

STATE OF MINNESOTA
COUNTY OF FARIBAULT

DISTRICT COURT
FIFTH JUDICIAL DISTRICT

Case Type: Civil

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

Court File No. 22-CV-20-703

Plaintiff,

vs.

Veteran Enterprises, Ltd. d/b/a Carlson Event
Center,

**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 as extended and modified by Executive Order 20-103, brings this *Ex Parte* Motion for a Temporary Restraining Order and Temporary Injunction against Defendant Veteran Enterprises, Ltd. d/b/a Carlson Event Center (collectively hereinafter "Carlson Event Center").

INTRODUCTION

In blatant disregard for the safety measures put into place by Governor Tim Walz during a global pandemic, Carlson Event Center is determined to hold a "New Years Eve Bash" from 8pm on December 31, 2020 until 2am on January 1, 2021. In doing so, Defendant is not only threatening to violate the law but is also threatening to place 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 generally, and Faribault County where Defendant operates more specifically, are dangerously high. Concert halls, performance venues, and other indoor venues providing events and entertainment—where individuals congregate in enclosed spaces for extended periods of time to mingle, drink, and dance indoors—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 Emergency Executive Order 20-99 as extended and modified by Executive Order 20-103 (hereinafter, collectively, “Modified Executive Order 20-99”) 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 reflects 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 pandemic, but the virus continues to spread, and the need for emergency preventative measures remains in order to protect public health and safety.

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 Noah Lewellen (“Lewellen Aff.”), Exhibit 2.

COVID-19 kills people. In Minnesota alone, as of December 29, 2020, COVID-19 has already caused at least 5,321 deaths. 413,107 confirmed and probable cases have been reported across the state with 28,901 of those positive cases reported in the first week of December alone.²

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 Faribault County, at least 10 individuals have passed away due to COVID-19 and 886 have tested positive.⁴ Moreover, in Faribault County, the 14-day case rate per 10,000 people has jumped dramatically from 46.06 for the reporting period of October 18, 2020 to October 31, 2020, to 141.77 for the reporting period of November 29, 2020 to December 12, 2020.⁵

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. Surging COVID-19 cases are pushing Minnesota's hospital system to a critical point.⁶ Due to

² *Situation Update for COVID-19, Updated December 29, 2020*, MINN. DEPT. OF HEALTH, <https://www.health.state.mn.us/diseases/coronavirus/situation.html>. (Lewellen Aff., Ex. 3) (positive case by date data).

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

⁴ *See* Lewellen Aff. Ex. 3 (County level data).

⁵ 14-day COVID-19 Case Rate by County, (updated 12/24/2020), MINN. DEPT. OF HEALTH available at <https://www.health.state.mn.us/diseases/coronavirus/stats/wschoo1.pdf> (Lewellen Aff. Ex. 11.)

⁶ 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/> (Lewellen Aff. Ex. 10.)

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.⁷

COVID-19 can easily be spread through respiratory droplets exhaled into the air, especially by those individuals not wearing face coverings. (Danila Aff. at ¶4.) And while face coverings are helpful in reducing those airborne droplets, masks are not perfect,⁸ and additional factors, like heavy breathing associated with exertion, loud talking or yelling, and extended close contact with individuals from other households all contribute to the community spread of COVID-19 among even masked individuals. (*Id.*) Thus, entertainment or event activities in indoor venues in Minnesota continue to pose substantial risks to public health and safety.

Venues hosting indoor events and entertainment, particularly those that permit on-premises consumption of food or beverage, 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 venues while talking. (*Id.*) Indoor venues 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

⁷ *Id.*

⁸ Ueki et al., *Effectiveness of Face Masks in Preventing Airborne Transmission of SARS-CoV-2*, 5 MSPHERE 5 (Sept./Oct., 2020), available at <https://msphere.asm.org/content/5/5/e00637-20> (Lewellen Aff., Ex. X.)

indoor venues later at night when individuals are more prone to move about and mingle within these establishments, and even more so when the establishment encourages dancing. (*Id.*) Dancing, in particular, is dangerous because the science shows that people in proximity to one another, breathing heavily and exerting themselves increases the risk of community spread of COVID-19. (*Id.*) All of these factors make indoor venues providing events or entertainment high risk for the easy transmission of COVID-19. (*Id.*)

