

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

RILEY DRIVE ENTERTAINMENT I, INC.
dba TONIC BAR; RILEY DRIVE
ENTERTAINMENT XVI, INC. dba SAINTS
PUB + PATIO WAUKEE,

Plaintiffs,

v.

GOVERNOR KIMBERLY K. REYNOLDS,
in her official capacity as Governor of the
State of Iowa; IOWA DEPARTMENT OF
PUBLIC HEALTH,

Defendants.

**PETITION, REQUEST FOR
DECLARATORY JUDGMENT,
REQUEST FOR TEMPORARY AND
PERMANENT INJUNCTIVE RELIEF,
AND REQUEST FOR EXPEDITED
HEARING**

Plaintiffs, Riley Drive Entertainment I, Inc. d/b/a Tonic Bar, and Riley Drive Entertainment XVI, Inc. d/b/a Saints Pub + Patio Waukee, by and through their attorneys Billy J. Mallory and Daniel P. Kresowik of Brick Gentry, P.C., pursuant to Rules 1.1501 et. seq., 1.1101, and 1.1102 of the Iowa Rules of Civil Procedure, submit the following Petition, Request for Declaratory Judgment, Request for Temporary and Permanent Injunctive Relief, and Request for Expedited Hearing.

PARTIES AND JURISDICTION

1. Plaintiff Riley Drive Entertainment I, Inc. d/b/a Tonic Bar (“RDE I”) is an Iowa corporation.
2. Plaintiff Riley Drive Entertainment XVI, Inc. d/b/a Saints Pub + Patio Waukee (“RDE XVI”) is an Iowa corporation.
3. Defendant Kimberly K. Reynolds (“Governor Reynolds”) is an individual and the duly-elected Governor of the State of Iowa.

4. Defendant Iowa Department of Public Health (“IDPH”) is a state administrative agency responsible for, among other duties, exercising “general supervision over the public health.” Iowa Code § 135.11.

5. This Petition seeks declaratory and injunctive relief to prevent Defendants’ violations of the laws of the State of Iowa, including Plaintiffs’ rights, privileges and immunities under the Constitution of the State of Iowa.

6. This Court has jurisdiction and the power to issue injunctions pursuant to Rules 1.1505, 1.1506, 1.1101, and 1.1102 of the Iowa Rules of Civil Procedure.

7. Venue is proper in the Iowa District Court for Polk County, as the conduct complained of herein occurred within, and at least one Plaintiff and Defendants are residents of, or have their principal place of business in, or are doing business in Polk County, Iowa.

BACKGROUND

8. Plaintiffs incorporate the foregoing paragraphs as if fully set forth herein.

9. RDE I owns and operates Tonic Bar at 5535 Mills Civic Parkway, West Des Moines, Polk County, Iowa (“Tonic Bar”).

10. RDE XVI owns and operates Saint Pub + Patio Waukee at 87 NE Carefree Lane, Waukee, Dallas County, Iowa (“Saints Pub Waukee”).

11. Tonic Bar and Saints Pub Waukee are licensed to sell and serve alcoholic beverages pursuant to Iowa Code Chapter 123.

12. On August 27, 2020, Governor Reynolds issued a “Proclamation of Disaster Emergency” (“August 27th Proclamation”).

13. A true and accurate copy of the August 27th Proclamation is attached as Exhibit 1.

14. The August 27th Proclamation was purportedly issued pursuant to “the Iowa Constitution, Art. IV, §§ 1, 8 and Iowa Code §§ 29C.6(1), 135.140(6), and 135.144.” Ex. 1 at p. 1.

15. Section 2(A) of the August 27th Proclamation includes a mandate that “[a]ll bars, taverns, wineries, breweries, distilleries, night clubs, and other establishments that sell alcoholic beverages for consumption on their premises, shall be closed to the general public, except as permitted in this section” (the “Order of Closure”). Ex. 1 at p. 2.

16. Section 2(A)(3) purports to exempt “[a]n establishment that prepares and serves food, the sale of which results in at least half of the establishment’s monthly revenues” from the Order of Closure, “provided that the establishment complies with all requirements for restaurants in paragraph B of this section” (collectively, “Exempt Establishments”). *Id.*

17. Establishments referenced in the Order of Closure which do not qualify as Exempt Establishments are hereinafter referred to as “Non-Exempt Establishments.”

18. The inalienable rights clause of the Iowa Constitution provides that “[a]ll men and women are, by nature, free and equal, and have certain inalienable rights--among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.” Iowa Const. art. I, § 1.

19. The Order of Closure was issued in violation of the Iowa Constitution, and Iowa Code Sections 29C.6(1), 135.140(6), and 135.144.

