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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

OREGON RESTAURANT AND LODGING  
ASSOCIATION, an Oregon Domestic Non-  
Profit Corporation; and RESTAURANT LAW  
CENTER,

Plaintiffs,

v.

KATHERINE “KATE” BROWN, in her  
official capacity as the Governor of the State  
of Oregon,

Defendant.

Case No.

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF;  
STATUTORY COMPENSATION

For its complaint against Defendant, Plaintiffs Oregon Restaurant and Lodging Association (“ORLA”) and Restaurant Law Center (“Law Center”) (collectively with the members whose interests they represent, hereafter “Plaintiffs”) hereby complain and allege as follows:

## I. INTRODUCTION

1. This is a civil action brought by Plaintiffs concerning a certain Executive Order set forth by Defendant, and specifically pertaining to the enforcement of the last-minute Executive Order issued by Defendant in the afternoon of November 17, 2020, known as Executive Order No. 20-65 (“TEMPORARY FREEZE TO ADDRESS SURGE IN COVID-19 CASES IN OREGON”) (hereafter, EO 20-65)<sup>1</sup>. A copy of EO 20-65 is attached hereto as **Exhibit 1**.

2. EO 20-65 subjects Plaintiffs and many whom Plaintiffs represent in relation to EO 20-65 to unfair, unclear restrictions that have no rational basis in fact, and that are applicable to those in the restaurant and hospitality industries across the State of Oregon.

3. Further, EO 20-65 creates justiciable and immediately redressable violations of the Due Process Clause of the 14<sup>th</sup> Amendment to the United States Constitution, the Equal Protection Clause of the 14<sup>th</sup> Amendment to the United States Constitution, the Dormant Commerce Clause of the United States Constitution, Oregon statutory takings and Fifth Amendment takings claims, and claims of improper delegation under the Oregon Constitution.

4. Plaintiffs request this Court issue a declaration that EO 20-65 violates Plaintiffs’ rights and issue a temporary injunction barring enforcement of EO 20-65 in whole or in part, during the pendency of this case.

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<sup>1</sup> Available at [https://drive.google.com/file/d/1bDrWpqXrkFpHOkk2-6SPdxv-My\\_CAoxd/view](https://drive.google.com/file/d/1bDrWpqXrkFpHOkk2-6SPdxv-My_CAoxd/view)

5. Plaintiffs are jointly filing with this Complaint a Motion for Temporary Restraining Order requiring Defendant to show cause why a preliminary injunction should not enter to prevent enforcement of EO 20-65 in whole or in part.

## **II. JURISDICTION AND VENUE**

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and § 1343, because certain of the claims stated herein arise under the Constitution of the United States. Additionally, this Court has supplemental jurisdiction over any remaining state law claims under 28 U.S.C. § 1367.

7. Venue properly lies in this judicial district pursuant to 28 U.S.C. 1391(b) because Plaintiff ORLA is a business entity organized under the laws of the State of Oregon with principal place of business within the State of Oregon, and a substantial part of the acts or omissions giving rise to the claims in this Complaint occurred or will occur within the State of Oregon.

8. Further, 28 U.S.C. § 2201(a) permits this Court to adjudicate any actual controversy within its jurisdiction and may declare the rights and other legal relations of any interested party in this matter. Any such declaratory relief shall have the force and effect of a final judgment.

## **III. PARTIES**

9. Plaintiff ORLA is a trade association that represents hundreds of Oregon food service, beverage, and lodging establishments. The members whom ORLA represents make up a substantial and vital part of the Oregon economy and greatly contribute to the business community that makes Oregon a wonderful place to live and work.

10. Plaintiff Law Center is an independent public policy organization that works on behalf of the largest national food service trade association in the United States. The industry

served by Law Center is critical to the economy of the United States and Oregon. Nationally, the food service industry is comprised of over one million restaurants and food service outlets that employ over fifteen million people, making restaurants and food service providers the nation's second-largest employer in the private sector.

11. Defendant Kate Brown is the Governor of the State of Oregon, who was and is at all relevant times acting in her capacity as the holder of this office.

#### IV. FACTUAL ALLEGATIONS

12. On November 13, 2020, Defendant announced in a press conference that a “Two-Week Freeze” would be in effect across the entire State of Oregon beginning November 18, 2020 and would purportedly last through December 2, 2020.<sup>2</sup>

13. Defendant stated that the “Two-Week Freeze” would include the following measures, among others:

- Limiting social get-togethers (indoors and outdoors) to no more than six people, total, from no more than two households.
- Limiting eating and drinking establishments to take-out and delivery only.
- Limiting grocery stores and pharmacies to a maximum of 75% capacity and encouraging curbside pickup.
- Limiting retail stores and retail malls (indoor and outdoor) to a maximum of 75% capacity and encouraging curbside pickup.

