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December 10, 2020

Governor Kevin Stitt
2300 N Lincoln Blvd # 212
Oklahoma City, OK 73105

Re: Second Letter - Seventh Amended Executive Order 2020-20 paragraphs 25 and 26

Dear Governor Stitt:

Last week, my law firm delivered a letter to your office asking several questions about your November 16 Executive Order (the Order). We have not received answers to those questions.

Over the last week, my law firm has investigated the enforcement of the Order, focusing on the ABLE Commission. We discovered a staggering amount of due process violations and lawlessness. The evidence we have obtained is shocking and has no place in a republic.

We have the following evidence:

- ABLE Violation Complaint issued on November 23, 2020 for committing the following offense: “Title 21-1321.4 Violation of Governor’s Executive Order.” This is referring to the Oklahoma Riot Control and Prevention Act (RCPA). This is alleging a criminal violation, which would be prosecuted by a district attorney. You have never invoked the RCPA, so this law is not in effect.
- ABLE Violation Complaint issued 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.” This law says nothing about the Governor, executive orders, or emergencies. It is irrelevant.
- ABLE Violation Complaint issued on December 4, 2020 for committing the following offense: “Title 37A 2-158 Sale consume during prohibited hours.” A natural disaster pursuant to Oklahoma law has never been declared. This law is inapplicable.
- ABLE Violation Complaint issued on December 5, 2020 for committing the following offense: “Allow AB to be sold after hours.” ABLE will be unable to prosecute this “violation” because it is far too vague.
- ABLE Violation Complaint issued on December 5, 2020 for committing the following offense: “Violation of ABC Act.” This is essentially like saying this bar owner will be prosecuted for “violating the law,” so it is unconstitutionally vague.
- Video of an ABLE agent stating that they can act pursuant to Title 37A O.S. § 2-158 because President Trump declared COVID-19 a disaster. ABLE is an agency of the State of Oklahoma—not the federal government. ABLE acts pursuant to Oklahoma law. President Trump’s disaster declaration is irrelevant.
- Video of an ABLE agent threatening to shut down a bar if he is recorded. Section 540 of Title 21 of the Oklahoma statutes states that it is legal to record the activity of a law enforcement officer in a public area as long as the recording activity does not delay or obstruct the law enforcement agent in his or her duties. The person attempting to record the agent was not

delaying or obstructing the agent. Threats and intimidation such as this are completely unacceptable.

One word best describes the behavior of the ABLE Commission with respect to the Order—lawless. They are doing things that simply have no basis in Oklahoma law. As is obvious from the evidence detailed above, ABLE clearly does not know what law a licensee violates when the licensee “violates” the Order. If they did, then not only would everyone have known this law from day one, but ABLE would be citing people for violating only that law. Succinctly, ABLE is making stuff up as they go along. This behavior is reckless and unethical—at best.

If an agency is going to deprive someone of their property, it must have solid legal grounds to do so. Connecting statutes and agency action with the thinnest of legal arguments is unacceptable and simply not how our system is supposed to work. ABLE is using irrelevant statutes, statements made in a press conference, and a press release to justify their actions. The grounds ABLE is using to threaten licensees are anything but solid.

The Order states that “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 Order does not contain a punishment for violating the Order. That alone should be enough proof that paragraphs 25 and 26 of the Order are merely suggestions. Nobody should have to guess about what the punishment is or who is going to enforce it.

When asked about enforcement of the Order at your November 16 press conference, you 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 you were “not even thinking about the enforcement at this point.” We are three weeks into your Order. I hope you have discussed the enforcement of it by now. The things you say are important and carry significant consequences. In your press release, you stated: “all bars and restaurants will be required to close by 11 p.m.” That is clearly not what the Order says. All of this has caused great confusion on the part of state agencies and Oklahomans. And it has caused great damage to numerous businesses and workers in Oklahoma.

ABLE is writing citations to bars that have stopped serving at 11:00 p.m. but still have customers consuming their beverages on-premises. The Order clearly does 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 Order 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.” If the intent of the Order was to prohibit the consumption of beverages on-premises beyond 11:00 p.m., then the language in the Order would mirror that in § 3-125(A).

Prior to December 8, the only thing ABLE said when asked about the penalty for violating the Order was “license suspension and fines.” In an article in the Oklahoman on December 8, 2020, Steven Barker, Deputy Director and General Counsel for ABLE, stated that the penalty for violating the Order is a 30-day suspension and a \$3,000 fine. Where does this come from? What law is this a

violation of? It is possible that Mr. Barker is referring on 37A O.S. § 2-158. This law gives the Governor the authority to immediately suspend any license granted under the Alcoholic Beverage Control Act—but only in the event of natural disaster or civil disturbance. As previously stated, you have not declared COVID-19 a “natural disaster.” COVID-19 certainly does not constitute a “civil disturbance.” Therefore, this law is not in effect. Additionally, this law is not regulatory. A licensee cannot violate this law because it merely grants authority to the Governor. Furthermore, nothing was said in the Order about a *license* being *suspended*.