The Order of Closure is Not Justified By Facts

20. Iowa law requires that a “proclamation shall be in writing, indicate the area affected and the **facts upon which it is based**, be signed by the governor, and be filed with the secretary of state.” Iowa Code § 29C.6 (emphasis added).

21. As the purported “facts upon which it is based,” the August 27th Proclamation cites various declarations and issuances from over 150 days ago. Ex. 1 at p. 1.

22. The only recent statement is the conclusory allegation that “the continued spread of COVID-19 in the state of Iowa, especially in Black Hawk, Dallas, Johnson, Linn, Polk, and Story

counties warrants taking additional reasonable measures to reduce the transmission of COVID-19.”
Id.

23. In contravention of Iowa law, Defendants have not set forth facts justifying the imposition of the Order of Closure.

24. As a result of the failure to set forth specific facts justifying the imposition of the Order of Closure, the Order of Closure is void and unenforceable as a matter of law.

There is No “Public Health Disaster” in Polk County and Dallas County as Defined under Iowa Law

25. Iowa Code Section 135.144 permits the IDPH, in conjunction with Governor Reynolds, to take a variety of potential actions if “a public health disaster exists.” Iowa Code §135.144.

26. Under Iowa law:

‘Public health disaster,’ means a state of disaster emergency proclaimed by the governor in consultation with the department pursuant to section 29C.6 for a disaster which specifically involves an **imminent threat of an illness or health condition** that meets any of the following conditions . . .

b. Poses a **high probability** of any of the following:

- (1) A **large** number of deaths in the affected population.
- (2) A **large** number of serious or long-term disabilities in the affected population.
- (3) Widespread exposure to an infectious or toxic agent that poses a **significant risk of substantial future harm** to a **large** number of the affected population.
- (4) Short-term or long-term physical or behavioral health consequences to a **large** number of the affected population.

Iowa Code § 135.140 (emphasis added).

27. Defendants have again entirely failed to set forth specific facts establishing the existence of a public health disaster in Polk and Dallas County, Iowa.

28. Not only have Defendants procedurally failed to do so—which renders the Order of Closure invalid—but Defendants also cannot substantively demonstrate that COVID-19 poses a “high probability” of any of the four enumerated categories in Polk or Dallas County, Iowa.

29. By all accounts, COVID-19 has only been affecting humans for less than one year.

30. The first diagnosis of COVID-19 in Iowa occurred less than six months ago.

31. The State of Iowa has reported that, as of earlier this week, a total of 59,710 individuals in Iowa had been diagnosed with COVID-19.

32. Defendants do not have statistics to show the percentage of the affected population that has “serious or long-term disabilities” due to COVID-19 from which Defendants can project a high probability of a large number of serious or long-term disabilities in the affected population.

33. Defendants also cannot demonstrate that COVID-19 poses a “high probability” of a widespread exposure to an infectious or toxic agent that poses a “significant risk of substantial future harm” to a “large number” of the affected population.

34. Defendants cannot demonstrate that COVID-19 poses a “high probability” of short-term or long-term “physical or behavioral health consequences” to a “large number” of the affected population.

35. At her August 27, 2020 press conference, Governor Reynolds essentially admitted there is no imminent threat, stating “[w]hile we aren’t seeing the impact reflected in hospitalization numbers we’re concerned that it will start to impact the staffing in our health care systems, and potentially our schools....”

The Order of Closure is Not a “Reasonable Measure”

36. The August 27th Proclamation was purportedly issued pursuant to, in part, Iowa Code Subsection 135.144(3). Ex. 1 at p. 1, §2.

37. Iowa Code Subsection 135.144(3) permits the IDPH, in conjunction with the governor, to “[t]ake ***reasonable measures*** as ***necessary*** to prevent the transmission of infectious disease ***and*** to ensure that all cases of communicable disease are properly identified, controlled, and treated.” Iowa Code §135.144(3) (emphasis added).

38. Instead of attempting to ensure that “all” cases of COVID-19 are “controlled,” the Order of Closure improperly attempts to limit individual’s potential exposure in six counties solely if those people would have, absent the Order of Closure, frequented what has now been deemed a Non-Exempt Establishment.

39. The purported distinctions in the Order of Closure between Exempt and Non-Exempt Establishments are not reasonable.

40. Section 2(B)(1) of the August 27th Proclamation not only permits, but now actively *requires* an establishment serving alcoholic beverages to “prepare *and* serve food to *all* customers.” Ex. 1 at p. 1, §2(B)(1) (emphasis added).

