

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

Case Type: Civil

State of Minnesota, by its Attorney General,
Keith Ellison,

Court File No. 19HA-CV-20-4167

Plaintiff,

vs.

Lionheart L.L.C. d/b/a Alibi Drinkery,

**MEMORANDUM IN SUPPORT OF THE
STATE'S *EX PARTE* MOTION FOR
TEMPORARY RESTRAINING ORDER
AND TEMPORARY INJUNCTION**

Defendant.

The State of Minnesota, by its Attorney General, Keith Ellison, (the "State"), pursuant to Minnesota Rules of Civil Procedure 6.04, 7.02(a), 65.01, and 65.02; Minnesota Statutes sections 8.31, subdivision 3, and Governor Tim Walz's Emergency Executive Order 20-99, brings this *Ex Parte* Motion for a Temporary Restraining Order and Temporary Injunction against Defendant Lionheart L.L.C. d/b/a Alibi Drinkery ("Alibi Drinkery").

INTRODUCTION

In direct and knowing defiance of Governor Walz's Executive Order 20-99, which has the full force and effect of law during a declared peacetime emergency, Defendant Alibi Drinkery has publicly advertised and offered on-premises consumption of food or beverage and allowed more than five members of the public in its establishment, grouping over 50 people together in close quarters during a global pandemic. In doing so, Alibi Drinkery is not only violating the law but is also placing the public health and safety of its own community at risk to increased community spread of COVID-19 at a time when confirmed COVID-19 cases in

Minnesota are still increasing. It is also doing so despite restaurants and bars like Alibi Drinkery where individuals, unmasked, congregate for extended periods while eating, drinking, and exhaling at an increased volume and rate, present substantial public health risks and are particularly fertile environments for the community spread of COVID-19. Accordingly, the Attorney General brings this action to enforce Executive Order 20-99 as well as to protect public health and safety of all Minnesota residents.

FACTUAL BACKGROUND

I. COMMUNITY SPREAD OF COVID-19 REPRESENTS ONE OF THE GREATEST PUBLIC HEALTH EMERGENCIES IN MINNESOTA'S HISTORY.

Minnesota's fight against the COVID-19 virus represents one of the greatest public health emergencies this state has handled in its 162-year history. In part, the magnitude of Minnesota's response has been in reaction to the uniquely virulent characteristics of the disease: In one study, researchers found that a single infected person likely spread the virus to 53 other people during the course of a single choir rehearsal.¹ Minnesota is fighting the infection, but the virus continues to spread, and the need for emergency preventative measures remains in order to protect public health and safety.

COVID-19 kills people. In Minnesota alone, as of December 10, 2020, COVID-19 has already caused at least 4,455 deaths. 386,412 positive cases have been reported across the state with 28,795 of those positive cases reported in the first week of December alone.²

¹ Hammer et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, 69 MORBIDITY & MORTALITY WEEKLY R. 16, 606-10 (May 15, 2020), available at, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm>. Affidavit of Elizabeth Odette (“Odette Aff.”), Exhibit 2.

² *Situation Update for COVID-19, Updated December 16, 2020*, MINN. DEPT. OF HEALTH, <https://www.health.state.mn.us/diseases/coronavirus/situation.html#map1>. (Odette Aff., Ex. 3.)

Minnesota is currently experiencing some of the highest numbers of COVID-19 cases since the beginning of the pandemic. For example, it took Minnesota over 6 months to record its first 100,000 positive COVID-19 cases, but only 41 days to add an additional 100,000 new cases. Just 16 days later, Minnesota logged another 100,000 positive cases.³

In the months of November and December of 2020, Minnesota has been recording record numbers of daily new cases, hospitalizations, intensive care unit admissions, and deaths. On December 16, 2020 alone, there were 92 reported deaths due to COVID-19.⁴ Surging COVID-19 cases are pushing Minnesota's hospital system to a critical point.⁵ Due to unprecedented staffing shortages, many hospitals are diverting patients to other facilities and making difficult choices, like discharging patients that normally would have longer hospital stays. Hospitals are running out of critical care beds that are a necessity for COVID-19 patients experiencing severe symptoms.⁶

In Dakota County, at least 241 individuals have passed away due to COVID-19 and 27,798 have tested positive.⁷ Dakota County is presently experiencing extremely high rates of community spread of COVID-19. The 14-day case rate per 10,000 people has jumped dramatically from 29.10 for the reporting period of October 4, 2020 to October 17, 2020, to

³ Affidavit of Richard Danila ("Danila Aff.") ¶4.

