

STATE OF INDIANA

MARION COUNTY SUPERIOR/CIRCUIT COURT

COUNTY OF MARION

CAUSE NO.:

**BAR INDY LLC,
D/B/A TIKI BOBS CANTINA,**

**REVEL BAR INDY LLC,
D/B/A INVY NIGHTCLUB,**

**ISENTARK ENTERTAINMENT, LLC,
D/B/A COACHES TAVERN,**

**BEMbars, INC.,
D/B/A COURTSIDE CONVENIENCE,**

**R&D COMPANIES, INC.,
D/B/A JOES GRILL CASTLETON,**

**WHISTLE STOP INN INC.,
D/B/A THE WHISTLE STOP INN,**

**CLASSIC 46, INC.,
THAT PLACE BAR & GRILL,**

**TAD INDY INC.,
D/B/A TAPS AND DOLLS,
AFTER 6 LOUNGE,
JOKERS COMEDY CLUB,
247 SKY BAR,**

**NEW JOURNEY, LLC,
D/B/A WHISKEY BUSINESS LAWRENCE,**

**I2V, LLC,
D/B/A WHISKEY BUSINESS SOUTHPORT,**

**KORE ENTERPRISES, INC.,
D/B/A AVERAGE JOE'S SPORTS PUB,
ROCK LOBSTER,
MINESHAFT SALOON,**

**BASEY LLC,
BASEY'S DOWNTOWN,**

MILO ENTERTAINMENT LLC,

D/B/A THE RED ROOM,

**3135 HOLDINGS INC.,
D/B/A MICKIE'S PUB,**

**D & D LUGAR INC.,
D/B/A SPORTS PAGE LOUNGE,**

and Those Similarly Situated,

PLAINTIFFS,

v.

CITY OF INDIANAPOLIS,

JOE HOGSETT,

(in his official capacity as
Mayor of the City of Indianapolis, IN),

MARION COUNTY PUBLIC HEALTH DEPARTMENT,

and

DR. VIRGINIA CAINE,
(in her official capacity as
Director and Chief Medical
Officer),

Defendants.

**VERIFIED COMPLAINT FOR DAMAGES, DECLARATORY JUDGMENT, AND
PRELIMINARY AND PERMANENT INJUNCTION**

Now comes BAR INDY LLC, D/B/A TIKI BOBS CANTINA, REVEL BAR INDY
BAR INDY LLC, D/B/A INVY NIGHTCLUB, ISENTARK ENTERTAINMENT, LLC, D/B/A
COACHES TAVERN, BEMbars, INC., D/B/A COURTSIDE CONVENIENCE, R&D
COMPANIES, INC. D/B/A JOES GRILL CASTLETON, WHISTLE STOP INN INC., D/B/A
THE WHISTLE STOP INN, CLASSIC 46, INC., D/B/A THAT PLACE BAR & GRILL, TAD
INDY INC. D/B/A TAPS AND DOLLS, AFTER 6 LOUNGE, JOKERS COMEDY CLUB, 247

SKY BAR, NEW JOURNEY, LLC D/B/A WHISKEY BUSINESS LAWRENCE, I2V, LLC, D/B/A WHISKEY BUSINESS SOUTHPORT, KORE ENTERPRISES, INC., D/B/A AVERAGE JOE'S SPORTS PUB, ROCK LOBSTER, MINESHAFT SALOON, BASEY LLC, D/B/A BASEY'S DOWNTOWN, MILO ENTERTAINMENT LLC, D/B/A THE RED ROOM, 5135 HOLDINGS INC., D/B/A MICKIE'S PUB, and D & D LUGAR INC., D/B/A SPORTS PAGE LOUNGE (collectively referred to as the "Plaintiffs"), on behalf of themselves and those similarly situated, by and through counsel, and bring this Verified Complaint for Damages, Declaratory Judgment, and Preliminary and Permanent Injunction, against Defendants City of Indianapolis, Joe Hogsett, in his official capacity as Mayor of the City of Indianapolis, the Marion County Public Health Department, and Dr. Virginia Caine, in her official capacity as Director and Chief Health Officer of the Marion County Public Health Department (collectively referred to as the "Defendants").

INTRODUCTION

1. All Plaintiffs are businesses located in the City of Indianapolis, Marion County, IN. These Plaintiffs, like the rest of the citizens and businesses of this jurisdiction, have been adversely affected by the COVID-19.
2. During this public health crisis, Plaintiffs have cooperated with health authorities and directives to prevent and control the spread of infectious diseases.
3. At all times relevant hereto, Plaintiffs operated their businesses in accordance with every Order issued by the Governor of Indiana and the Marion County Public Health Department.

4. During a public health crisis, governments, like the city of Indianapolis and State of Indiana, are afforded some emergency powers to reasonably address public health and safety issues, including pandemics such as COVID-19.
5. On March 6, Governor Eric Holcomb issued Executive Order 20-02, declaring a public health emergency in the State of Indiana. As part of the response to the COVID-19 pandemic, Governor Eric Holcomb issued Executive Order 20-04 on March 16, 2020, ordering bars and restaurants to be closed to in house patrons beginning March 16, 2020 at 9:00 p.m.
6. From March 16 to May 1, the State of Indiana, as well as most of the country, was in a state of virtual complete lockdown. Only “essential businesses” were allowed to remain open and many social activities and travel were discouraged.
7. During the lockdown, the narrative from federal, state and local government officials and the Center for Disease Control was that the country needed to “flatten the curve,” referring to statistical charts which showed spikes in rates of infection, hospitalizations and deaths. The reasoning behind “flattening the curve” was to prevent hospital systems from being overrun with critical patients at a time when there were massive shortages on supplies, medical equipment and staff. Further, hospitals generally had no experience in treating COVID-19 patients.
8. As the curve “flattened,” on May 1st, Governor Holcomb announced a five-stage plan called “Back on Track Indiana” detailing the gradual reopening of business sectors in Indiana. At that time, Phase 5, the final stage of completely reopening the state without restrictions, was projected to be July 4, 2020.

9. The initial statewide lockdown was retroactively deemed Stage One. Stage Two began on May 4th, with retail and commercial businesses allowed to operate at 50% capacity and mall common areas restricted to 25% capacity.
10. A week after entering Stage 2, restaurants and bars with food could open at 50% capacity for dine-in service. Bar seating and “Bars and Nightclubs” (presumably establishments that did not serve food) remained ordered closed.
11. Stage 4 of the Governor’s plan started on June 12th with bars and nightclubs finally being allowed to open at 50% capacity. Bar seating was also permitted at 50% capacity. Dining room service for restaurants and bars with food service were allowed to operate at 75% capacity as long as social distancing was observed.
12. Similarly, consistent with the Governor’s plan, Virginia Caine, M.D., Director and Chief Medical Officer of the Marion County Health Department, in conjunction and/or with the support of the City of Indianapolis and Mayor Joe Hogsett, issued Order 16-2020 on June 11, 2020. Public Health Order 16-2020 allowed bar seating, bars and nightclubs to reopen at 50% capacity, but delayed opening to a week later, effective June 19, 2020.
13. After Indianapolis bars and nightclubs were allowed to open for about a month, however, Dr. Caine reversed her course and shut down Indianapolis bars and nightclubs again effective July 24, 2020, issuing Public Health Order 22-2020, which stated:

Bars and nightclubs must be closed. Bars and nightclubs are defined as all indoor establishments that serve alcoholic beverages for consumption on the premises and/or that cater to dancing or social interactions among patrons, other than a restaurant or club covered by Paragraphs 9 or 10 of this Order.