14. Defendant further stated publicly that the Two-Week Freeze would not apply to or change current health and safety protocols for personal services (such as barber shops, hair

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<sup>2</sup> See <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=37702> last visited November 17, 2020;

<https://drive.google.com/file/d/1j1WR4sxEMz35wVcWZIEa0vQZ0LLNjXuN/view> last visited November 17, 2020.

salons, and non-medical massage therapy), congregate homeless sheltering, outdoor recreation and sports, youth programs, childcare, K-12 schools, K-12 sports currently allowed, current Division 1 and professional athletics exemptions, and higher education — all of which would be permitted to continue operating under previous guidance issued by the Oregon Health Authority, even if the Two-Week Freeze were in place.

15. When EO 20-65 was issued on the afternoon of November 11, 2020, Defendant stated that it would last from “Wednesday November 18 through Wednesday December 2, unless extended or terminated earlier by the Governor.”

16. As it pertains to certain of those businesses that Plaintiffs work on behalf of in the State of Oregon, food and drink establishments, EO 20-65 completely removes any possibility of conducting a substantial portion of any typical bar or restaurant operation, namely the ability of such establishments to permit their patrons to enjoy food or drink on site, whether in indoor seating or in outdoor seating.

17. Plaintiffs and the businesses they represent have spent substantial sums to construct, build and create indoor and outdoor safety dividers, outdoor seating for customers, outdoor weather protection, and other safety precautions and protections. Such costs were incurred in reliance on previous executive orders of the Governor, and guidance of the state of Oregon, which executive orders and guidance were rationally based on medical and scientific facts. EO 20-65 lacks such rational basis in scientific and medical facts differentiating the categories of dining and drinking that are prohibited, from those that are allowed to continue.

18. Specifically, during the defined two week “freeze period” set forth by EO 20-65, “restaurants, bars, taverns, brew pubs, wine bars, wineries, cafes, food courts, coffee shops, clubs or other similar establishments that offer food or drink may not offer or allow on-premises

consumption of food or drink, *inside or outside.*” EO 20-65, ¶ 4 a. (1) (emphasis added). The only method permissible for such businesses to stay in business is to offer take-out, drive through, or delivery.

19. EO 20-65 expressly exempts other businesses that are very similar, and similarly situated to those defined as “food and drink” establishments whose indoor and outdoor operation is prohibited by Paragraph 4 a. (1). On its face, EO 20-65 states that “Paragraph 4(a)(1) of this Executive Order does not apply to workplaces, government buildings, health care facilities, child care facilities, emergency response activities, school-based food programs, encampments of people experiencing homelessness, and shelter and meal programs serving vulnerable populations” which may continue to operate indoor and outdoor food and drink service businesses and operations. EO 20-65, ¶ 4 a. (2).

20. EO 20-65 expressly discriminates against those in the restaurant and hospitality businesses by permitting other similarly situated businesses, i.e. “[c]ertain specified sectors of Oregon’s economy” to operate with only limited restrictions, or in some cases no restrictions whatsoever. For example, under EO 20-65 grocery stores, retail stores, farmers markets, and indoor and outdoor malls may continue to operate at 75% capacity with no restrictions whatsoever on how long members of the public are permitted to remain on site. EO 20-65, ¶ 4 c. (1), (2). Drive-ins are exempted from the full force of this Executive Order as well. EO 20-65, ¶ 4 c. (5).

21. Outdoor recreation and outdoor sports, including Division 1 college sports, are similarly not restricted. EO 20-65, ¶ 4 c. (4).

22. The Executive Department of the State of Oregon has adopted regulations requiring ventilation with outside air for food service businesses, that adequately protect

customers, when combined with existing preventive measures including social distancing and mask wearing (except when eating or drinking).

23. By its terms, EO 20-65 may be enforced as permitted under ORS 431A.010 by civil penalties with a maximum fine of \$500 per day per violation. EO 20-65, ¶ 11 a. Furthermore, by its terms EO 20-65 provides that penalties may also be applied in accordance with ORS 401.990, in particular “that any person knowingly violating” EO 20-65 could be charged with a Class C misdemeanor that is punishable by 30 days in jail or a fine of \$1,250 or both. EO 20-65, ¶ 11 b.

24. Plaintiffs maintain that they and those similarly situated should be able to continue business operations within the appropriate public health guidelines offered by the CDC and OHA, as applicable, without the restrictions imposed by EO 20-65.