⁴ See fn. 2, Odette Aff., Ex. 3.

⁵ Howatt, Glen, New bar, restaurant and gym COVID-19 restrictions expected in Minnesota, MINNEAPOLIS STAR TRIB. (Nov. 18, 2020), available at <https://www.startribune.com/new-bar-restaurant-and-gym-restrictions-expected-in-minn/573107051/>. (Odette Aff., Ex. 10.)

⁶ *Id.*

⁷ Dakota County, MN COVID 19 Dashboard Statistics, (Dec. 16, 2020), available at <https://experience.arcgis.com/experience/a654394207ac44239af0792303664db3/>. (Odette Aff., Ex. 1.)

141.51 for the reporting period of November 15, 2020 to November 28, 2020.⁸ Nearby hospital Fairview Ridges in Burnsville, MN is reporting a 90% occupancy of ICU beds with only one bed available.⁹ This is the deadly backdrop against which the Defendant has decided to defy an order intended to stem community spread of a virus and unlawfully remain open to the public for on-premises consumption of food and beverages.

COVID-19 can easily be spread through respiratory droplets exhaled into the air by individuals not wearing face coverings. The on-premises consumption of food and beverages at bars and restaurants in Minnesota continues to pose substantial risks to public health and safety. (Affidavit of Richard Danila at ¶11 (“Danila Aff.")). Bars and restaurants pose a particularly high risk of COVID-19 transmission because they allow people to gather and congregate around people from different households to eat and drink without face coverings, often for extended periods of interaction. (*Id.*) Individuals cannot remain masked while they are eating and drinking, and many people leave their masks off in bars and restaurants while talking. (*Id.*) Bars and restaurants can be loud, leading to a larger volume of respiratory droplets in the air as people talk, raise their voices to be heard, or laugh. (*Id.*) Moreover, both the consumption of alcohol at these establishments and gathering with close friends or family can lower inhibitions and interfere with effective social distancing. (*Id.*) This is especially true at bars later at night when individuals are more prone to move about and mingle within these establishments. (*Id.*) All of these factors make bars and restaurants high risk for the easy transmission of COVID-19. (*Id.*)

⁸ Minnesota Department of Health 14-day COVID-19 Case Rate by County (updated 12/10/2020) published on Minnesota’s Stay Safe MN website, *available at* <https://www.health.state.mn.us/diseases/coronavirus/stats/wschoo.pdf>. (Odette Aff., Ex. 12.)

⁹ Leatherby, Lauren, et al., *There’s No Place for Them to Go: I.C.U. Beds Near Capacity Across U.S.*, N.Y. TIMES (Dec. 9, 2020), *available at* <https://www.nytimes.com/interactive/2020/12/09/us/covid-hospitals-icu-capacity.html> (Odette Aff., Ex. 3; Grove Aff., Ex. 4).

For example, one study examined COVID-19 transmission in a bar during a St. Patrick's Day celebration in Vietnam. (*Id.* at ¶12.) The study found that it was likely that a single person spread the virus to 18 other people over the course of a single night, even though only 4 of the 18 reported being in close contact with the infectious individual. (*Id.*)

In another study publicized by the national Centers for Disease Control and Prevention ("CDC"), a significant viral outbreak occurred at a family gathering at a restaurant. (*Id.*, Ex. A.) Not only did the family members who attended the meal become ill, but other patrons unassociated with the reunion became sick. (*Id.*) The researchers' hypothesis indicates that the virus was spread simply through the air of the restaurant. (*Id.*)

In yet another study, an outbreak of three cases occurred at a restaurant where one of the people who got infected sat 21 feet away from the infector for only 5 minutes. (*Id.* at ¶ 12, Ex. A.)