14. Public Health Order 22-2020 also ordered that all restaurants (and presumably all bars that qualified as restaurants) must **close between the hours of 12:00 a.m. to 5 a.m. nightly.**
15. Public Health Order 22-2020 did not cite local health data to justify the closings, but rather cited “the recent increase of new cases *nationwide* with a trend toward cases in a younger population.” (Emphasis added).
16. Dr. Caine, in conjunction with Joe Hogsett, later issued Public Health Order 25-2020 in which she clarified the meaning of “bars and nightclubs” and made a distinction between restaurants that were “age restricted” and “not age restricted.” The order read in pertinent part:

Restaurants or retail food establishments that are not age-restricted, and were not age-restricted as of March 1, 2020, may remain open for indoor dining but must restrict capacity to 50%. All restaurants or retail food establishments that are restricted to 21 years of age and older and were functioning as a full service restaurant or retail food establishment as of March 1, 2020, may remain open for indoor dining but are limited to 25% capacity inside.

* * *

Bars and nightclubs, including any establishment that met the definition of a bar or nightclub as of March 1, 2020, must be closed. Bars and nightclubs are defined as all indoor establishments that serve alcoholic beverages for consumption on the premises, restrict the age of patrons to 21 years or older, and/or that cater to dancing or social interactions among patrons, other than a restaurant or club covered by Paragraphs 9 or 10 of this Order.

17. Indianapolis bar and night club owners were caught completely off guard by the re-closing order and given no metric by which they, or their employees, might expect to reopen again.¹
18. Public Health Order 25-2020 effectively penalized establishments that were, by their own choice, age-restricted to serving adults by either restricting their capacity or closing them altogether without allowing owners to adapt their business plan in order to survive.
19. Effective September 8, 2020, Dr. Caine issued Order 29-2020, modifying order 25-2020. This order, which is currently in effect, is **still more restrictive and punitive** than the Governor's current order. Order 29-2020, in relevant parts applicable to Plaintiffs, states as follows in relevant part:

Restaurants or retail food establishments that are not age-restricted, and were not age-restricted as of March 1, 2020, may remain open for indoor dining at 50% capacity. All restaurants or retail food establishments that are restricted to 21 years of age and older and were functioning as a full service restaurant or retail food establishment as of March 1, 2020, may remain open for indoor dining but are limited to 25% capacity inside.

* * *

Bars and nightclubs, including any establishment that met the definition of a bar or nightclub as of March 1, 2020, may reopen at 25% capacity for indoor seating and 50% capacity for outdoor seating. Bars and nightclubs are defined as all indoor establishments that serve alcoholic beverages for consumption on the premises, restrict the age of patrons to 21 years or older, and/or that cater to dancing or social interactions among patrons, other than a restaurant or club covered by Paragraphs 9 or 10 of this Order.

- a. All bar-top seating must remain closed, but tables within the bar area may be open for table service.
- b. Restricted retail food establishments, as described above in ll(a), with

¹<https://www.indystar.com/story/entertainment/dining/bars/2020/07/24/indianapolis-coronavirus-bars-close-restaurants-indoor-dining-restrictions/5496749002/>

- full food service menus may also offer carry-out food or beverage as long as they follow all MCPHD carry-out guidelines.
- c. Live entertainment is not permitted.
- d. Dance floors must remain closed.
- e. Gentlemen's and Ladies' Clubs are will be considered bars.
- f. Hooka and cigar bars will be considered bars.
- g. Individuals or groups must keep a distance of six (6) feet apart at all times. Air ventilation should be increased to maximum capacity, or at least 6 air changes per hour.

* * *

All restaurants must be closed and cleared of all customers between the hours of 12:00 AM and 5:00 AM nightly.

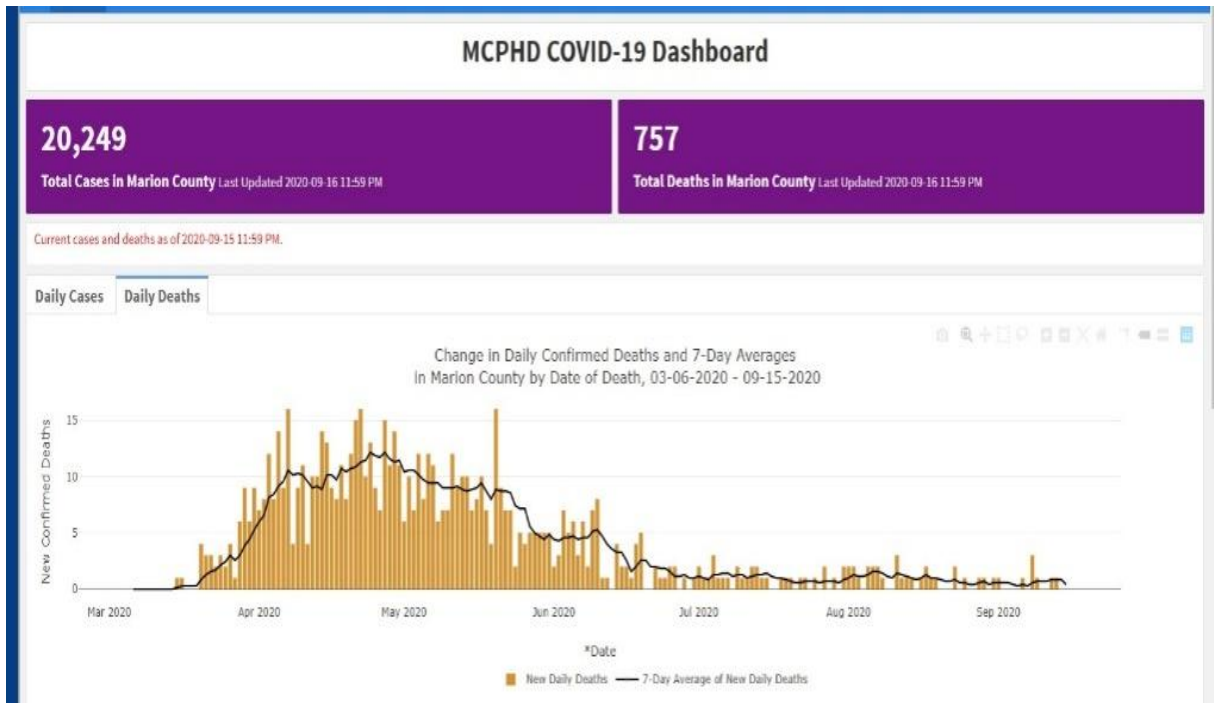
20. At the time of the filing of this complaint, the State of Indiana is currently in a newly added “Stage 4.5.” Stage 4.5 is currently scheduled to last from July 4th to September 25th and continues the same capacity requirements statewide as Stage 4.