41. By including this requirement, when compared to an identical Non-Exempt Establishment, Governor Reynolds and the IDPH have indisputably substantially *increased* the potential for an individual to both contract and spread COVID-19 at an Exempt Establishment.

42. At its core, the only distinction between Exempt and Non-Exempt Establishments under the Order of Closure is an establishment’s monthly revenues from the sale of alcoholic beverages for consumption on the premises. Ex. 1 at p. 2. §2(A).

43. If an establishment does not sell alcoholic beverages for consumption on the premises, it is automatically designated as an Exempt Establishment.

44. If an establishment that sells alcoholic beverages for consumption on its premises does not also both prepare and serve food, it is automatically designated as a Non-Exempt Establishment.

45. A distinction based on the sale of alcoholic beverages for consumption on the premises is nonsensical, arbitrary, and capricious.

46. There is no evidence that the mere fact alcohol is being sold for consumption on premises increases an individual's risk of contracting or passing away from COVID-19, or somehow increases the severity of COVID-19 in an infected individual.

47. There is no evidence that consumption of alcohol at an establishment either increases an individual's risk of contracting or passing away from COVID-19, or somehow increases the severity of COVID-19 in an infected individual.

48. There is no evidence that COVID-19 is somehow more likely to be transferred on alcoholic beverage containers than on beverage containers containing non-alcoholic beverages.

The Lack of Notice to Affected Establishments is Patently Unreasonable.

49. The public was provided with notice of the August 27th Proclamation late in the morning of Thursday, August 27, 2020.

50. However, by its terms, the Order of Closure went into effect mere hours later, at 5:00 p.m.

51. Establishments which were subject to the Order of Closure had already had to prepare for and secure staffing for the evening of August 27, 2020, and the following days and weeks.

52. Establishments which were subject to the Order of Closure had already had to prepare for and secure food, beverages, and supplies for the evening of August 27, 2020, and the following days and weeks.

53. However, under the Order of Closure, these establishments were no longer able to secure income in what has already been an unprecedentedly difficult year for the bar and restaurant industry.

54. Much of this food and some of the beverages will now go to waste if the Order of Closure is upheld.

55. Further, employees and independent contractors who were scheduled to provide goods and/or services to the establishments and their customers are now unable to earn money in what has already been an extremely difficult year for them.

56. There is absolutely no legitimate reason for the mere hours of notice provided prior to implementation of the Order of Closure.

**There is No Rational Basis for the Application of the Order of Closure to
Dallas and Polk Counties**

57. The application of the Order of Closure to Dallas County and Polk County is not reasonable.¹

58. The Governor's stated basis for imposing the Order of Closure is a spike in positive tests for COVID-19 in Johnson and Story County.

59. While Johnson County and Story County have recently experienced a spike in cases, the same is almost assuredly due to the return of students to the University of Iowa and the Iowa State University of Science and Technology, respectively.

60. Governor Reynolds does not assert, and has not provided any evidence, that Dallas County and Polk County have experienced a similar spike.

61. There is also absolutely no rational basis for utilizing a spike (the cause of which has been identified) in COVID-19 cases in two counties, as justification for the imposition of the Order of Closure in other counties, including Dallas County and Polk County.

62. At her August 27th press conference, Governor Reynolds further posited that "it is imperative that we implement some immediate steps to slow the spread among young adults in our state."

¹ Among other issues, there are multiple other counties in Iowa with a higher percentage of positive COVID-19 cases by age group than some of the six restricted Counties.

63. This assertion entirely fails to provide any rational support for prohibiting a restaurant in Waukee from serving alcohol at 10:30 pm.

The Order of Closure is Not “Necessary”

64. “The word necessary means ‘indispensably requisite: that cannot be otherwise without preventing the purpose intended.’” *A. Wolf & Son v. Indep. Sch. Dist. of Pleasant Valley Twp.*, 1 N.W. 695, 697 (Iowa 1879) (emphasis added); *see also* Iowa R. Civ. P. 1.234 (entitled “Necessary parties,” and referencing “definition of indispensable party”).

65. Defendants cannot demonstrate that the unconstitutional Order of Closure is, by any means, “indispensable,” or that the spread of COVID-19 in Iowa cannot be prevented other than by making an arbitrary distinction based on whether or not a liquid served at an establishment contains alcohol.

66. To the contrary, on August 1, 2020, over 300 physicians and advanced practice providers urged Governor Reynolds to require individuals to wear masks in public places.²

67. Notably, the August 27th Proclamation does not contain any requirement for the wearing of masks.

68. The Order of Closure is not necessary.

WHEREFORE, Plaintiffs respectfully request that this Court grant them the requests for relief set forth in the Common Request for Relief, below.