An outbreak is generally defined as multiple cases of illness related by time and place in which an epidemiologic investigation suggests person-to-person transmission or contamination occurred. (*Id.* at ¶ 10.) It is challenging to document the full scope of any COVID-19 outbreak, by what is known as secondary and tertiary transmission of COVID-19. (*Id.*) This is because a person may have COVID-19 and be asymptomatic or experience mild symptoms and never get tested, but still be able to infect others. (*Id.*) And importantly, the contact tracing process relies on truthful and accurate self-reporting from persons infected or exposed to the virus. (*Id.*) If a person exposed to the virus does not fully disclose their symptoms, activities, or contacts, then the total numbers related to an outbreak will be underreported. (*Id.*) Because of these challenges, the total impact of outbreaks in Minnesota will never be fully known. (*Id.*) Instead,

these documented outbreaks represent just the tip of the iceberg of transmission and there are likely many more cases from the outbreak source that haven't been identified. (*Id.*)

Minnesota Department of Health's contact tracing investigations have shown that apart from long term care settings, bars and restaurants are among the settings most frequently associated with COVID-19 outbreaks in Minnesota. Specifically, the Minnesota Department of Health has already traced 448 COVID-19 outbreaks¹⁰ and 4,145 confirmed cases of COVID-19 to bars and restaurants in Minnesota. (*Id.* at ¶13.)

Minnesota has had success in keeping its infection rate and mortality count relatively lower than some other areas, in part through its outreach to educate Minnesotans on the restrictions in place, and in part by placing certain restrictions on activities that are more likely to result in spread of the virus like large events and fully occupied restaurants with people from different households congregating in close proximity. Nevertheless, Minnesota is currently experiencing some of the highest numbers of COVID-19 cases since the beginning of the pandemic. Minnesota's attempts to slow the spread of COVID-19 are an attempt to protect the health and safety of its residents. These efforts have been deemed necessary by the Governor, including in Dakota County.

II. GOVERNOR WALZ ISSUED EMERGENCY EXECUTIVE ORDER 20-99 TO TEMPORARILY PROHIBIT ON-PREMISES DINING AT RESTAURANTS, BARS, AND TAVERNS IN ORDER TO LIMIT COMMUNITY SPREAD OF COVID-19.

On March 13, 2020, Governor Tim Walz declared a peacetime emergency as a result of the COVID-19 pandemic. At its emergency meeting on March 16, the Executive Council of the State of Minnesota approved the peacetime emergency to protect Minnesotans from COVID-

¹⁰ The outbreak threshold MDH has established for bars and restaurants is seven or more COVID-19 cases from different households that report visiting the bar or restaurant within one month.

19.¹¹ The peacetime emergency was most recently extended and approved by the Executive Council until at least through January 13, 2021, pursuant to Executive Order 20-100.¹²

In order to protect public health and safety by slowing the “community spread” of COVID-19, on November 18, 2020, Governor Walz issued Executive Order 20-99, which, in relevant part, orders that “restaurants, . . . bars, . . . and other Places of Public Accommodation offering food, beverages (including alcoholic beverages), or tobacco products for on-premises consumption are closed to ingress, egress, use, and occupancy by member of the public, except as set forth below.”¹³ Executive Order 20-99 goes on to specify that restaurants and bars may “permit up to five members of the public at one time . . . for the purpose of picking up their food or beverage orders.”¹⁴ On-premises consumption is prohibited, as is any occupancy above five members of the public waiting for their orders, until at least December 18, 2020 at 11:59 p.m. Executive Order 20-99 has been extended to January 10, 2021 at 11:59 p.m. by Executive Order 20-103, which permits restaurants to provide outdoor, on-premises consumption services starting on December 18, 2020 at 11:59 p.m.¹⁵

Executive Order 20-99 was promulgated by the Governor under the authority of Minnesota Statutes section 12.21, subdivision 3, clause (1), was approved by the Executive

¹¹ See Executive Order 20-99 at 2, available at <https://www.leg.mn.gov/archive/execorders/20-99.pdf>.

¹² See Executive Order 20-100, available at https://mn.gov/governor/assets/EO%2020-100%20Final%20Signed%20and%20Filed_tcm1055-458402.pdf.

¹³ Executive Order 20-99 ¶7.c.iii.A.

¹⁴ *Id.* at ¶7.c.iii.A.1.

¹⁵ Executive Order 20-103 at 7, available at https://mn.gov/governor/assets/EO%2020-103%20Final_tcm1055-458404.pdf.

Council, and filed in the Office of the Secretary of State.¹⁶ Thus, pursuant to Minnesota Statutes section 12.32, Executive Order 20-99 has the full force and effect of law during the peacetime emergency. Moreover, Executive Order 20-99 authorizes the Attorney General to enforce its provisions and seek any relief available pursuant to Minnesota Statutes section 8.31, “including civil penalties up to \$25,000 per occurrence from businesses and injunctive relief.” (*Id.* at ¶ 10.)