21. The current differences between the Governor’s plan and the current Marion County Public Health Order are as follows:

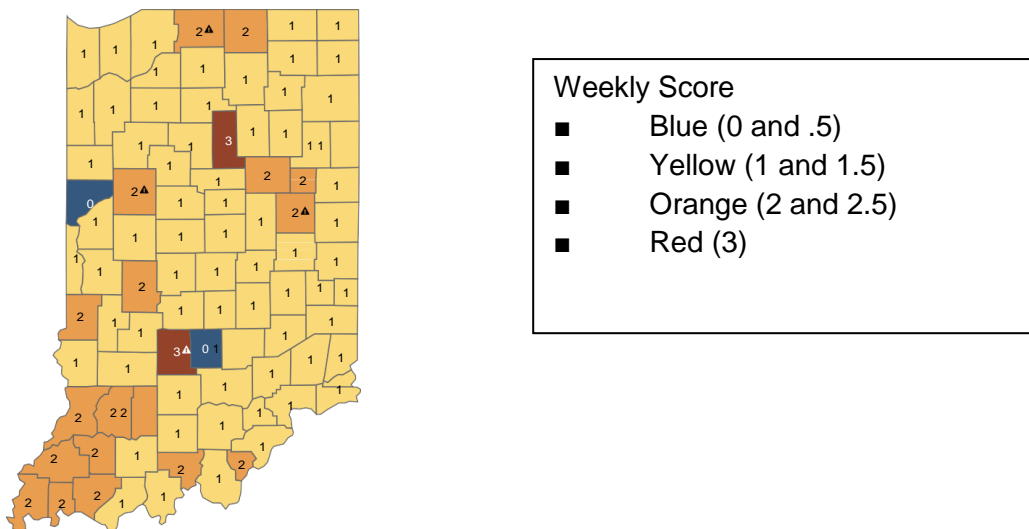
	Back on Track Indiana Stage 4.5	Marion County Public Health Order 29-2020
Restaurants and Bars with Dining Service	75% Capacity	Restaurants (must have been functioning as a restaurant March 1, 2020): <ul style="list-style-type: none"> ○ Not age restricted:50% ○ Age Restricted: 25%
Bars and Nightclubs	50% Capacity	25% Capacity
Bar Seating	50% Capacity	Not allowed
Other Restrictions		<ul style="list-style-type: none"> ○ No live entertainment ○ No dancing ○ Restaurants cannot be open between midnight and 5 a.m.

22. Phase 5, which will allow all businesses to operate at full capacity, including bars and nightclubs, was slated to begin on July 4, 2020, but now has a “Start Date to be Determined.”²
23. The Marion County Public Health Orders include no timetable or measurable metric giving business owners any idea of when their establishments may re-open to full capacity.
24. The Marion County Public Health Orders give no medical or scientific justification why Marion County should be treated differently than the rest of the State.
25. The Marion County Public Health Orders give no medical or scientific justification why bars and nightclubs are treated disparately from other restaurants and food and eating establishments.
26. The Marion County Public Health Orders give no medical or scientific justification why bars and nightclubs are treated disparately from other businesses where people gather such as the Indianapolis Public Library, shopping malls, private clubs and fraternal organizations, churches, campgrounds and youth summer day camps, community swimming pools, and gaming facilities, which are under Order 29-2020 currently allowed to operate at 50% capacity or higher.
27. The Marion County Public Orders do not provide a process for businesses to seek an amendment, variance or waiver based on actual risks posed to the public and to take in consideration any mitigation efforts establishments have made.
28. Per the Marion County Health Departments COVID-19 dashboard, deaths are significantly less than at the height of pandemic earlier in the year³:

² Source: https://backontrack.in.gov/files/Stage4.5_Aug-1_update.pdf



29. As of September 13, 2020, the State of Indiana’s COVID-19 dashboard shows that in terms of reported cases per 100,000 residents, Marion County is in line with most of the other counties in the State who do not have stricter restrictions⁴:



³ Source: <http://marionhealth.org/covid-19/>

⁴ Source: <https://www.coronavirus.in.gov/2393.htm>

30. As a result of the increased restrictions of Order 22-2020, 25-2020 and 29-2020, the Plaintiffs have lost significant, irreplaceable revenue, laid off employees, have incurred significant debt and are in eminent danger of permanent closure of their businesses.
31. The Marion County Public Health Orders cite as authority Indiana Code § 16-20-1-24, which states:
- a) Local health officers may order schools and churches closed and forbid public gatherings when considered necessary to prevent and stop epidemics.
 - (b) An individual who takes action under this section *shall comply with state laws and rules.*
(Emphasis added).
32. Indiana Code § 16-20-1-24 gives no authority for local health officers to regulate or close businesses indefinitely.
33. Indianapolis bars and restaurants, in addition to state sales tax, have paid food and beverage taxes that have financed the building and expansion of massive city projects including the Hoosier Dome, Indianapolis Convention Center and Lucas Oil stadiums and led to the revitalization and growth of Downtown Indianapolis.
34. There has been no meaningful dialogue or support from the Defendants to attempt to mitigate the severe financial consequences caused by the Public Health Orders.
35. In the past 6 months, dozens of Indianapolis bars and restaurants, many long time institutions of the city, have shut down permanently as a result of the COVID-19 restrictions, and many more are sure to close in the near future.

ARGUMENT

36. The police power afforded to governments to reasonably address public health and safety issues is not limitless.
37. The rights secured by the Indiana Constitution and United States Constitution do not disappear during a public health crisis.
38. The United States Supreme Court has recognized the fundamental constitutional right to engage in activities protected by the First Amendment to include the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.
39. Recently, Indiana’s Attorney General Curtis Hill’s Official Opinion 2020-6 was written in response to Governor Holcomb’s attempt to criminalize violation of a facemask mandate. The Opinion reads in pertinent part:

“It is elementary that the authority of the State to engage in administrative action is limited to that which is granted it by statute[.]” *Ind. State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 622 N.E.2d 935, 939 (Ind. 1993), *cert. denied* (1994); *see also Vehslage v. Rose Acre Farms, Inc.*, 474 N.E.2d 1029, 1033 (Ind. Ct. App. 1985) (“It is black-letter law that generally, administrative agencies are creatures of statute, and only the legislature has the broad power to provide for their creation. Administrative boards, agencies, and officers have no common law or inherent powers, but only such authority as is conferred upon them by statutory enactment.”). “Any act of an agency in excess of its power is *ultra vires* and void.” *Howell v. Ind.-Am. Water Co.*, 668 N.E.2d 1272, 1276 (Ind. Ct. App. 1996), *trans. denied* (1997). “To maintain the proper balance between the departments of government, the courts have power to confine administrative agencies to their lawful jurisdictions.” *Wilmont v. City of S. Bend*, 48 N.E.2d 649, 650 (1943).

* * *

Individual rights secured by the Constitution do not disappear during a public health crisis. Although the governor has powers under the EMDL, the General Assembly is limited by nondelegation principles in its ability to delegate its lawmaking powers to the governor and his agencies.

40. The Indiana Constitution and United States Constitution afford citizens equal treatment and equal protection under the law.
41. Public Health Orders 22-2020, 25-2020 and 29-2020's disparate treatment of bars and night clubs that serve food, beer, wine, and liquor for onsite consumption only is not narrowly tailored to achieve a compelling government interest.
42. Public Health Orders 22-2020, 25-2020 and 29-2020's disparate treatment of bars and night clubs that restrict patrons of 21 years of age or older lacks a real or substantial scientific relation to the spread of COVID-19. There is no justification that establishments that serve older people are more likely to spread the COVID-19 virus than establishments that serve children, such as Chuck E. Cheese Pizza.
43. Public Health Orders 22-2020, 25-2020 and 29-2020's disparate treatment of bars and nightclubs that did not serve food prior to March 1, 2020 lacks a real or substantial scientific relation to the spread of COVID-19. The March 1st deadline is an arbitrary cut off date that only serves to keep owners from adapting to survive.
44. Public Health Orders 22-2020, 25-2020 and 29-2020's disparate treatment of restaurants, bars and night clubs remain open after 12:00 midnight lacks a real or substantial scientific relation to the spread of COVID-19. There is no scientific evidence that COVID-19 is transmitted easier or is more deadly during any particular time of day.
45. Public Health Orders 22-2020, 25-2020 and 29-2020's disparate treatment of bars and nightclubs that serve alcohol instead of food lacks a real or substantial scientific

relation to the spread of COVID-19. There is no scientific evidence that people are more susceptible to the virus when they are drinking instead of eating.

