

**GOVERNOR GREGG ABBOTT,
in his official Capacity as Governor of
the State of Texas,
TEXAS ALCOHOL AND BEVERAGE
COMMISSION, and BENTLEY
NETTLES, in his official
Capacity as Executive Director of the
Texas Alcohol and Beverage
Commission,**

§
§
§
§
§
§
§
§
§
§
§

Defendants.

**PLAINTIFFS’ ORIGINAL PETITION, APPLICATIONS FOR EMERGENCY
TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND
PERMANENT INJUNCTION**

COME NOW Plaintiffs, Tonia “Tee” Allen Parker, Melissa Lynn Kelly, Gabrielle Ellison, Adam Duran, Jennifer Gibbs, Elvin Coy Chew, Kevin Wann, Kellie Messer, Chris Bergeron, Sandra Young, Holly Landry, Heather Vaughan, Morris Landrum, Wendy Landrum, David Phillips, Renee Phillips, Delia MacKenzie, Kenny Kittrell, James W. Blair, III, Tammy J. Blair, Mike Braswell, and Shenita Cleveland and file this their Original Petition, Applications for Emergency Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and for cause would show as follows:

BACKGROUND

On Friday, June 26, 2020, Governor Abbott took his most drastic action yet to respond to the post-reopening coronavirus pandemic in Texas, shutting bars back down and scaling back restaurant capacity to 50 percent. Governor Abbott’s (“Abbott”) Executive Order GA-28 (“GA-28”), among other things, ordered, “People shall not visit bars or similar establishments that hold a permit from the Texas Alcoholic Beverage Commission (TABC). . . .” The rights Plaintiffs enjoy under the Texas Constitution are being trampled on by Defendants, while millions of individuals have lost their jobs and thousands of businesses are on the brink of bankruptcy. If Defendants’

conduct is not restrained and declared unconstitutional, once this virus passes, the rights enjoyed by Plaintiffs under the Texas Constitution will be forever damaged. Viruses mutate, so there may be a different coronavirus strain next year. Like the flu vaccine, this year's coronavirus vaccine may not protect against next year's strain. Will we allow Defendants to set precedent for future governmental remedies related to viruses or diseases? Will we allow Defendants to violate the Texas Constitution? Will we continue to allow Defendants to take away our liberties and destroy the economy – where does it stop? Every day Defendants are allowed to unlawfully shut down Plaintiffs' businesses, the liberties of Plaintiffs and other bar owners are trampled on.

DISCOVERY CONTROL PLAN

Plaintiffs intend to conduct discovery under Level 2 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

DISCLOSURES

Plaintiffs request Defendants provide disclosures in accordance with Texas Rule of Civil Procedure 194, including relevant documents.

TRCP 47 STATEMENT

Plaintiffs are suing for injunctive relief and declaratory relief.

Plaintiffs are seeking monetary relief of less than \$100,000.00.

JURISDICTION AND VENUE

The Court has subject-matter jurisdiction under the Texas Constitution, Article V, § 8, as the amount in controversy exceeds the minimum jurisdictional limits of the court of exclusive interest. Plaintiffs seek relief that can be granted by courts of law or equity.

The Court has jurisdiction over the Plaintiffs' request for declaratory relief against Defendants because the Declaratory Judgment Act waives governmental immunity when the

plaintiff is challenging the validity of an ordinance, order, or government action. *See* Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006; *Texas Lottery Commission v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Texas Education Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

The Court has jurisdiction over the Plaintiffs' request for injunctive relief against Defendants because Defendants are acting *ultra vires* by forcing Plaintiffs to shut down their businesses in violation of Texas law and the Texas Constitution. *See City of El Paso v. Heinrich*, 284 S.W.3d 366-368-69 (Tex. 2009).

Plaintiffs have standing to seek declaratory and injunctive relief because they have been affected by the Defendants' conduct.

The Court has personal jurisdiction over the Defendants.