Researchers in Korea have already studied the consequences of prematurely reopening indoor entertainment venues. One such study found that the reopening of night clubs in Seoul during a “postpeak period” resulted in “superspreading related to visiting nightclubs in Seoul” that had the “potential to spark a resurgence of cases in South Korea.” (Lewellen Aff., Ex. 12.) The researchers identified 67 individuals who had gone to night clubs and subsequently tested positive, and, alarmingly, researchers identified an additional 51 people who appear to have been subsequently infected by the original clubgoers. (*Id.*)

Studies involving analogous situations in restaurants underscore just how virulent COVID-19 is. For example, one study examined COVID-19 transmission in a bar during a St. Patrick’s Day celebration in Vietnam. (Lewellen Aff., Ex. 13.) 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. 15.) 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 including one case who sat 21 feet away from the infector for only 5 minutes. (*Id.*, Ex. 14)

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. (Danila Aff. 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 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 public health safety precautions, and in part by placing restrictions on activities that are more likely to result in spread of the virus (e.g. large events and fully occupied restaurants with people from different households congregating in close proximity). (*Id.* at ¶5.) Nevertheless, Minnesota is experiencing some of the highest numbers of COVID-19 cases since the beginning of the pandemic. (*Id.* at ¶4.) Pursuant to his emergency authority, Governor Walz is acting to slow the spread of COVID-19 to protect the health and safety of Minnesotans. The restrictions imposed by Modified Executive Order 20-

99 have been deemed necessary by the Governor to preserve public health throughout Minnesota, including in Freeborn County.

II. GOVERNOR WALZ ISSUED MODIFIED EXECUTIVE ORDER 20-99 TO TEMPORARILY PROHIBIT VENUES PROVIDING INDOOR ENTERTAINMENT AND EVENTS FROM OPENING TO THE PUBLIC 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-19.⁹ The peacetime emergency was most recently extended and approved by the Executive Council until at least through January 13, 2021, pursuant to Executive Order 20-100.¹⁰

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 “venues providing indoor events and entertainment such as . . . concert halls . . . [and] performance venues . . . are closed to ingress, egress, use, and occupancy by members of the public” until December 18, 2020 at 11:59 p.m.¹¹

On December 16, 2020, Governor Walz issued Executive Order 20-103 which, in relevant part, extended Executive Order 20-99’s provisions, including Executive Order 20-99’s prohibition on the opening of venues providing indoor events and entertainment to the public, and its enforcement provisions, to January 10, 2021.¹² In issuing Executive Order 20-103, Governor Walz

⁹ See Executive Order 20-99 at 2, available at <https://www.leg.mn.gov/archive/execorders/20-99.pdf>.

¹⁰ See Executive Order 20-100, available at https://mn.gov/governor/assets/EO%2020-100%20Final%20Signed%20and%20Filed_tcm1055-458402.pdf.

¹¹ Executive Order 20-99 ¶7.c.iii.D.

¹² Executive Order 20-103 ¶1.

noted improvements in Minnesota’s infection rate, due, in part to the restrictions of Executive Order 20-99, but Governor Walz also specifically considered the “alarming levels of community spread” of the virus.¹³ Modified Emergency Executive Order 20-99 prohibits venues from providing indoor events and entertainment, but modified Executive Order 20-99 to allow for outdoor events, with restrictions.¹⁴

Executive Orders 20-99 and 20-103 were promulgated by the Governor under the authority of Minnesota Statutes section 12.21, subdivision 3, clause (1), were approved by the Executive Council, and filed in the Office of the Secretary of State.¹⁵ Thus, pursuant to Minnesota Statutes section 12.32, Executive Orders 20-99 and 20-103 have the full force and effect of law during the peacetime emergency. Moreover, Modified 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.”¹⁶

III. CARLSON EVENT CENTER HAS THREATENED TO VIOLATE MODIFIED EXECUTIVE ORDER 20-99

Carlson Event Center has advertised and publicly represented that it will hold a “New Years Eve Bash” on December 31st for “all ages,” encouraging attendees to “bring your own beer and liquor,” and “B.Y.O.B.” (i.e., Bring Your Own Beverages):

¹³ *Id.* at 1.

¹⁴ Executive Order 20-103 at 6.