46. Public Health Orders 22-2020, 25-2020 and 29-2020's disparate treatment of bars and nightclubs that features dancing lacks a real or substantial scientific relation to the spread of COVID-19. There is no scientific evidence that people are more susceptible to the virus when they are dancing as opposed to working out at a gym.

47. Public Health Orders 22-2020, 25-2020 and 29-2020's disparate treatment of bars and nightclubs that utilized bar seating instead of tables lacks a real or substantial scientific relation to the spread of COVID-19. There is no scientific evidence that people are more susceptible to the virus when they are sitting on a bar stool.

48. Defendants, by and through Public Health Order 22-2020, 25-2020 and 29-2020, exercised their police power in an unreasonable manner which illegally infringed upon the fundamental rights of the Plaintiffs.

49. Defendants, by and through Public Health Order 22-2020, 25-2020 and 29-2020, exercised their police power in an arbitrary and unreasonable manner which exceeded what was reasonably required for public safety.

50. Public Health Order 22-2020, 25-2020 and 29-2020 exceed the limits of authority of its powers in regulating businesses by abrogating Indiana state law.

51. Public Health Order 22-2020, 25-2020 and 29-2020 is overly broad in that it has no definitive termination date, and no calculable metric to determine when the orders should terminate.

52. Public Health Order 22-2020, 25-2020 and 29-2020 derives its authority from "emergency powers" when no "emergency" currently exists. The COVID-19 state of

emergency was declared over 6 months ago, and COVID-19 is likely to remain active for the foreseeable future, and is in fact now, the “new normal.”

53. Occupancy limits are based on fire code which are consistent throughout the State of Indiana. Therefore, the efficacy of efforts to limit the virus’ spread based on a limited percentage of occupancy would be equally effective regardless of which county a person is in.

54. There has been adequate time for government officials to stabilize health systems, implement testing, research, educate, and create contact tracing procedures.

55. It is no longer the appropriate role of local municipal government and unelected health officials to dictate policy and regulate business and industry. That is the job of the State Legislature.

56. This lawsuit challenges the Defendant’s current Public Health Order 29-2020, which arbitrarily and unreasonably closes and/or limits Plaintiffs’ businesses in derogation of state law. It also seeks to enjoin enforcement of the provisions by the City of Indianapolis, Mayor Joe Hogsett and the Marion County Health Department and Dr. Virginia Caine.

57. Without injunctive relief, Plaintiffs and those similarly situated, will suffer irreparable harm, which includes, but is not limited to, the following: loss of their State and Constitutional rights and freedoms; loss of property and employees; and other losses which would result in the permanent closure of their businesses.

58. Plaintiffs, all well respected businesses and their owners, bring this lawsuit under the Federal and Indiana Constitution, 42 U.S.C. § 1983 and corresponding State law.

They seek declaratory relief, injunctive relief, and damages from the unconstitutional orders.

PARTIES

Tiki Bob's Cantina

59. Plaintiff, Bar Indy LLC d/b/a Tiki Bob's Cantina, owned by Jason Stellema and Jason Jenkins, has been in business since 2010.
60. Plaintiff's normal hours of operation are 8 p.m. to 3 a.m. Friday and Sunday, and 10 p.m. to 3 a.m. Sunday, Wednesday, and Thursday.
61. Prior to March 1, 2020, Tiki Bob's Cantina was an age restricted establishment that served both food and alcohol.
62. As a result of the pandemic and subsequent orders of the Defendants, Tiki Bob's Cantina estimates that they have lost over \$1,500,000.00 in irreplaceable revenue. They have exhausted all of the Payment Protection Program money received during the pandemic. Bills from rent, utilities, and overhead are depleting all cash reserves of the business as revenue has stopped.
63. Tiki Bob's Cantina has taken the following steps to ensure the public health and safety of its customers: purchasing personal protective equipment for employees, complying with CDC guidelines, requiring face coverings for all occupants, providing temperature checks, requiring employees to regularly submit health questionnaires and implementing strict sanitizing and disinfecting protocol.
64. Tiki Bob's Cantina has been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: the forced temporary closure, the current occupancy restrictions, restrictions on times of operation,

and their inability to adapt to food and alcohol restrictions have severely impacted their generation of revenue.

65. The affidavit of Jason Jenkins is attached as Exhibit A.

INVY Nightclub

66. Plaintiff, Revel Bar Indy LLC d/b/a INVY Nightclub, owned by Jason Jenkins, has been in business since January 2020.

67. Plaintiff's normal hours of operation are 10 p.m. to 3 a.m. and was open 2-3 nights per week.

68. Prior to March 1, 2020, INVY Nightclub was an age restricted establishment that served both food and alcohol.

69. As a result of the pandemic and subsequent orders of the Defendants, INVY Nightclub estimates that they have lost over \$1,500,000 in revenue. The financial impact on their business has been devastating. They currently have no cash reserves and have exhausted all of the Payment Protection Program Relief and Economic Injury Disaster Loan. They cannot pay rent or utilities as they are not generating enough revenue.

70. INVY Nightclub has taken the following steps to ensure the public health and safety of its customers: purchasing personal protective equipment for employees, complying with CDC guidelines, requiring face coverings for all occupants, providing temperature checks, requiring employees to regularly submit health questionnaires, and implementing strict sanitizing and disinfecting protocol.

71. INVY Nightclub has been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: the forced temporary closure, the current occupancy restrictions, restrictions on times of operation,

and restrictions on their ability to adapt to the food and alcohol restrictions have taken a financial toll on their business.

Coaches Tavern

72. Plaintiff, Isentark Entertainment, LLC d/b/a Coaches Tavern (hereinafter, “Coaches”), owned by Tom Sutton, has been in business since 2008.
73. Plaintiff’s normal hours of operation are 11 a.m. to 3 a.m. Monday through Saturday, and 2 p.m. to 3 a.m. Sunday.
74. Prior to March 1, 2020, Coaches Tavern was an age restricted establishment that served both food and alcohol.
75. As a result of the pandemic and subsequent orders of the Defendants, Coaches Tavern estimates that they have lost over \$300,000 in revenue from March 1st until May 31st during the period of total business shutdown. Coaches estimates that they have lost \$200,000 in revenue from May 31st to September due to current COVID-19 restrictions on limited capacity and the enforcement of no bar seating. Without any immediate relief, Coaches Tavern is facing severe debt and financial hardship.
76. Coaches Tavern has taken the following steps to insure the public health and safety of its customers: mandated masks for all occupants, and required COVID-19 testing and temperature screenings of employees.
77. Coaches Tavern has been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: the mandated shutdown of the establishment from March 16, 2020 to May 31, 2020 resulted in a massive loss in revenue, and the current capacity restrictions in Marion County have prolonged their financial difficulties.

78. The affidavit of Tom Sutton is attached as Exhibit B.

Courtside Convenience

79. Plaintiff, BEMbars, INC., d/b/a Courtside Convenience (hereinafter, “Courtside Convenience”), owned by Joel Bourke, has been in business for 22 years and owned by Bourke since 2018.