Venue is proper in Travis County because Defendants have their principal office in Travis County, Texas. *See* Tex. Civ. Prac. & Rem. Code § 15.002(a)(3).

PARTIES

Plaintiff Tonia Allen Parker is an owner of the Machine Shed Bar and Grill located at 6113 State Highway 31, Kilgore, Texas, Smith County, Texas 75662.

Plaintiff Melissa Lynn Kelly is the owner of Outlaws Longview Bar located at 1315 Marshall Avenue, Longview, Gregg County, Texas 75601.

Plaintiff Gabrielle Ellison is the owner of Big Daddy Zanes Bar located at 6840 W. University Boulevard, Odessa, Ector County, Texas.

Plaintiff Adam Duran is the owner of Fry Street Tavern located at 121 Avenue A, Denton, Denton County, Texas 76201, Shots & Crafts located at 103 Avenue A, Denton, Denton County, Texas 76201, and Northside Drafthouse & Eatery located at 3000 Northside Boulevard, Suite 800, Richardson, Texas 75080.

Plaintiff Jennifer Gibbs is the owner of Dusty's Bar & Grill located at 119 S. Elm Street, Denton, Denton County, Texas 76201, Game Changers located at 122 W. Mulberry Street, Denton, Denton County, Texas 76201, and Cletus's located at 119 S. Elm Street, Denton, Denton County, Texas 76201.

Plaintiff Elvin Coy Chew is the owner of Whiskey Girl Bar located at 833 U.S. Highway 80 E, Abilene, Taylor County, Texas 76601.

Plaintiff Kevin Wann is an owner of Texas Borders Bar & Grill located at 20940 Katy Freeway, Suite H, Katy, Harris County, Texas 77449.

Plaintiff Kellie Messer is an owner of Texas Borders Bar & Grill located at 20940 Katy Freeway, Suite H, Katy, Harris County, Texas, 77449.

Plaintiff Chris Bergeron is the owner of Chuters Dancehall and Saloon located at 7337 Spencer Highway, Pasadena, Harris County, Texas 77505.

Plaintiff Sandra Young is the owner of Bokeeters Cocktail Bar located at 18110 Highway 59, New Caney, Montgomery County, Texas 77357.

Plaintiff Holly Landry is the owner of Sharky's Tavern, 504 25th Street, Galveston, Galveston County, Texas 77550.

Plaintiff Heather Vaughan is the owner of Crossroad Saloon located at 2101 S. U.S. Highway 87, Big Spring, Howard County, Texas 79720.

Plaintiff Morris Landrum is a citizen and resident of Smith County, Texas.

Plaintiff Wendy Landrum is a citizen and resident of Smith County, Texas.

Plaintiff David Phillips is a citizen and resident of Gregg County, Texas.

Plaintiff Renee Phillips is a citizen and resident of Gregg County, Texas.

Plaintiff Delia MacKenzie is a citizen and resident of Gregg County, Texas.

Plaintiff Kenny Kittrell is a citizen and resident of Gregg County, Texas.

Plaintiff James W. Blair, III is a citizen and resident of Smith County, Texas.

Plaintiff Tammy J. Blair is a citizen and resident of Smith County, Texas.

Plaintiff Mike Braswell is a citizen and resident of Smith County, Texas.

Plaintiff Shenita Cleveland is a citizen and resident of Dallas County, Texas.

Defendant Bentley Nettles is the Executive Director of the Texas Alcohol and Beverage Commission and is being sued in his official capacity as the Executive Director of the Texas Alcohol and Beverage Commission. He may be served with process at the following address:

Bentley Nettles
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

or wherever he may be found.

Defendant Greg Abbott is the governor of the State of Texas and is being sued in his official capacity only. He may be served at 1100 San Jacinto Boulevard, Austin, Texas 78701.