COUNT I –DECLARATORY JUDGMENT

69. Plaintiffs incorporate all other paragraphs of this Petition as if fully set forth herein.

70. The Order of Closure is unconstitutional, exceeds Governor Reynolds’ authority, and was issued in violation of the laws of the State of Iowa.

² <https://www.weareiowa.com/article/news/health/coronavirus/iowa-doctors-medical-professionals-mask-mandate-governor-gov-kim-reynolds-state-capitol-building-press-conference-coronavirus-covid-19/524-35effad1-9548-4148-989b-7af93806bd41> (last accessed August 27, 2020).

71. This action seeks a judicial determination of issues, rights and liabilities embodied in an actual and present controversy between the parties involving the validity and application of the Order of Closure.

WHEREFORE, Plaintiffs respectfully request that this Court grant them the requests for relief set forth in the Common Request for Relief, below.

COUNT II – VIOLATION OF PLAINTIFFS’ RIGHT TO EQUAL PROTECTION AND DUE PROCESS

72. Plaintiffs incorporate all other paragraphs of this Petition as if fully set forth herein.

73. The Order of Closure wrongfully and unconstitutionally treats Plaintiffs differently from other similarly-situated establishments in Dallas and Polk County, Iowa.

74. There is no rational basis for the Order of Closure’s treatment of Plaintiffs in a manner disparate to its treatment of other similarly-situated establishments in Dallas and Polk County.

75. The Order of Closure wrongfully and unconstitutionally treats Plaintiffs differently from other similarly-situated establishments in other counties in Iowa.

76. There is no rational basis for the Order of Closure’s treatment of Plaintiffs in a manner disparate to its treatment of other similarly-situated establishments in other counties in Iowa.

77. The Order of Closure deprives Plaintiffs of their right to equal protection under the Iowa Constitution.

WHEREFORE, Plaintiffs respectfully request that this Court grant them the requests for relief set forth in the Common Request for Relief, below.

COUNT III – TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

78. Plaintiffs incorporate all other paragraphs of this Petition as if fully set forth herein.

79. Plaintiffs would be greatly and/or irreparably harmed if the Order of Closure is enforced.

80. Plaintiffs will not be able to maintain their businesses if the Order of Closure is enforced.

81. An injunction is necessary to preserve the status quo.

82. Money damages would not provide Plaintiffs an adequate remedy.

83. Plaintiffs have a likelihood of success on the merits.

84. The public interest clearly weighs in favor of intervening on behalf of Plaintiffs and “protecting the public from the dangers to liberty which lurk in insidious encroachment by [persons] of zeal.” *Doctor John’s, Inc. v. City of Sioux City, Iowa*, 305 F. Supp.2d 1022, 1042 (N.D. Iowa 2004).

85. Plaintiffs are entitled to preliminary and permanent injunctive relief which includes enjoining Defendants or Defendants’ agents from implementing or enforcing the Order of Closure.

86. Plaintiffs incorporate by reference the Affidavit of Scott Anderson. *See* Ex. 2.

87. No petition for the same relief, or part thereof, has been previously presented to and refused by any court or justice.

WHEREFORE, Plaintiffs respectfully request that this Court grant them the requests for relief set forth in the Common Request for Relief, below.

COMMON REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter an order:

A. Holding that the Order of Closure is void and of no force and effect, and prohibiting Defendants from enforcing the Order of Closure;

B. In the alternative, holding that the Order of Closure is void and of no force and effect with respect to Non-Exempt Establishments;

C. In the alternative, holding that the Order of Closure is void and of no force and effect with respect to Exempt Establishments;

D. In the alternative, holding that the Order of Closure is void and of no force and effect with respect to Plaintiffs and similarly situated Non-Exempt Establishments or Exempt Establishments;

E. In the alternative, holding that the Order of Closure is void and of no force and effect with respect to Plaintiffs and similarly situated Exempt or Non-Exempt Establishments in Polk County and Dallas County, Iowa;

F. In the alternative, holding that the August 27th Proclamation is void and of no force and effect with respect to Plaintiffs;

G. Entering a temporary injunction prohibiting Defendants from implementing or enforcing the Order of Closure, whether directly or indirectly, against any or all of the foregoing Exempt or Non-Exempt Establishments;

H. Enter a permanent injunction prohibiting Defendants from implementing or enforcing the Order of Closure, whether directly or indirectly, against any or all of the foregoing Exempt or Non-Exempt Establishments;

I. Awarding Plaintiffs their reasonable attorney fees; and

J. Awarding Plaintiffs such additional and further relief as the Court deems just and appropriate.

Respectfully submitted,

BRICK GENTRY P.C.

By: /s/ Billy J. Mallory

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