80. Plaintiff’s normal hours of operation are 11 a.m. to 3 a.m. seven days a week.

81. Prior to March 1, 2020, Courtside Convenience was an age restricted establishment that served both food and alcohol.

82. As a result of the pandemic and subsequent orders of the Defendants, Courtside Convenience’s sales are down 75% from \$1.2 million in 2019. They have struggled to pay monthly operation costs (such as lease, utilities, and payroll) during the closures and restrictions which have cost them \$22,000/month while sales are still down. Without any immediate relief, Courtside Convenience is on the brink of permanent closure.

83. Courtside Convenience has taken the following steps to insure the public health and safety of its customers: requiring daily temperature checks for employees, enforcing masks for all occupants, creating dining areas with sufficient space for social distancing, and adding additional sanitizing protocol between guests.

84. Courtside Convenience has been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: capacity restrictions and forced 12 a.m. closures, which have contributed to the loss of revenue for Courtside Convenience.

85. The affidavit of Joel Bourke is attached as Exhibit C.

Joe's Grille Castleton

86. Plaintiff, R&D Companies, Inc. d/b/a Joe's Grille Castleton (hereinafter, "Joe's"), owned by Ryan C. Nally, has been in business since 1992.
87. Joe's normal hours of operation are 11 a.m. to 3 a.m. seven days a week.
88. Prior to March 1, 2020, Joe's was an age restricted establishment that served both food and alcohol.
89. As a result of the pandemic and subsequent orders of the Defendants, Joe's loss of revenue in sales for this year is projected to be \$600,000. Their current financial situation is grim. Without any immediate relief, Joes Grille Castleton expects to not recover financially.
90. Joe's has taken the following steps to ensure the public health and safety of its customers: installed sanitizing stations around the establishment, requiring all employees to wear a mask, regularly monitoring the staff's temperature, and providing extra gloves for protection.
91. Joe's has been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020: being forced to operate at 25%-50% capacity and being forced to close at midnight have severely impacted their ability to maintain their financial stability.
92. The affidavit of Ryan Nally is attached as Exhibit D.

The Whistle Stop Inn

93. Plaintiff, Whistle Stop Inn Inc., d/b/a The Whistle Stop Inn, owned by Jessica Thompson, has been in business since July of 1999.

94. Plaintiff's normal hours of operation are 10 a.m. to 3 a.m. Monday through Saturday, and closed on Sunday.
95. Prior to March 1, 2020, The Whistle Stop Inn was an age restricted establishment that served both food and alcohol.
96. As a result of the pandemic and subsequent orders of the Defendants, The Whistle Stop Inn's financial situation is dire. From March of 2019 to August of 2019, The Whistle Stop Inn's gross monthly revenue was \$185,075.52. From March of 2020 to August of 2020, The Whistle Stop Inn's gross monthly revenue was \$0. The 6 month forced closure of The Whistle Stop Inn has left them in financial danger of permanent closure if they are not given any immediate relief.
97. The Whistle Stop Inn has taken the following steps to ensure the public health and safety of its customers: complying with all CDC regulations and recommendations, temporarily closing under the governor's orders, and currently operating at a limited capacity.
98. The Whistle Stop Inn has been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: the temporary closures of business and current orders to operate at limited capacity have had a detrimental impact on the finances of The Whistle Stop Inn.
99. The affidavit of Jessica Thompson is attached as Exhibit E.

That Place Bar and Grill

100. Plaintiff, Classic 46, Inc., d/b/a That Place Bar & Grill (hereinafter, "That Place"), owned by JR Johnson, has been in business since 2006.
101. Plaintiff's normal hours of operation are 11 a.m. to 3 p.m. seven days a week.

102. Prior to March 1, 2020, That Place was an age restricted establishment that served both food and alcohol.

103. As a result of the pandemic and subsequent orders of the Defendants, That Place's sales are currently down by 65% from last year due to restrictions of capacity. That Place also went on a 79 day period with zero revenue generated while under complete closure, and the 25% capacity that they are limited to now has further crippled their finances. Without immediate relief, they are merely waiting for permanent closure.

104. That Place has taken the following steps to ensure the public health and safety of its customers: requiring all occupants to wear masks, purchasing chemicals from Ecolab to kill viruses, and enforcing social distancing guidelines by spreading tables apart.

105. That Place has been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: the required midnight closure and the order to operate at 25% capacity have severely devastated That Place Bar & Grill's financial revenue.

106. The affidavit of JR Johnson is attached as Exhibit F.

Taps and Dolls, After 6 Lounge, Jokers Comedy Club and 247 Sky Bar

107. Plaintiffs, TAD Indy Inc., d/b/a Taps and Dolls, After 6 Lounge, Jokers Comedy Club, 247 Sky Bar, owned by Ryan Greb, have been in business since March of 2009.

108. Plaintiff normal hours of operation are 5 p.m. to 3 a.m. 365 days a year.

109. Prior to March 1, 2020, Taps and Dolls, After 6 Lounge, Jokers Comedy Club, and 247 Sky Bar were age restricted establishments that served both food and alcohol.

110. As a result of the pandemic and subsequent orders of the Defendants, Taps and Dolls, After 6 Lounge, Jokers Comedy Club and 247 Sky Bar have suffered extreme

losses to their financial revenue. They were unable to generate any revenue during their five months of closure due to the mandate. Currently, they are only able to operate at 25% capacity and fear they will not be able to financially recover. Without any immediate assistance or relief, they could face permanent closure.

111. Taps and Dolls, After 6 Lounge, Jokers Comedy Club, and 247 Sky Bar have taken the following steps to ensure the public health and safety of its customers: requiring masks for all occupants, enforcing social distancing by marking distances with decals, complying with all government guidelines, hiring extra staff to sanitize, and providing adequate cleaning supplies for staff.

112. Taps and Dolls, After 6 Lounge, Jokers Comedy Club, and 247 Sky Bar have been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follow: the discriminatory mandates barring them from opening beyond 25% capacity and the five month ordered closure have taken business away from them and severely hurt their financial state.

113. The affidavit of Ryan Greb is attached as Exhibit G.

Whiskey Business Lawrence and Whiskey Business Southport

114. Plaintiffs, New Journey, LLC d/b/a Whiskey Business Lawrence (hereinafter, “Whiskey Business Lawrence”) and I2V, LLC d/b/a Whiskey Business Southport (hereinafter, “Whiskey Business Southport”), both owned by Michael Doran, have been in business since 2009 and 2018, respectively.

115. Plaintiffs’ normal hours of operation are 11 a.m. to 3 a.m. seven days a week.

116. Prior to March 1, 2020, Whiskey Business Lawrence and Whiskey Business Southport were age restricted establishments that served both food and alcohol.

117. As a result of the pandemic and subsequent orders of the Defendants, both Whiskey Business Lawrence and Whiskey Business Southport have suffered extreme financial losses. Whiskey Business Lawrence sales are down by \$402,000 compared to last year's revenue, and Whiskey Business Southport sales are down by \$429,000 compared to last year's revenue. The restrictions on hours, capacity, live entertainment and gaming in bars have taken customers away from Whiskey Business locations to surrounding counties. Their financial reserves are depleting rapidly as the restrictions remain in place. Without immediate assistance or relief, they may face financial ruin.

118. Whiskey Business Lawrence and Whiskey Business Southport have taken the following steps to ensure the public health and safety of their customers: requiring masks for all occupants, requiring glove use in kitchens, providing additional hand sanitizing stations, and utilizing a fogging machine to disinfect more frequently.

119. Whiskey Business Lawrence and Whiskey Business Southport have been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: the limitations on capacity and operating hours, and the prohibition of live entertainment and gaming in bars have been the contributing factors that have led to the current financial struggles of these establishments.