III. ALIBI DRINKERY VIOLATED AND THREATENED TO VIOLATE EXECUTIVE ORDER 20-99.

Alibi Drinkery has flagrantly violated Executive Order 20-99. On Tuesday, December 15, 2020, Alibi Drinkery advertised on its public Facebook page “WE ARE OPEN WEDNESDAY 11AM” (Affidavit of Nina Grove (*hereinafter* “Grove Aff.”), Ex. 1.)



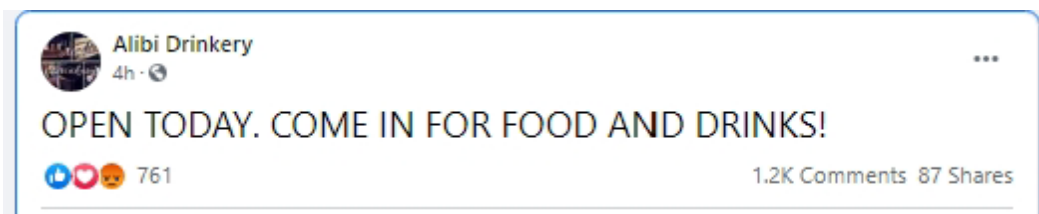
On that same day, the Minnesota Attorney General’s Office sent a letter to Alibi Drinkery informing it of the potential consequences for violating the Executive Order, including facing a civil enforcement action seeking injunctive relief and civil penalties of up to \$25,000 for

¹⁶ *Id.* at 3.

each and every occurrence of an Executive Order 20-99 violation, as well as its attorney’s fees and costs (including costs of investigation). (Affidavit of Noah Lewellen (hereinafter “Lewellen Aff.”), Ex. 1). Further, the letter explained that the Minnesota Department of Public Safety has provided public notice to license holders that compliance with Executive Order 20-99 is mandatory and non-compliance can result in the suspension or even revocation of a liquor license. The letter requested a written response confirming compliance by noon on December 16, 2020. No response was received. (*Id.*)

Beginning on Wednesday, December 16, 2020, at 11:00 a.m. and continuing as of the time of filing this motion, Alibi Drinkery opened to the public for on-premises consumption. On December 16, 2020, the Star Tribune reported and documented in photos an overflow crowd. (Grove Aff. ¶ 3, Ex. 2) Photos capture mostly unmasked patrons packing every table and the bar area with standing-room only. (Grove Aff. ¶ 3, Ex. 3) Co-owner Lisa Zarza told the newspaper she intended to keep serving until 2 a.m., her normal closing time and if officials showed up to tell her otherwise, she said “You know what? We’ll see them in court.” (Grove Aff. Ex. 2).

Defendant also posted on its public Facebook page on December 17, 2020 “OPEN TODAY. COME IN FOR FOOD AND DRINKS!” (Grove Aff., ¶ 5, Ex. 5.)



Photos from media reports show people eating and drinking on-premises both December 16 and December 17, 2020 (Grove Aff., Exs. 2-3, 6).

Governor Walz’s Emergency Executive Order 20-99 was issued to slow the community spread of COVID-19 and thereby protect public health and safety. (Danila Aff., ¶ 20.) This

includes, in part, requiring settings that are especially high risk for the easy transmission of COVID-19 from person to person and out into the community to temporarily close to on-premises dining and restrict entry by members of the public to protect the public's health and safety. Without such restrictions, the dangerous public health emergency Minnesota is currently facing would continue to worsen threatening the health, safety, and lives of Minnesotans. Attorney General Keith Ellison has authority to enforce Executive Order 20-99 and brings this action to enjoin and remediate Alibi Drinkery's violations described herein.

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER AND A TEMPORARY INJUNCTION ARE APPROPRIATE TO ENJOIN ALIBI DRINKERY FROM VIOLATING EXECUTIVE ORDER 20-99.