¹⁵ Executive Order 20-99. at 3; Executive Order 20-103 at 3.

¹⁶ Executive Order 20-99 at ¶10; Executive Order 20-103 at ¶1.

CARLSON EVENT CENTER *Dec. 31st New Year Eve.*

ALL AGES WELCOME

\$25

Handwritten signature



PRESTIGIO DEL NORTE

Lleva tu propia cerveza y licor



B.Y.O.B.



WINNEBAGO, MN

3203303702

132 1st Ave. S.E



(Siliciano Aff., Ex. C.) The advertisement touts that the band Prestigio del Norte will perform live at the event, and describes the “bash” as being held from 8pm to 2am. (*Id.*) The advertisement indicates there will be a \$25 fee that attendees must pay to enter. (*Id.*)

The individual who posted the advertisement told the Attorney General’s Office that he had been hired by Carlson Event Center’s owner, Garth Carlson, to advertise the event on Facebook. (*Id.* at ¶4.) The event’s Facebook page indicates that this event is “gran baile de año nuevo,” a “big new year’s dance.” (*Id.*, Ex. A.)

On December 29, 2020, the Attorney General’s Office attempted to contact Carlson Event Center representatives Garth Carlson and Megan Zimmerman by phone and by email, but the Office’s voicemails and emails were not returned. (Lewellen Aff. at ¶3.) On the same day, the Attorney General’s Office sent Carlson Event Center representatives Garth Carlson and Megan Zimmerman an emailed letter explaining Modified Executive Order 20-99 and requesting that Carlson Event Center comply with the Order and provide a response by noon on December 30, 2020. (Lewellen Aff. at ¶3, Ex. 1.) The Office did not receive a response. (Lewellen Aff. at ¶3.)

Governor Walz’s Emergency Executive Orders 20-99 and 20-103 were issued to slow the community spread of COVID-19 and thereby protect public health and safety. (Danila Aff., ¶ 12.) 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 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 Modified Executive Order 20-99, and has brought this action to enjoin Carlson Event Center’s threatened violations of Modified Executive Order 20-99..

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER AND A TEMPORARY INJUNCTION ARE APPROPRIATE TO ENJOIN CARLSON EVENT CENTER FROM VIOLATING MODIFIED EXECUTIVE ORDER 20-99.

Temporary injunctive relief should be issued upon a showing by the State that Carlson Event Center “has violated, or is about to violate” Modified 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

Here, the State brings this law enforcement action against Carlson Event Center to “prevent and restrain” its promised violations of Modified Executive Order 20-99, by opening to the public for an indoor concert and dance event. *See* Minn. Stat. § 8.31, subd. 3 (providing “the courts of this state are vested with jurisdiction to prevent and restrain violations”). Modified 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

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 Carlson Event Center cannot legitimately dispute that it owns and operates a venue offering indoor events and entertainment that is subject to Modified Executive Order 20-99, which may be enforced by the Attorney General pursuant to Minnesota Statutes section 8.31 and statutorily authorizes the Attorney General to, among other things, “sue for and have injunctive relief . . . against any . . . threatened violation.” *See* Minn. Stat. § 8.31, subd. 3.

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) Carlson Event Center “is about to” violate Modified 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, Carlson Event Center has willfully advertised that it will host an indoor concert in blatant violation of Modified Executive Order 20-99, despite repeated attempts at education by the Attorney General’s Office. (Lewellen Aff. ¶3.) Consequently, the Court should temporarily enjoin Carlson Event Center from violating Modified Executive Order 20-99 and endangering public health and safety by opening to the public for indoor events and entertainment.

Lastly, the temporary injunctive relief the State requests would fulfill the purposes of Modified 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 Modified 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” and address the lingering dangers of COVID-19. (Executive Order 20-99 at 3; Executive Order 20-103 at 1.) Accordingly, the Court should grant the State’s motion for temporary injunctive relief preventing Carlson Event Center from violating Modified Executive Order 20-99 and opening to the public for indoor events and entertainment.