120. The affidavit of Michael Doran is attached as Exhibit H.

Average Joe's Sports Pub, Rock Lobster, and Mineshaft Saloon

121. Plaintiffs, Kore Enterprises, Inc., d/b/a Average Joe's Sports Pub (hereinafter, "Average Joe's"), Rock Lobster, and Mineshaft Saloon, all owned by Robert Sabatini, have been in business since 1995, 1993, and 1992, respectively.

122. Average Joe's normal hours of operation are 5 p.m. to 3 a.m. Monday through Friday, and 11:30 p.m. to 3 a.m. Saturday and Sunday. Rock Lobster's normal hours of operation are 10 p.m. to 3 a.m. Fridays and Saturdays. Mineshaft Saloon's normal hours of operation are 9 p.m. to 3 a.m. Wednesday to Sunday.
123. Prior to March 1, 2020, Average Joe's, Rock Lobster, and Mineshaft Saloon were age restricted establishments that served both food and alcohol.
124. As a result of the pandemic and subsequent orders of the Defendants, Average Joe's, Rock Lobster, and Mineshaft Saloon have experienced extreme financial difficulties. As of September 1st, 2020, Average Joe's sales are down by \$225,500, Rock Lobster's sales are down by \$455,000, and Mineshaft Saloon's sales are down by \$54,500. They are merely surviving with the assistance of the Paycheck Protection Program and Economic Injury Disaster Loans, but without any other assistance or relief, they may not recover financially.
125. Average Joe's, Rock Lobster, and Mineshaft Saloon have taken the following steps to ensure the public health and safety of its customers: implementing temperature checks, adhering to mask requirements, complying with social distancing guidelines, and providing masks, hand sanitizer, and gloves to both patrons and employees.
126. Average Joe's, Rock Lobster, and Mineshaft Saloon have been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: the restricted bar and service seating, 25% limited capacity, enforced midnight closing, and the four month closure of Broad Ripple Avenue have crippled these establishment's ability to profit and devastated their financial reserves.
127. The affidavit of Robert Sabatini is attached as Exhibit I.

Basey's Downtown

128. Plaintiff, Basey LLC, d/b/a Basey's Downtown, owned by Greg Basey, has been in business since 1982.
129. Plaintiff normal hours of operation are 11 a.m. to 1 a.m., 7 days a week.
130. Prior to March 1, 2020, Basey's Downtown was a non-age restricted establishment that served both food and alcohol.
131. As a result of the pandemic and subsequent orders of the Defendants, Basey's Downtown sales have declined by 90%. Greg Basey estimates that they have lost \$450,000 because of the COVID-19 restrictions that have limited the establishment's ability to produce. If these restrictions remain in place, Basey fears that the financial situation will worsen. Without any immediate relief, Basey's Downtown could face permanent closure.
132. Basey's Downtown has taken the following steps to ensure the public health and safety of its customers: complying with all CDC guidelines, requiring occupants to wear masks, requiring food handlers to use gloves, providing hand sanitizer, and have contracted an outside sterilization service to routinely deep clean the establishment.
133. Basey's Downtown has been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: the mandated closures, restrictions on occupancy, and limits on operating hours have all majorly contributed to the financial devastation of Basey's Downtown.
134. The affidavit of Greg Basey is attached as Exhibit J.

The Red Room

135. Plaintiff, MILO Entertainment LLC., d/b/a The Red Room, owned by Chris Miller, has been in business for 20 years and under Miller's ownership since 2013.
136. Plaintiff normal hours of operation are 8 p.m. to 3 a.m. Wednesday through Sunday.
137. Prior to March 1, 2020, The Red Room was an age restricted establishment that served both food and alcohol.
138. As a result of the pandemic and subsequent orders of the Defendants, The Red Room's revenue is down by 65% since last year. They have been utilizing their outdoor rooftop to accommodate social distancing, but this has largely been dependent on weather and will be an unsustainable approach for the coming seasons. Their financial devastation was further exacerbated during the period of rioting when The Red Room was forced to shut down, and current limits on capacity are merely prolonging the devastation. Capacity restrictions have taken business away from The Red Room to establishments outside of Marion County. The landlord of the property has a mortgage, so The Red Room is only receiving limited assistance. Without immediate relief or additional assistance, The Red Room could face permanent closure.
139. The Red Room has taken the following steps to ensure the public health and safety of its customers: requiring employees to disinfect and wash hands immediately upon entering the premises, implementing routine temperature checks and COVID-19 questionnaires for employees, requiring all occupants to wear masks, and continuously sanitizing the establishment.

140. The Red Room has been specifically unjustly affected by the following provisions of Public Health Order 22-2020, 25-2020 and 29-2020 as follows: the restrictions on occupancy and hours, and the prohibition of live entertainment and dance floors have detrimentally impacted the Red Room's ability to attract customers and maintain consistent profits.

141. The affidavit of Chris Miller is attached as Exhibit K.

Mickie's Pub

142. Plaintiff, 5135 Holdings Inc., d/b/a Mickie's Pub (hereinafter, "Mickie's Pub"), owned by Edward Gregg, has been under Gregg's ownership since 2017.

143. Plaintiff's normal hours of operation are 11 a.m. to 3 a.m. Monday through Saturday, and 11 a.m. to 1 a.m. on Sunday.

144. Prior to March 1, 2020, Mickie's Pub was an age restricted establishment that served both food and alcohol.

145. As a result of the pandemic and subsequent orders of the Defendants, Mickie's Pub has suffered massive financial losses. The continuing cost of rent and utilities, coupled with the total halt of business, forced the establishment's owners to take a mortgage on their house to survive. The current limits to their hours, live entertainment, and occupancy have further prevented this establishment from economically recovering from the total shutdown. Without immediate assistance or relief, they may never recover.

146. Mickie's Pub has taken the following steps to ensure the public health and safety of its customers: complying with local and federal regulations, enforcing social distancing, requiring masks and providing hand sanitizer for all occupants, requiring gloves for all staff, and implementing disinfecting protocol.

147. Mickie’s Pub has been specifically unjustly affected by the following provisions of Public Health Order 25-2020 and 29-2020 as follows: the forced midnight closure, prohibiting of live entertainment, and limits to occupancy have all drawn customers away from Mickie’s Pub to establishments outside of Marion County.

148. The affidavit of Edward Gregg is attached as Exhibit L.

Sports Page Lounge

149. Plaintiff, D & D Lugar Inc., d/b/a Sports Page Lounge (hereinafter, “Sports Page Lounge”), owned by Dennis Lugar, has been in business since 2009.

150. Plaintiff’s normal hours of operation are 11 a.m. to 1 a.m. Monday through Thursday, 11 a.m. to 3 a.m. Friday and Saturday, and 12 p.m. to 12 a.m. Sunday.

151. Prior to March 1, 2020, Sports Page Lounge was an age restricted establishment that served both food and alcohol.

152. As a result of the pandemic and subsequent orders of the Defendants, Sports Page Lounge has lost massive amounts of revenue and is fighting to survive. They have been financially crippled by the loss in sales that restrictions in Marion County have contributed to, and are struggling to pay the bills. Without immediate relief or assistance, Sports Page Lounge could face permanent closure.

153. Sports Page Lounge has taken the following steps to ensure the public health and safety of its customers: complying with CDC regulations and guidelines, providing daily COVID screenings and temperature checks for employees, and making hand sanitizer readily available to all occupants.

154. Sports Page Lounge has been specifically unjustly affected by the following provisions of Public Health Order 25-2020 and 29-2020 as follows: limits on occupancy

and hours, prohibiting of bar seating, and enforced social distancing have all taken business opportunities away from this establishment to locations outside of Marion County.