Temporary injunctive relief should be issued upon a showing by the State that Alibi Drinkery “has violated, or is about to violate” Executive Order 20-99 and when injunctive relief would fulfill the purpose of the Order. *See State v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 572 (Minn. Ct. App. 2005) (quoting *Wadena Implement Co. v. Deere & Co., Inc.*, 480 N.W.2d 383, 389 (Minn. Ct. App. 1992)); accord *State v. Minn. School of Business, Inc.*, 899 N.W.2d 467, 471-72 (Minn. 2017) (recognizing “[t]he conditions that must be met to grant a statutory injunction are determined by the text of the statute authorizing the injunction.”).¹⁷

¹⁷ Only when a law does not provide for injunctive relief are courts to evaluate the *Dahlberg* factors to determine whether sufficient grounds exist to issue a TRO or temporary injunction. *Cross Country Bank*, 703 N.W.2d at 573 (when statutes specifically provide for injunctive relief court is “not required to make findings on the *Dahlberg* factors to enjoin violation of the statute.”). Where a party “legitimately disputes” the applicability of the underlying statute authorizing injunctive relief, a district court “is not required” to grant a temporary injunction without consideration of the *Dahlberg* factors. *See State v. Int’l Assoc. of Entrepreneurs of Am.*, 527 N.W.2d 133, 137 (Minn. App. 1995) (citing *Pac. Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 918 (Minn. App. 1994)). This narrow exception, however, has no application to this case because Alibi Drinkery cannot legitimately dispute that they own and operate a restaurant that is subject to Executive Order 20-99, which may be enforced by the Attorney General pursuant to Minnesota Statutes section 8.31 and statutorily authorizes the Attorney

Here, the State brings this law enforcement action against Alibi Drinkery to “prevent and restrain” its violations and promised violations of Executive Order 20-99, by offering on-premises consumption of food and beverage and by allowing more than five members of public in the restaurant at one time. *See* Minn. Stat. § 8.31, subd. 3 (providing “the courts of this state are vested with jurisdiction to prevent and restrain violations”). Executive Order 20-99 expressly provides that it can be enforced by the Minnesota Attorney General’s Office (“AGO”) pursuant to Minnesota Statutes section 8.31. Section 8.31 authorizes the AGO to “sue for and have injunctive relief in any court of competent jurisdiction against any such violation *or threatened violation* without abridging the penalties provided by law.” Minn. Stat. § 8.31, subd. 3 (emphasis added); *accord Minn. School of Business, Inc.*, 899 N.W.2d at 472. Accordingly, the State is entitled to a temporary restraining order (TRO) and temporary injunction (TI) by showing that: (1) Alibi Drinkery violated, is violating, or “is about to” violate Executive Order 20-99; and (2) the injunctive relief sought by the State would fulfill the purpose of the statute and Order.

As described above, Alibi Drinkery has represented that they have knowingly violated Executive Order 20-99 and will continue to do so by continuing to serve food and beverages for on-premises consumption and not restrict its public capacity to five people. (Grove Aff., Ex. 2-3, 6) Consequently, the Court should temporarily enjoin Alibi Drinkery from violating the Executive Order and endangering public health and safety by offering on-premises consumption of food and beverages, and by permitting more than five members of the public to enter the establishment at one time.

General to, among other things, “sue for and have injunctive relief . . . against any . . . threatened violation.” *See* Minn. Stat. § 8.31, subd. 3.

Lastly, the temporary injunctive relief the State requests undoubtedly would fulfill the purposes of Executive Order 20-99. It would protect public health and safety, slow the community spread of COVID-19, hospitalizations, intensive care unit admissions, and deaths related to COVID-19 by preventing congregation in a restaurant when community spread of COVID-19, test positivity rate, and new COVID-19 cases are at some of their highest levels in Minnesota since the beginning of the pandemic. The purpose of Executive Order 20-99 is to protect the public from public health risks, to “safely bridge the gap to more permanent solutions to this pandemic.” (Executive Order 20-99 at 3.) Accordingly, the court should grant the State’s motion for temporary injunctive relief preventing Alibi Drinkery from violating Executive Order 20-99, offering on-premises consumption of food or beverages and allowing more than five members of the public in its restaurant at one time.

II. TEMPORARY INJUNCTIVE RELIEF IS NECESSARY EVEN ASSUMING *ARGUENDO* THAT THE *DAHLBERG* FACTORS WERE APPLICABLE HERE.

In any event, even assuming *arguendo* that the *Dahlberg* factors apply to the State’s motion, such factors weigh strongly in favor in granting the temporary restraining order and temporary injunctive relief sought by the State. Each of the following factors weigh in favor of the State: (1) relationship between the parties; (2) relative harm to the parties if injunctive relief is granted or denied; (3) the party’s likelihood of success on the merits; (4) any public interest or public policy involved; and (5) the administrative burdens involved in judicial supervision and enforcement. *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965).

