

69. Plaintiffs hereby incorporate by reference all stated paragraphs.

70. Article VI section 6 of the Oklahoma Constitution states that “[t]he Governor shall be Commander-in-Chief of the **militia** of the State, except when in service of the United States, and **may call out the same** to *execute the laws, protect the public health, suppress insurrection, and repel invasion.*” OKLA. CONST. art. VI, § 6 (emphasis added).

71. The Governor has the constitutional authority to directly command only the *militia* to execute Oklahoma’s laws and protect the public health. *See id.* The Oklahoma Constitution says nothing about the Governor being the Commander-in-Chief of *ABLE*. *See id.* The Oklahoma Constitution does not give the Governor the authority to command *ABLE* to execute Oklahoma’s laws and protect the public health. Yet, *ABLE* has, *sua sponte*, assumed the role of the militia. It is not within *ABLE*’s authority to automatically begin enforcing anything the Governor says—even if it comes in the form of an executive order. Even assuming, *arguendo*, the Governor had the authority to regulate businesses via the Orders, the proper method of enforcing the Orders would be through the militia—not *ABLE*. *See id.* The Governor has not called out the militia to enforce the Orders, which, again, signals that they are unenforceable. The lawlessness and unconstitutional assumption of power by *ABLE* must end immediately.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs ask this Court:

- A. to declare that the enforcement of the Orders, as it applies to businesses, is a violation of the due process clause of the Oklahoma Constitution;
- B. to declare that the Orders, as they apply businesses, are unenforceable recommendations;
- C. to declare that all citations written pursuant to the Orders are null and void;
- D. to enjoin Defendants' enforcement of the Orders; and
- E. to grant such other and further relief as this Court should find just and proper.

Respectfully Submitted,

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

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