## **V. FIRST CLAIM FOR RELIEF**

### **(Equal Protection Clause and 42 U.S.C. § 1983)**

25. Plaintiffs reallege and reincorporate the allegations above in Paragraphs 1 through 24 as if fully restated here.

26. EO 20-65 subjects Plaintiffs and similarly situated persons or entities that fall into the definition of “food and drink” establishments to civil and criminal penalties in violation of their rights to equal protection under law, and due process of law in that EO 20-65 is not supported by a rational basis under the circumstances.

27. There is significant and substantial overlap between those businesses to which EO 20-65 applies with full force as “food and drink” establishments in paragraph 4 a. (1), and those that are expressly exempted from that definition by paragraph a. (2), including but not limited to “workplaces,” “government buildings,” health and child care facilities that may operate indoor or outdoor cafeterias and other food and drink establishments, which are simply “encouraged” to

use physical distancing, staggered schedules, and take-out service rather than being required to switch entirely and exclusively to this method at the risk of civil penalties and/or a jail sentence if noncompliance is found to be “knowing[.]” under paragraph 11 b.

28. EO 20-65 also unreasonably and unfairly categorizes all “food and drink” establishments and subjects each to the same rules despite the fact that many such establishments are substantially different in terms of configuration, open space, ventilation, filtration, and dozens of other critical factors for indoor dining safety. EO 20-65 also permits up to six persons of two different households to congregate together and to socially eat and/or drink with no sufficient explanation for this arbitrary number, nor distinction as to why “food and drink” establishments are treated differently. In addition, EO 20-65 makes no distinction between indoor and outdoor dining, barring either from taking place on site of a “food and drink” establishment, but allowing social gatherings to eat and drink food prepared by a prohibited business, at adjoining sites, indoors and outdoors.

29. EO 20-65 also unreasonably categorizes all “food and drink” establishments, whether indoors or outdoors, as the same even when the establishments in question have effective and open outdoor dining facilities that would offer no higher risk, and often lower risk, than those businesses that are exempted from the strict requirements present in EO 20-65. No reasons for the discrimination can be articulated by Defendant that offer any rational basis, and none is present.

30. EO 20-65 is therefore an impermissible exercise of Defendants’ power as the Governor of the State of Oregon that violates the Equal Protection Clause, subjecting Plaintiffs to substantial fine and possible criminal sanctions for transgression of the Executive Order. This violation of Equal Protection of the laws should be enjoined from enforcement during the

pendency of this action until such time as this action has concluded.

31. Plaintiffs have no adequate remedy at law for this continuing violation of their rights under the United States Constitution.

## **VI. SECOND CLAIM FOR RELIEF**

### **(Due Process Clause and 42 U.S.C. § 1983)**

32. Plaintiffs reallege and reincorporate the allegations above in Paragraphs 1 through 31 as if fully restated here.

33. Plaintiffs have a strong interest in conducting business operations in the State of Oregon free from unreasonable restrictions that are not supported by a rational basis and are entitled to the protection of the Fifth and Fourteenth Amendment guarantee that they not be deprived of liberty or property without due process of law.

34. Plaintiffs have a right to operate their businesses without being treated unequally and unfairly by the imposition of EO 20-65. However, EO 20-65 imposes a series of unevenly applied and irrational restrictions upon “food and drink” establishments that are not imposed on similarly situated businesses and there is no rational basis for such differential treatment.

35. Plaintiffs and others in the restaurant and hospitality businesses are required to obtain licenses, permits, and/or approvals from various state, county, and local jurisdictions to do business. There are created property rights in these licenses, permits, and/or approvals that cannot be infringed without the due process of law. However, EO 20-65 does just this without due process of law and without any rational basis.

36. EO 20-65 is an impermissible exercise of Defendants’ power as the Governor of the State of Oregon that violates the Due Process Clause. This violation should be enjoined from enforcement during the pendency of this action until such time as this action has concluded.

37. Plaintiffs have no adequate remedy at law for this continuing violation of their rights under the United States Constitution.

## **VII. THIRD CLAIM FOR RELIEF**

### **(Dormant Commerce Clause U.S. Const. Art. I, Sec. 8, cl. 3 and 42 U.S.C. § 1983)**

38. Plaintiffs reallege and reincorporate the allegations above in Paragraphs 1 through 37 as if fully restated here.

39. The Commerce Clause of the United States Constitution reserves the power to regulate interstate and foreign commerce to Congress. Because these powers are reserved to Congress, individual states may not unduly burden interstate commerce, including excessively burdening commerce in Oregon and favoring commerce in other states (nor vice versa).