STATEMENT OF THE CLAIM

THE DECLARATION

1. Governor Abbott's GA-28 Is Unconstitutional

Governor Abbott's Executive Order GA-28 allows almost all businesses to remain open. (Exhibit "A"). However, Governor Abbott's Executive Order GA-28 singles out bars stating:

"People shall not visit bars or similar establishments that hold a permit from the Texas Alcoholic Beverage commission (TABC) and are not restaurants as defined above in paragraph number 6; provide, however, that the use by such bars or similar establishments of drive-thru, pickup, or delivery options for food and drinks is allowed to the extent authorized by TABC."

(Exhibit "A", paragraph 7).

Under GA-28, if a person visits a bar or similar establishment the bar owner is subject to having their license suspended by the TABC or fines.

2. The Defendants Conduct Violates Texas Government Code § 410 et seq.

Texas Government Code § 410 et seq. (“Disaster Act”) does not allow Defendants to force businesses to effectively shut down. Specifically, the Disaster Act limits Defendants’ power to those provisions expressly described in the statute. In GA-28, Governor Abbott expressly “suspends” laws. (Exhibit “A”). Specifically, GA-28 states, “I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local official do not impose restrictions inconsistent with this executive order....” (Exhibit “A”).

3. Defendants are Violating Article XI, § 5 of the Texas Constitution

Article XI, § 5 of the Texas Constitution provides that:

[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.

Tex. Const. article XI, § 5.

Governor Abbott’s Order attempts to shut down Plaintiffs’ businesses making it inconsistent with the “Constitution of the State.” TEX. CONST. article XI, § 5. Specifically, Defendants violate, among other things, Article I § 19 of the Texas Constitution. (See below).

Defendants, therefore, violate Article XI, § 5 of the Texas Constitution.

4. Defendants Violate the Texas Constitution

“The legislature has the exclusive authority to define crimes and to designate the punishments for those crimes.” *Neil v. State*, No. 12-16-00236-R, 2017 Tex. App LEXI 8862, at *3 (Tex. App. – Tyler Sep. 20, 2017) (citing *Grant v. State*, 505 S.W.2d 279, 282 (Tex. Crim. App.

1974)). Defendants make it a punishable offense for bar owners for people to visit their businesses. (Exhibit “A”). Specifically, Defendants arbitrarily picks winners and loser, closing businesses in violation of Governor Abbott’s Executive Orders. (Exhibit “A”). Accordingly, the conduct of Defendants is void in that it attempts to usurp the authority vested in the Texas Legislature

5. Defendants Violate Article I, § 19 of the Texas Constitution

Article I, § 19 states:

“DEPRIVATION OF LIFE, LIBERTY, PROPERTY, ETC. BY DUE COURSE OF LAW. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.”

By requiring Plaintiffs to close down their businesses, Defendants violate Article I, § 19 of the Texas Constitution. Specifically, Plaintiffs are deprived of their liberty or freedom to operate their businesses. Accordingly, GA-28 is void under the Texas Constitution.

6. No Relationship Between Defendants’ Conduct and Virus-Related Harm

Governor Abbott has opened up cosmetology salons, hair salons, barber shops, nail salons, tattoo studios, piercing studios, hair removal services, hair loss treatment and growth services, and other establishments where licensed cosmetologist or barbers practice their trade or other cosmetology services. (Exhibit “A”). Clearly, bar owners have less interaction, proximity, or frequency with patrons than beauticians, or cosmetologists, or tattoo artists.

7. Governor Abbott’s Order Violates the Equal Protection Clause of the Texas Constitution, Article I, §3

Governor Abbott’s Executive Order GA-28 picks and chooses winners and losers. Winners include cosmetologists, massage therapists, hair salons, camps, sporting events, and other businesses. Unfortunately for Plaintiffs and other bar owners, they have been relegated to

Governor Abbott’s loser category and sentenced to bankruptcy. Specifically, Governor Abbott does not shut down or limit occupancy to the following:

“This 50 percent occupancy limit does not apply to the following establishments that operate with at least six feet of social distancing between work stations:

- a. cosmetology salons, hair salons, barber shops, nail salons/shops, and other establishments where licensed cosmetologist or barbers practice their trade;
- b. massage establishments and other facilities where licensed massage therapists or other persons licensed or otherwise authorized to practice under Chapter 455 of the Texas Occupations Code practice their trade; and
- c. other personal-care and beauty services such as tanning salons, tattoo studios, piercing studios, hair removal services, and hair loss treatment and growth services.”