On December 9, 2020, Mr. Barker told KFOR, “The Commission will continue to take any enforcement measures necessary to ensure the health and safety of the public is protected.” ABLE does not have the power to take *any* enforcement measures necessary. ABLE only has the power that the Governor and legislature have given it through the rulemaking process.

The Oklahoma and U.S. constitutions state that “no person shall be deprived of life, liberty, or property, without due process of law.” A fundamental aspect of due process is notice. The public must be on notice as to what law they could be violating and the penalty for violating said law. The public must know the standards that will be used when applying the law. And anyone accused of violating a law must have the ability to challenge that accusation. In this situation, the due process violations run from top to bottom. Nobody—including ABLE, as proven above—knows what law restaurants and bars are supposed to follow. The penalty for violating the Order is not stated anywhere. In all likelihood, there is no penalty. Finally, business owners have not been informed on how to challenge an accusation that they violated the “law.”

An executive order is not a law. It could contain legally binding mandates, depending on the authority given to the Governor under Oklahoma law. Circumstances must also exist to make the things said in an executive order something that becomes a legally enforceable mandate. In addition, any agency in the executive branch must have authority, per their own rules, to act pursuant to something stated in an executive order. It is totally improper for an agency to say, “the Governor said he wanted businesses to stop serving food and drinks at 11 pm, so let’s figure out a way to do that.” All actions by agencies must be approved through the rulemaking process in the Oklahoma Administrative Procedures Act. There is no administrative rule that allows ABLE agents to go to bars and tell them to stop serving alcohol just because you issued an executive order. Furthermore, a law giving a governor power to regulate businesses through an executive order must fit with an agency rule allowing that agency to act pursuant to that order. That is simply not the case here. ABLE is acting based only on your off-the-cuff remarks in a press conference and a gross misinterpretation of the Order. This is not how our system is set up to operate.

You stated that you issued the Order 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 or she wants. If that were the case, then a legislature would be irrelevant.

According to the Order, you are acting pursuant to Oklahoma Emergency Management Act (OEMA) of 2003, Title 63 of the Oklahoma Statutes sections 683.1–683.24. No part of the OEMA authorizes you 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. Section 683.9 of the OEMA states that under an emergency, you 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.” This does not give the Governor the power to do anything he or she wants. The OEMA is administrative in nature. It primarily 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 a governor’s powers during an emergency. Section 683.23 is the “violations” section of the OEMA. This section provides for penalties for violating rules, regulations, or orders of the Oklahoma Department of Emergency Management. It says nothing about violations of an executive order issued pursuant to the OEMA.

We demand that you immediately end these gross violations of due process and the ridiculously broad overreach by the ABLE Commission. The same request applies to actions by the Health Department pursuant to the Order. We also demand that you declare any citations for violating paragraphs 25 and 26 of the Order null and void. Finally, we demand that you notify the public that you will not seek to regulate businesses and people in this, or a similar, manner in any future executive orders issued pursuant to the OEMA or Section 2 of Article VI of the Oklahoma Constitution. If you do not do those things, we will file a lawsuit, and an Oklahoma court will order you to do those things. The intimidation and lawless threats by agents in your administration must stop.

Finally, I am calling on the Attorney General to investigate the ABLE Commission’s enforcement of the Order. The public deserves answers. Why are ABLE agents referring to different statutes when citing bar owners for the same activity? Why are ABLE agents referring to statutes that are either irrelevant or not in effect when writing violation citations? Why—after three weeks into the Order—has nobody from ABLE publicly stated what rule they are acting pursuant to and what rule contains the punishment for violating the Order? How did ABLE determine that the Order prohibited consumption after 11:00 p.m. when the wording in the Order differs significantly from 37A O.S. § 3-125(A)? Why does ABLE believe it has the authority to act pursuant to federal law and not Oklahoma law? It is completely unacceptable that ABLE agents have been allowed to threaten and intimidate businesses when they neither know what law these businesses are violating nor the punishment for violating the unknown law.

This letter serves as notice pursuant to 12 O.S. § 1384.1.

Sincerely,



Frank A. Urbanic

CC:

Lieutenant Governor Matt Pinnell
Attorney General Mike Hunter
Speaker of the House Charles McCall
Senate Pro Tempore Greg Treat
Chief of Staff Bond Payne
ABLE Commission
Oklahoma State Department of Health