40. EO 20-65 imposes burdens on interstate commerce and upon Plaintiffs that is excessive in relation to the putative benefits. Plaintiffs' businesses impact the flow of interstate commerce, as many of their customers can travel to neighboring states where restaurants and other "food and drink" establishments remain open. Further, EO 20-65 impermissibly burdens the entire food industry supply chain, as to retail sellers within Oregon, suppliers within Oregon, and suppliers to Oregon.

41. Because Plaintiffs are ready to provide indoor or outdoor food and beverage consumption under established health and safety guidelines while respecting social distancing, there is only nominal or even no benefit to preventing Plaintiffs from providing such services. Conversely, EO 20-65 singles out and incapacitates "food and drink" establishments in a way that will cause job loss, loss of business revenue, and inevitable bankruptcy and permanent closure of more and more Oregon businesses. EO 20-65 also encourages interstate travel to neighboring states where restaurants are open for indoor or outdoor dining. Encouraging travel

during the current pandemic is at cross purposes with the reasons stated for EO 20-65 as well.

42. EO 20-65 impermissibly burdens in-state commerce to the benefit of commerce in neighboring states by requiring Plaintiffs' customers or those who wish to become Plaintiffs' customers, to leave Oregon to be able to enjoy indoor or outdoor dining on premises, and burdens the entire food service industry supply chain within Oregon and to Oregon.

43. Accordingly, EO 20-65 is an unconstitutional regulation and interference with interstate commerce and/or an undue burden on in-state commerce in violation of the Dormant Commerce Clause of the United States Constitution.

44. Plaintiffs have no adequate remedy at law for this continuing violation of their rights under the Constitution.

#### **VIII. FOURTH CLAIM FOR RELIEF**

##### **(Improper Delegation – Oregon Constitution, Article III, Section 1)**

45. Plaintiffs reallege and reincorporate the allegations above in Paragraphs 1 through 44 as if fully restated here.

46. EO 20-65 is issued under the authority of ORS 401.168. (paragraph above No. 1 on P. 2, Exh.1), which delegates to the governor “the right to exercise, within the area designated in the proclamation, all police powers vested in the state by the Oregon Constitution.” The “police power” includes all legislative as well as executive powers.

47. Article III, Section 1 of the Oregon Constitution provides that the powers of the Government shall be divided into three separate branches – Legislative, Executive, and Judicial – and that no person charged with official duties under one of these branches shall exercise the functions of another unless expressly provided for in the Oregon Constitution.

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48. By imposing EO 20-65, Defendant has exceeded her powers as leader of the Executive Branch in violation of Article III section 1, Oregon constitution. Plaintiffs are entitled to an injunction prohibiting EO 20-65 from taking effect or being applied because it is the product of unlawful delegation of legislative authority to Defendant. Plaintiffs have no adequate remedy at law for this continuing violation of their rights under the Oregon Constitution.

### **IX. FIFTH CLAIM FOR RELIEF**

**(Statutory Taking – ORS 401.168, ORS 433.441; Taking Clause of the U.S. Constitution – Fifth Amendment, and 42 U.S.C. § 1983)**

49. Plaintiffs reallege and reincorporate the allegations above in Paragraphs 1 through 48 as if fully restated here.

50. In the alternative to the claims above, Plaintiffs are entitled to relief in the form of compensation under Oregon statutes as described below.

51. Section 4 of EO 20-65 is authorized in part by the power granted in ORS 401.188(1) to “freeze” certain activities.

52. ORS 401.188(1) describes the Oregon Governor’s powers during a state of emergency, and it provides as follows:

Whenever the Governor has declared a state of emergency, the Governor may issue, amend and enforce rules and orders to:  
(1) Control, restrict, and regulate by rationing, freezing, use of quotas, prohibitions on shipments, price fixing, allocation or other means, the use, sale or distribution of food, feed, fuel, clothing and other commodities, materials, goods and services.

ORS 401.188(1).

53. Additionally, ORS 401.192(3) requires the state to pay reasonable compensation for real or personal property taken for public use or purposes under ORS 401.188. ORS

401.192(3) provides as follows:

When real or personal property is taken under power granted by ORS 401.188, the owner of the property shall be entitled to reasonable compensation from the state.

54. ORS 433.441 describes the conditions that govern public health emergency declarations by the Governor to protect public health, and it provides as follows:

(1) Upon the occurrence of a public health emergency, the Governor may declare a state of public health emergency as authorized by ORS 433.441 to 433.452 to protect the public health.

(2) A proclamation of a state of public health emergency must specify:

(a) The nature of the public health emergency;

(b) The political subdivision or geographic area subject to the proclamation;

(c) The conditions that have brought about the public health emergency; and

(d) The duration of the state of public health emergency, if the duration is less than 14 days.