(Exhibit “A”, paragraph 3).

8. GA-28 Unlawfully Suspends Laws, Is Illegally Vague and Arbitrary

GA-28 unlawfully suspends laws, is illegally vague and arbitrary and violates the Texas constitution. GA-28 does not pass strict scrutiny analysis and violates the Texas Constitution, Art. 1, §§28 and 29:

Sec. 28. SUSPENSION OF LAWS. No power of suspending laws in this State shall be exercised except by the legislature.

Sec. 29. BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT AND INVIOATE. To guard against transgressions of the high powers herein delegated, we declare that everything in this “Bill of Rights” is excepted out of the general powers of the government, and shall forever remain inviolate, and all laws contrary thereto, or the following provisions, shall be void.

Note: neither section 28 nor 29 says “. . .unless the government contends an emergency might possibly exist.” Indeed, our rights are MOST important during times of emergencies!

The sections of the Texas Bill of Rights that GA-28 violates by “suspending” laws include Sections 17 (property rights), 19 (due process), and 27 (assembly). Abbott also illegally suspends the laws allowing licensed bars to operate.

Governor Abbott can claim all day that the legislature gave him “broad powers.” However, those powers that Abbott claims to have, whatever they may be, cannot supersede the Texas Constitution.

CAUSES OF ACTION

Plaintiffs bring this claim for relief under the Uniform Declaratory Judgment Act. They also bring suit under *City of El Paso v. Heinrich*, 284 S.W.3d, 366, 368-369 (Tex. 2009), which authorizes *ultra vires* claims against public officials who act in violation of state law.

Plaintiff is seeking relief entirely under state law and is not asserting claims that arise under federal law or any federal cause of action.

GROUNDS FOR TEMPORARY INJUNCTION

To obtain a temporary injunction, an applicant must plead and prove: “(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru v. Fort Motor Car Co.*, 284 S.W.3d 198, 205 (Tex. 2002).

The Uniform Declaratory Judgment Act and *Heinrich* each provide Plaintiffs with a cause of action to seek declaration and injunctive relief against the Defendants.

Plaintiffs have a probable right to relief because the Defendants conduct shut down the Plaintiffs’ businesses and violates the Texas Constitution.

Plaintiffs will suffer probable, imminent, and irreparable injury absent a temporary restraining order and temporary injunction because the Defendants are trampling on Plaintiffs’ rights under the Texas Constitution and are exceeding Defendants’ authority under the Texas Government code § 410 et seq.

DEMAND FOR JUDGMENT

Plaintiffs demand the following relief:

- a. a declaration that Defendants' conduct in ordering the Plaintiffs to close their businesses violates Article I § 19 of the Texas Constitution and is invalid;
- b. a declaration that Defendants' conduct in ordering the Plaintiffs to close their businesses violates Article XI, § 5 of the Texas Constitution and is invalid;
- c. a declaration that Defendants' conduct in ordering the Plaintiffs to close their businesses violates Art. I, §28 of the Texas Constitution;
- d. a temporary and permanent injunction that prevents Defendants from closing down Plaintiffs' businesses;
- e. an award of nominal and compensatory damages;
- f. an award of costs and attorneys' fees; and
- g. all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted,

/s/ Jared R. Woodfill
Jared R. Woodfill
State Bar No. 00788715
Woodfill Law Firm, P.C.
3 Riverway, Suite 750
Houston, Texas 77056
Tel: (713) 751-3080
Fax: (713) 751-3058
woodfillservice@gmail.com (service)
jwoodfill@woodfilllaw.com (non-service)