A. Relationship of the Parties.

The first *Dahlberg* factor—“the nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief”—weighs heavily in favor of the State. *Dahlberg Bros.*, 137 N.W.2d at 321. Executive Order 20-99 empowers the Attorney

General's Office to take action against Places of Public Accommodation that are operating in violation of the Order. As the chief legal officer for the State of Minnesota, the Attorney General has authority to file a civil enforcement action seeking injunctive relief (among other remedies) to secure compliance with Executive Order 20-99. *See* Minn. Stat. § 8.31, subds. 3, 3a; Executive Order 20-99 at ¶ 11. Defendant is violating and has threatened to violate the Order, including but not limited to remaining open to the public on or after November 21, 2020. Because the background and relationship of the parties is that of regulator and non-compliant regulated entity, the first *Dahlberg* factor heavily favors granting the State's requested relief. *Accord State ex rel. Swanson v. CashCall, Inc.*, Nos. A13-2086, A14-0028, 2014 WL 4056028, *5 (Minn. App. Aug. 18, 2014), *review denied* (Minn. Nov. 17, 2015). Moreover, Defendant appears to have complied with Executive Order 20-99 between November 20, 2020 through December 15, 2020, and granting injunctive relief would preserve the status quo. That preservation further weighs in favor of granting the injunctive relief requested.

B. Minnesotans will be Threatened with Real, Substantial, and Irreparable Injury Absent a Temporary Injunction.

The second *Dahlberg* factor requires the Court to balance the harms to be suffered if the temporary injunction is granted with the harms to be suffered if it is denied. *Dahlberg Bros.*, 137 N.W.2d at 321; *see also Indep. Sch. Dist. No. 35, Marshall County v. Engelstad*, 144 N.W.2d 245, 248 (Minn. 1966) (“There must be threatened injury which is real, substantial, and irreparable.”); *Cramond v. Am. Fed. of Labor & Congress of Indus. Organizations*, 126 N.W.2d 252, 256 (Minn. 1964) (recognizing irreparable injury may occur where the actions of an adverse party may render the relief sought by the other party “ineffectual”).

Here, Minnesotans will be threatened with real, substantial, and irreparable harms for which a future payment of money is not a “realistic remedy” if the Court does not grant the

State's requested temporary injunctive relief. Minnesota is currently experiencing an alarming surge in COVID-19 cases, including the record high daily case numbers received this month and increasing reported deaths. Defendant's conduct risks further increasing the rate of community spread in Minnesota. Executive Order 20-99 was thoughtfully conceived by public health professionals to address the specific and deadly exigencies posed by the public health crisis facing our State. (*See* Danila Aff. at ¶¶7-8.) The Order seeks to restrict only that behavior most tied to outbreaks in Minnesota, even as infections grow dangerously higher. (*Id.*) The virus appears to spread most easily between people indoors for extended periods of time, (*Id.* at ¶ 9), and those situations are precisely what Defendant's conduct will foster. Compliance with the Order is critical to slowing the spread of COVID-19 and protecting the capacity of Minnesota's health system.

Payment of money is not a realistic remedy in this situation, not only for members of the public who could become infected, but for the public as a whole. Such harm also far outweighs any interest Defendant may have in temporarily closing to the public for in-person consumption for seven weeks (e.g., until January 10, 2020). Because the public health and safety of Minnesotans are threatened by Defendant's defiant actions absent a temporary restraining order and temporary injunction, this factor weighs strongly in favor of the State.

C. The State is Likely to Succeed on the Merits of Its Claims.

The State is likely to succeed on the merits of its claims because Defendant has admitted that it intends and has remained open to the public in clear violation of Executive Order 20-99. While the State understands Defendant's business and employees may be struggling during the global pandemic, it does not justify violating an executive order aimed at stemming infections and transmission of a deadly virus.

Executive Order 20-99 has the force and effect of law. Minn. Stat. § 12.32. Executive orders issued during peacetime emergencies like the present have repeatedly withstood judicial scrutiny. Efforts to invalidate executive orders issued during a public health crisis like the present one are evaluated under the framework of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). Under this framework, courts give significant deference to the emergency measures instituted during a public health crisis. “The Constitution does not compel courts to turn a blind eye to the realities of the COVID-19 crisis.” *Cassell v. Snyders*, 20 C 50153, 2020 WL 2112374, at *6 (N.D. Ill. May 3, 2020) (citing *Jacobson*, 197 U.S. at 27).¹⁸

Under *Jacobson*, state action is susceptible to constitutional challenge only if: (1) it has no real or substantial relation to the object of protecting the public health, safety, or morals; or (2) “is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” *Jacobson*, 197 U.S. at 31. The heightened deference courts apply during public health emergencies is rooted in the fact that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27.