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

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 the State requests. 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. Modified 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 Modified Executive Order 20-99. *See* Minn. Stat. § 8.31, subds. 3, 3a; Executive Order 20-99 at ¶ 11. Defendant has threatened to violate the Order, including but not limited to opening to the public for indoor events and entertainment. 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, historically, complied with Executive Order 20-99 and Modified Executive Order 20-99, 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 Orders 20-99 and 20-103 were 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 ¶¶8-11; Executive Order 20-103 at 1.) Modified Executive Order 20-99 seeks to restrict activities that present the greatest risk to facilitating rampant community spread of COVID-19, even as infections grow dangerously higher. (*Id.*) The virus appears to spread most easily between people indoors, in close contact and often unmasked for extended periods of time, (*Danila Aff.* at ¶11), and those situations are precisely what Defendant’s conduct

threatens to foster. Compliance with Modified Executive Order 20-99 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 until January 10, 2021. Because the public health and safety of Minnesotans are threatened by Defendant's actions in the absence of 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 there is overwhelming evidence that Defendant intends to host a public indoor "New Years Eve Bash" in clear violation of Modified Executive Order 20-99. Defendant has declined all contact from the Attorney General's Office attempting to provide education about Modified Executive Order 20-99 and restore compliance. (Lewellen Aff. at ¶3.) Defendant has, however, continued to advertise the upcoming event via social media. (Siliciano Aff. at ¶¶2-3, Exs. A-C.)

Modified 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.

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). 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 Modified Executive Order 20-99.¹⁹ Indeed, multiple courts throughout the state have already issued rulings

¹⁸ Moreover, nothing in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S.Ct. 63 (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. Instead, the *Roman Catholic* Court struck down an executive order that was not content-neutral on its face and directly targeted religious institutions. *Roman Catholic* at *67. No such provision is before this Court today. Thus, any attempted suggestion to the contrary by Defendant is wrong as a matter of law.

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

finding that the State was likely to succeed on the merits against defiant restaurants, and every court that has examined the State's requests for injunctive relief in similar cases has granted that relief. (Lewellen Aff., Ex. 8 (orders granting TROs in Stearns, Wabasha, Polk, Ramsey, Dakota, Right, and Scott counties); Ex. 9 (orders finding against defendants attacking the constitutionality of the governor's executive orders)).

Modified 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 temporarily prohibits venues providing indoor events and entertainment from opening to the public. The Order's prohibitions are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31; see, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010) ("The liberties protected by substantive due process do not include economic liberties."); see also *Henry v. DeSantis*, No. 20-CV-80729, 2020 WL 2479447, at *7 (S.D. Fla. May 14, 2020) ("Time and again, the Supreme Court has determined that there is no fundamental right to a job, or right to work").

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).

Defendant is openly threatening to violate Modified Executive Order 20-99. Because the Order has the force and effect of law, passes constitutional muster, and is about to be 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 Modified Executive Order 20-99 to slow the spread of a deadly infectious disease. Defendant has advertised that it will violate the Order's safety restrictions by opening to the public for a "New Years Eve Bash" from 8pm to 2am. Public policy clearly weighs in favor of temporary injunctive relief that requires Defendant to temporarily close to the public in accordance with Modified 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 Modified Executive Order 20-99. Indeed, the State only requests that Defendant conform its conduct to that which is expected of other similarly-situated indoor venues providing events or entertainment 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 CARLSON EVENT CENTER 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 Carlson Event Center 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 Carlson Event Center can be fully heard in opposition to the State's request for temporary injunctive relief authorized by Minnesota Statutes section 8.31 and Modified Executive Order 20-99. Carlson Event Center has represented publicly that it will hold a "New Years Eve Bash" on Thursday, December 31, 2020 and open to the public. Carlson Event Center's ongoing advertisement of the event is a continuing threatened violation of Modified Executive Order 20-99.

Given Defendant's ongoing and flagrant threatened violations of Modified 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 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. Indeed, the State has made multiple attempts at communicating with Defendant to discuss the impending action, (Lewellen Aff. at ¶3),

and has offered to provide Defendant with courtesy copies of pleadings and notices from the Court regarding hearing dates and times. (Lewellen Aff. at ¶20.)

The State has met all required elements for a TRO enjoining Carlson Event Center from violating Modified Executive Order 20-99 and opening to the public for indoor events and entertainment. 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 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.

Dated: December 30, 2020

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/s/ Noah Lewellen

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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.”).

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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/ Noah Lewellen

NOAH LEWELLEN