(3) During a public health emergency, the Governor may:

(a) Close, order the evacuation of or the decontamination of any facility the Governor has reasonable cause to believe may endanger the public health.

(b) Regulate or restrict by any means necessary the use, sale or distribution of food, fuel, medical supplies, medicines or other goods and services.

(c) Prescribe modes of transportation, routes and destinations required for the evacuation of individuals or the provision of emergency services.

(d) Control or limit entry into, exit from, movement within and the occupancy of premises in any public area subject to or threatened by a public health

emergency if such actions are reasonable and necessary to respond to the public health emergency.

(e) Authorize pharmacists licensed under ORS chapter 689 to administer vaccines to persons who are three years of age or older.

(f) Take any other action that may be necessary for the management of resources, or to protect the public during a public health emergency, including any actions authorized under ORS 401.168, 401.185, 401.188 and 401.192.

(4) Nothing in ORS 433.441 to 433.452 limits the authority of the Governor to declare a state of emergency under ORS 401.165. If a state of emergency is declared as authorized under ORS 401.165, the Governor may implement any action authorized by ORS 433.441 to 433.452.

(5) A proclamation of a state of public health emergency expires when terminated by a declaration of the Governor or no more than 14 days after the date the public health emergency is proclaimed unless the Governor expressly extends the proclamation for an additional 14-day period.

**(6) When real or personal property is taken under power granted by this section, the owner of the property shall be entitled to reasonable compensation from the state.** (Emphasis added.)

ORS 433.441(1)-(6).

55. EO 20-65 expressly provides that it is based in part upon ORS 433.441.

56. Pursuant to ORS 433.441(6), whenever real or personal property is taken under the power granted by this section, the owner of the property shall be entitled to reasonable compensation from the state.

57. EO 20-65 constitutes a taking of the property of Plaintiffs. Under the circumstances, EO 20-65 is less than two full calendar days old and Plaintiffs have not yet had the reasonable opportunity to calculate the compensation that they are entitled to by Oregon

statute. Accordingly, and in the alternative to any other claim for relief in this Complaint, Plaintiffs shall be entitled to compensation from the State of Oregon in an amount to be proven with more specificity at trial.

58. In addition, Defendant has seized without compensation Plaintiffs' real and personal property by forcing the limitations of EO 20-65 upon them, taking such property for a public purpose or public use. Defendant has therefore placed the burden and cost for any public benefit that EO 20-65 might create upon the shoulders of private businesses like those of Plaintiffs and their members without any compensation for such taking.

59. The Fifth Amendment to the United States Constitution does not prohibit the government from interfering with private property, but it does require the government pay adequate compensation for such takings. The Takings Clause applies to permanent as well as temporary interference with private use of personal and real property.

60. As a result of EO 20-65, Plaintiffs and those similarly situated have at least temporarily lost the economically beneficial use of their real and personal property. Accordingly, and in the alternative to the other claims stated herein, EO 20-65 effects an unconstitutional taking without just compensation, for which a remedy shall be due to Plaintiffs in a manner to be proven at trial.

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**X. PRAYER FOR RELIEF**

1. Plaintiffs request this Court enter an injunction that will prevent EO 20-65 from being enforced during the pendency of this Action:

(a) Under Plaintiffs’ Fourth Claim, Improper Delegation in its entirety; and/or

(b) Under Plaintiffs’ First, Second, and Third Claims,

(1) in part as to outdoor, on-premises service and consumption of food and drink; and;

(2) in part as to indoor, on-premises service and consumption of food and drink.

2. For a declaration in Plaintiffs’ favor under the First Claim for Relief, that EO 20-65 violates the Due Process Clause;

3. For a declaration in Plaintiffs’ favor under the Second Claim for Relief, that EO 20-65 violates the Equal Protection Clause;

4. For ruling in Plaintiffs’ favor under the Third Claim for Relief under the Dormant Commerce and Commerce Clauses of the United States Constitution;

5. For ruling in Plaintiffs’ favor under their Fourth Claim for Relief for Delegation;

6. In the alternative, for ruling in Plaintiffs’ favor under the Fifth Claim for Relief that compensation required by ORS 401.192(3) and ORS 433.441(6), and the Fifth and Fourteenth Amendments to the US Constitution in a specific amount to be proven at trial

7. For plaintiffs’ costs and disbursements incurred herein;

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8. For plaintiffs' attorneys' fees as permitted by law; and
9. For all such other relief deem just and equitable by the Court

DATED this 20<sup>th</sup> day of November, 2020.

JORDAN RAMIS PC

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