Thus, the temporary executive actions the Governor has taken in response to the COVID-19 emergency are entitled to substantial judicial deference and courts may not “second-guess the wisdom or efficacy of the measures.” *Rutledge*, 956 F.3d at 1028 (internal quotations omitted).

¹⁸ Moreover, nothing in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20A87, 2020 WL 6948354, 592 U.S. --- (Nov. 25, 2020) abrogates, overrules, or otherwise limits the application of *Jacobson* here. The Eighth Circuit (and numerous other federal courts) have confirmed that *Jacobson* applies to emergency orders issued to combat COVID-19. *See In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020). Indeed, the *Roman Catholic* majority did not discuss *Jacobson*, much less overrule or otherwise limit its application and the constitutional issues at play in *Roman Catholic* are easily distinguishable from the case at bar. Thus, any attempted suggestion to the contrary by Defendant is wrong as a matter of law.

Courts throughout the country have applied *Jacobson* in upholding a variety of executive orders to combat the COVID-19 pandemic, including measures similar to those contained in Executive Order 20-99.¹⁹ Indeed, in Stearns, Wabasha, Polk, and Ramsey Counties, district courts have held that the State was likely to succeed on the merits against (1) a similarly defiant restaurant that refused to comply with the Governor's Executive Orders early in the pandemic, (2) a defiant gym that refused to comply with Executive Order 20-99, (3) a defiant restaurant in East Grand Forks that refused to comply with Executive Order 20-99, and (4) a defiant restaurant in Lynd that refused to comply with Executive Order 20-99. All four courts granted the State's motions for temporary restraining orders. (Odette Aff., Ex. 8.)

Executive Order 20-99 has a clear connection to the protection of Minnesotans' health and safety, as shown in both the clear language of the Order and in the data on where COVID-19 spreads most readily. The Order prohibits restaurants from providing on-site consumption of food or beverages, and it limits restaurants to five on-premises customers at any given time

¹⁹ See, e.g., *Calvary Chapel Dayton Valley v. Sisolak*, No. 320-CV-00303, 2020 WL 4260438, at *2-3 (D. Nev. June 11, 2020); *Best Supplement Guide, LLC v. Newsom*, No. 220-CV-00965-JAM/CKD, 2020 WL 2615022, at *3 (E.D. Cal. May 22, 2020) (applying *Jacobson* to reject First and Fourteenth Amendment challenges to California's executive orders closing gyms, and collecting cases); *Henry v. DeSantis*, No. 20-CV-80729, 2020 WL 2479447, at *6 (S.D. Fla. May 14, 2020) (rejecting First and Fourteenth Amendment challenges to Florida's executive order closing bars and restaurants); *Friends of Danny DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *16 (Pa. Apr. 13, 2020) (applying *Jacobson* framework in affirming constitutionality of Pennsylvania's stay-at-home order); *Commcan, Inc. et al. v. Baker*, No. 2084CV00808-BLS2, 2020 WL 1903822, at *6 (Mass. Super. Apr. 16, 2020) (rejecting Equal Protection challenge to executive order closing legal marijuana dispensaries but leaving other businesses open); *Talleywhacker, Inc. v. Cooper*, 2020 WL 3051207 (E.D.N.C.) (denying strip club that also served alcohol and food motion for temporary and rejecting claims under the First, Fifth, and Fourteenth Amendments); *Amato v. Elicker*, 2020 WL 2542788 (D. Conn.) (denying restaurants motion for temporary injunction from bar/restaurant closure order and rejecting First Amendment claims); *McCarthy v. Cuomo*, 2020 WL 3286530 (E.D.N.Y.) (denying strip club/bar/restaurant's motion for a temporary injunction and rejecting First and Fifth Amendment claims).

waiting for take-out orders. Neither requirement is “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”

Defendant has explicitly acknowledged that its conduct violated Executive Order 20-99. Because the Order has the force and effect of law, passes constitutional muster, and is being openly violated by Defendant, the third *Dahlberg* factor weighs in favor of granting the State’s requested injunctive relief.