155. The affidavit of Dennis Lugar is attached as Exhibit M.

JURISDICTION AND VENUE

156. Jurisdiction and venue are proper in this Court as the Plaintiffs and Defendants are all situated in Marion County and the events and omissions giving rise to the claims alleged herein occurred within Marion County.

157. Plaintiffs' action for declaratory relief is authorized by Indiana Code § 34-14-1-1 and Indiana Trial Rule 57.

CAUSES OF ACTION

COUNT I: THE PUBLIC HEALTH ORDER 29-2020 VIOLATES THE INDIANA CONSTITUTION, ARTICLE 1, §23: EQUAL PRIVILEGES AND IMMUNITIES FOR ALL CITIZENS

158. All paragraphs of the Complaint are incorporated herein.

159. The Indiana Constitution, Article 1, §23 recognizes the fundamental right of equal privileges and immunities for all citizens.

160. The Due Process Clause of the U.S. Constitution and the Due Course of Law Clause of the Indiana Constitution prohibit state action that deprives a person of life, liberty, or property without a fair proceeding. [*Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg*, 694 N.E.2d 222, 241 \(Ind.1997\)](#) (citing [*Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 1005*1005 865 \(1950\)](#)).

161. An Article 1, §23 challenge focuses on two requirements: first, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics

which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated..

162. Public Health Order 29-2020 disparately and unjustly restricts the Plaintiffs ability to conduct business by arbitrarily restricting business activities that have no correlation to the spread of the Covid-19 virus.

163. As a direct and proximate cause of Defendants’ actions and/or omissions stated herein, Plaintiffs have suffered a deprivation of their fundamental rights, privileges and immunities afforded under the law and seek damages, declaratory relief, and injunctive relief to prevent such further deprivation.

**COUNT II: THE PUBLIC HEALTH ORDER 29-2020 VIOLATES THE INDIANA
CONSTITUION, ARTICLE 1, §21: PROPERTY SHALL NOT BE TAKEN BY LAW
WITHOUT JUST COMPENSATION**

164. All paragraphs of the Complaint are incorporated herein.

165. The Indiana Constitution, Article 1, §21states, “No person’s property shall be taken by law, without just compensation....”

166. The Defendants, through Public Health Orders 22-2020, 25-2020 and 29-2020, took property from the Plaintiffs herein, without just compensation.

167. As a direct and proximate cause of Defendants’ actions and/or omissions stated herein, Plaintiffs have suffered an unlawful deprivation of their property by law,without just compensation and seek damages, declaratory relief, and injunctive relief to prevent such further deprivation.

COUNT III: VIOLATION OF HOME RULE AUTHORITY

168. All paragraphs of the Complaint are incorporated herein.

169. The Indiana Home Rule Act, I.C. § 36-1-3-8, sets forth restrictions on the exercise of powers by local units of government. In pertinent part, the statute reads, “(7) The power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.”

170. The Indiana legislature, by IC 7.1-3-1-14, has regulated times when alcohol retailers are permitted to serve alcohol on premises. It reads in pertinent part:

Sec. 14. (a) Except as otherwise specifically provided in this title, an appropriate permittee may sell alcoholic beverages each day Monday through Sunday from 7 a.m., prevailing local time, until 3 a.m., prevailing local time, the following day.

(b) The holder of a retailer's permit may sell the appropriate alcoholic beverages as follows:

Monday through Sunday from 7 a.m., prevailing local time, until 3 a.m., prevailing local time, the following day, the holder of a retailer's permit may sell the appropriate alcoholic beverages for consumption on the licensed premises.

171. Public Health Orders 22-2020, 25-2020 and 29-2020 seek to abrogate the state law regulating the time and manner of alcohol sales.

172. The Defendants, through their Public Health Orders, have exceeded their emergency authority and deprived Plaintiffs of their fundamental rights, privileges and immunities afforded under the law and seek damages, declaratory relief, and injunctive relief to prevent such further deprivation.

COUNT IV: 42 U.S.C. § 1983 CLAIMS

173. All preceding paragraphs are incorporated herein.

174. Defendant Mayor Joe Hogsett: named in his official capacity ("Hogsett"), is the Mayor of the City of Indianapolis and is generally charged with enforcing the laws of the

City of Indianapolis, and issued Executive Orders on March 16, 2020, declaring a Local Disaster Emergency.

175. Defendant Dr. Virginia Caine, named in her official capacity ("Cain"), is the Director and Chief Health Officer of the Marion County Public Health Department and is generally charged with enforcing the laws regarding the public health of Marion County, Indiana, and its residents. Dr. Caine signed the COVID-19 Closure Orders at issue in this case.

176. 42 U.S.C. § 1983 states, in pertinent part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

177. Defendants are a "person" under the Civil Rights Act of 1871.

A. 42 U.S.C. § 1983-VIOLATION OF THE TAKINGS CLAUSE

178. All preceding paragraphs are incorporated herein.

179. The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V.

180. The Takings Clause bars the government from forcing some members of the public from bearing burdens that should be borne by the public as a whole.

181. The Defendants, through Public Health Orders 22-2020, 25-2020 and 29-2020, took property from members of the public, and from some of the Plaintiffs herein, without just compensation.

182. The taking occasioned by Public Health Orders 22-2020, 25-2020 and 29-2020 worked to prohibit the use of the citizens' property and therefore caused a diminution or loss in value of that property.

183. The taking in this case was so onerous as to work as a direct appropriation of the property.

184. Property and business owners who were forced to close their businesses suffered a taking and were therefore obligated to bear the cost of government action without just compensation.

185. Public Health Orders 22-2020, 25-2020 and 29-2020 worked to deprive numerous residents, including some of the Plaintiffs herein, of their property interests.

186. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiffs have suffered injuries and damages.

187. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiffs have suffered a deprivation of their property, fundamental rights, privileges, and immunities afforded under the law and seek damages, declaratory relief, and injunctive relief to prevent such further deprivation.

B. 42 U.S.C. § 1983, VIOLATIONS OF SUBSTANTIVE DUE PROCESS

188. All paragraphs of the Complaint are incorporated herein.

189. The Public Health Orders 22-2020, 25-2020 and 29-2020 forced business closures and limited the capacity of all bars, nightclubs and food service establishments.

190. Government actions that burden the exercise of fundamental rights are subject to strict scrutiny and will be upheld only when they are narrowly tailored to a compelling government interest.

191. The disparate treatment of Marion County restaurants, bars and nightclubs by Public Health Orders 22-2020, 25-2020 and 29-2020 is not narrowly tailored to achieve a compelling government interest.

192. The disparate treatment between restaurants, bars, and nightclubs by Public Health Orders' 25-2020 and 29-2020 lacks a real or substantial scientific relation to the spread of COVID-19.

193. The Plaintiffs have a protected liberty interest in their right to live without arbitrary governmental interference.

194. The Plaintiffs have a right to protection from arbitrary action of the government.

195. Substantive Due Process prevents the government from engaging in conduct that "shocks the conscious" or that interferes with the concept of ordered liberty.

196. Public Health Orders 25-2020 and 29-2020 issued by Defendants, constitute arbitrary, capricious, irrational and abusive conduct that interferes with Plaintiffs' liberty and property interests protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

197. Defendants actions constitute official policy, custom and practice of the State of Indiana Defendants' actions shock the conscience of the citizens of this State and of the Court.

198. Defendants' actions do not comport with the traditional ideas of fair play and decency.

199. Plaintiffs have the right to pursue lawful employment as they shall determine and be free of governmental interference.