D. The Public Interest and Public Policies Strongly Weigh in Favor of the Temporary Injunction.

The fourth *Dahlberg* factor requires consideration of any public interest or public policy expressed in applicable statutes. *Dahlberg Bros.*, 137 N.W.2d at 321-22. As discussed above, the Governor issued Executive Order 20-99 to slow the spread of a deadly infectious disease. Defendant has violated these safety restrictions by remaining open to the public on December 16 and December 17, 2020 and allowing more than five members of the public in its restaurant at one time. Public policy clearly weighs in favor of temporary injunctive relief that requires Defendant to temporarily restrict its services to the public in accordance with Executive Order 20-99.

E. The State’s Requested Temporary Injunctive Relief Poses Minimal Administrative Burdens on The Court.

Finally, the Court must consider the administrative burdens a temporary injunction may impose upon the Court. *Dahlberg Bros.*, 137 N.W.2d at 322. Here, issuing a temporary injunction will impose minimal administrative burdens on the Court because all the State requests is that Defendant obey the Governor’s Executive Order 20-99. Indeed, the State only requests that Defendant conform its conduct to that which is expected of other restaurants in

Minnesota. For this reason, this final *Dahlberg* factor also fully favors granting the State's requested temporary injunctive relief.

III. TEMPORARY INJUNCTIVE RELIEF IS NECESSARY BEFORE ALIBI DRINKERY CAN BE HEARD IN OPPOSITION, NECESSITATING AN *EX PARTE* TRO.

The function of a TRO and TI is to preserve the status quo until the matter is adjudicated on the merits. *Prolife Minnesota v. Minnesota Pro-Life Committee*, 632 N.W.2d 748, 753 (Minn. Ct. App. 2001) (discussing purpose of TRO); *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. App. 2002) (discussing purpose of temporary injunction). In order to obtain temporary injunctive relief before Alibi Drinkery can be heard in opposition (*i.e.* an *ex parte* TRO), the State must show that:

- (1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and
- (2) the applicant's attorney states to the court in writing the efforts, if any, which have been made to give notice or the reasons supporting the claim that notice should not be required.

Minn. R. Civ. P. 65.01.

Immediate and irreparable injury will result if the State is required to wait until Alibi Drinkery can be fully heard in opposition to the State's request for temporary injunctive relief authorized by Minnesota Statutes section 8.31 and Executive Order 20-99. Alibi Drinkery has represented publicly that it would continue offering on-premises consumption of food or beverage to the public, and allow more than five members of the public in its restaurant, in violation of Executive Order 20-99. Alibi Drinkery's ongoing conduct is a continuing violation and a series of individual violations since Executive Order 20-99 went into effect.

Given Defendant's ongoing and defiant violations of Executive Order 20-99, there is insufficient time to provide Defendant the ability to negotiate a time for a hearing or fully

respond in writing. Nevertheless, the Minnesota Attorney General's Office has given/attempted to give notice of its motion to Defendant and does not oppose Defendant appearing for hearing so long as the State's Motion is heard expeditiously and in manner that does not prevent effective temporary relief.

The State has met all required elements for a TRO enjoining Alibi Drinkery from violating Executive Order 20-99 and providing for on-premises consumption of food and beverages and allowing more than five members of the public in its restaurant at one time. Accordingly, the Court should grant the State's Motion for a TRO and schedule a TI hearing at the earliest practical time.²⁰ Minn. R. Civ. P. 65.01 (If a TRO is granted without notice to an opposing party, "the motion for a temporary injunction shall be set down for hearing at the earliest practicable time...and when the motion comes on for hearing, the party who obtained the [TRO] shall proceed with the application for a temporary injunction.")

CONCLUSION

For all of the above reasons, the State respectfully requests that the Court grant its *Ex Parte* Motion for a Temporary Restraining Order and Temporary Injunction and award the State the entirety of the temporary relief it seeks, as detailed in its accompanying proposed order.

²⁰ Despite the requirements for security set forth in Minn. R. Civ. P. 65.03(a) and Minn. Stat. § 570.041, subd. 1, the State is entitled to temporary injunctive relief without the giving of a security or bond. *See* Minn. Stat. § 574.18 ("No undertaking or bond need be given upon any appeal or other proceeding instituted in favor of the state . . ."); *State v. Nelson*, 189 Minn. 87, 89-90, 248 N.W. 751, 752 (1933) (recognizing the term "proceeding" includes "every proceeding before a competent court in the due course of the proper administration of justice and which is to result in any determination.").

Dated: December 17, 2020

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MINN. STAT. § 549.211 ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211 (2020).

/s/ Elizabeth Odette
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