200. The shutdown is causing citizens of Indiana to lose their jobs; their livelihoods, and their reputations in their communities.

201. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiffs have suffered damages.

202. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiffs have suffered a deprivation of their fundamental rights, privileges, and immunities afforded under the law and seek damages, declaratory relief, and injunctive relief to prevent such further deprivation.

C. 42 U.S.C. § 1983- PROCEDURAL DUE PROCESS

203. All previous paragraphs are incorporated herein.

204. The Fourteenth Amendment to the United States Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law.

205. None of the following due process protections have been afforded to Plaintiffs as required by the United States Constitution:

- a) No processes that permit evaluation by a neutral arbitrator;
- b) No processes that provide for an opportunity to be heard;
- c) No processes that offer an opportunity to present witnesses;
- d) No processes that permit an opportunity to cross examine witnesses;
- e) No processes that allow for a reasoned decision; and,
- f) No processes that provide for an opportunity for an appeal.

206. Public Health Orders 22-2020, 25-2020 and 29-2020 instituted by Defendants, do not provide due process protections set forth herein. The Defendants' disparate treatment between Marion County restaurants, bars, nightclubs and other business establishments,

without any explanation, constitutes an unexplained inconsistency and is arbitrary and capricious.

207. Public Health Orders 25-2020 and 29-2020 deprive Plaintiffs of fundamental property rights without due process of law, based solely upon the discretion of Defendants, which discretion is not subject to appeal rights.

208. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiffs have suffered damages.

209. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiffs have suffered a deprivation of their fundamental rights, privileges, and immunities afforded under the law and seek damages, declaratory relief, and injunctive relief to prevent such further deprivation.

**D. 42 U.S.C. § 1983, VIOLATIONS OF EQUAL PROTECTION CLAUSE OF THE
FOURTEENTH AMENDMENT**

210. Plaintiffs incorporate all foregoing paragraphs, as if alleged herein in full.

211. The Equal Protection Clause requires governments to act in a rational and non arbitrary fashion.

212. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution protects every citizen against intentional, arbitrary government discrimination, whether based on a policy's express terms or improper implementation by government agents.

213. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference.

214. Defendants, by and through Public Health Orders 22-2020, 25-2020 and 29-2020 deprived Plaintiffs of their fundamental rights guaranteed under the United States Constitution and Indiana Law.

215. Defendants' actions and/or omissions, as stated herein, constitute a violation of the Equal Protection Clause and corresponding State Law as Plaintiffs were treated differently than similarly situated businesses.

216. Defendants' actions in classifying food service establishments based on the age of their customers are arbitrary and irrational given that there has never been such a classification of business activity.

217. The easing of capacity restrictions in some establishments, and not in other establishments, is not rational and is an arbitrary exercise of Defendants power.

218. The Defendants' plan is nothing more than an arbitrary decision-making tool that relies on the speculations of the Defendants.

219. Defendants' decision not to ease capacity restrictions on all establishments impedes Plaintiffs' fundamental right to use their private property without the government imposing arbitrary or irrational restrictions on the use of the property.

220. Defendants' actions will cause Plaintiffs to be completely deprived of the use and control of their private property while other establishments will be authorized to operate.

221. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiffs have suffered injuries and damages.

222. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiffs have suffered a deprivation of their fundamental rights, privileges and

immunities afforded under the law and seek damages, declaratory relief, and injunctive relief to prevent such further deprivation.

Count V: Declaratory Judgment

223. Plaintiffs incorporate all foregoing paragraphs, as if alleged herein in full.

224. Plaintiffs are interested parties seeking declaration of their rights under the Indiana Constitution and United States Constitution as Public Health Orders 22-2020, 25-2020 and 29-2020 have functioned to deprive Plaintiffs of their fundamental rights and caused injuries and damages.

225. Plaintiffs seek a declaratory judgment that Public Health Orders 22-2020, 25-2020 and 29-2020 are in violation of the Indiana Constitution under: ARTICLE 1: §21(taking of property without just compensation), §23 (equal privileges and immunities) and §25 (takings effect clause), ARTICLE III §1 (distribution of powers), and ARTICLE 4 §1 (legislative authority vested in the General Assembly).

226. Plaintiffs seek a declaratory judgment that Public Health Orders 22-2020, 25-2020 and 29-2020 are in violation of Plaintiffs' right to equal protection of the law as guaranteed by the United States Constitution.

227. Plaintiffs seek a declaratory judgment that Public Health Orders 25-2020 and 29-2020 are in violation of Plaintiffs' right to property under the Indiana and Federal Constitution.

228. In addition to the declaratory judgments sought herein, Plaintiffs seek further necessary or proper prospective relief as justice may require pursuant to Indiana Rule of Civil Procedure 57.

Count VI: Request for Injunctive Relief

229. Plaintiffs incorporate all foregoing paragraphs, as if alleged herein in full.

230. Plaintiffs seek a preliminary injunction preventing Defendants from enforcing any restriction in Public Health Orders 22-2020, 25-2020 and 29-2020 and issuing any further orders which violate Plaintiffs' rights under the Indiana Constitution/laws and United States Constitution as they (a) likely to succeed under the merit, (b) they will suffer irreparable harm, and (c) the other factors of successful injunctive relief are satisfied.

231. Plaintiffs seek a preliminary and permanent injunction preventing Defendants from enforcing any restrictions in any other local ordinance or health order or directive which violates Plaintiffs' rights under the Indiana Constitution, State Law, and United States Constitution.

232. In the absence of the issuance of injunctive relief, Defendants will cause, and continue to cause, immediate and irreparable harm to Plaintiffs including, but not limited to, loss of their First and Fourteenth Amendment freedoms: loss of property and employees, and losses which would result in the permanent closure of their businesses.

233. Public policy favors the entry of a preliminary and permanent injunction because, inter alia, such relief will prevent unlawful conduct and will preserve and protect Plaintiffs' respective business interests.

234. The harm to the Plaintiffs and businesses who are subjected to Defendants' discriminatory and unconstitutional official policy and regulation discussed herein substantially outweighs any harm to the Defendants.

235. Plaintiffs also seek preliminary and permanent injunctions premised on the basis asserted herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendants jointly and severally as follows:

A. Declare that Defendants' actions as set forth herein were in violation of the Indiana Constitution and Indiana Law deprived Plaintiffs of their rights, immunities, and privileges afforded thereunder;

B. Declare that Defendants' actions as set forth herein were in violation of the United States Constitution and deprived Plaintiffs of their rights, immunities, and privileges afforded thereunder;

C. Order this cause set for immediate hearing on Plaintiffs request for preliminary injunction, and permanent injunction restraining and prohibiting Defendants from enforcing any restriction in Public Health Orders 22-2020, 25-2020 and 29-2020 which violates Plaintiffs' rights under the Indiana Constitution and United States Constitution so long as bars and restaurants continue to operate safely;

D. Award attorney's fees and costs pursuant to 42 U.S.C. § 1988; and other applicable law, award Plaintiffs' its actual costs, damages, nominal damages/expenses.

E. Any and all other relief just and proper in the premises.

Respectfully submitted,

/s/Richard C. Bucheri

Richard Bucheri, Atty. No. 19287-49

Attorney for Plaintiffs

REQUEST FOR TRIAL BY JURY

COMES NOW Plaintiff, by counsel, and requests a trial by jury of all issues in this cause of action.

Respectfully submitted,

POYNTER & BUCHERI, LLC

/s/Richard C. Bucheri

Richard C. Bucheri

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