IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1510

Polk County No. CVCV060630

RILEY DRIVE ENTERTAINMENT I, INC. dba TONIC BAR; RILEY DRIVE ENTERTAINMENT XVI, INC. dba SAINTS PUB + PATIO WAUKEE; CINDERELLA STORY, LLC dba SHOTGUN BETTY'S; KISS MY GRITS, LLC dba THE IRISH; AGB, L.L.C. dba ANNIE'S IRISH PUB; W. WEST INVESTMENTS, L.L.C. dba WELLMAN'S PUB & ROOFTOP,

Plaintiffs-Appellants,

vs.

GOVERNOR KIMBERLY K. REYNOLDS, in her official capacity as Governor of the State of Iowa; IOWA DEPARTMENT OF PUBLIC HEALTH,

Defendants-Appellees.

PLANTIFFS'/APPELLANTS' FINAL BRIEF

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ROUTING STATEMENT

The supreme court should retain this case as it presents substantial issues of first impression, it present fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court, and its presents substantial questions of enunciating or changing legal principles. *See* Iowa R. App. P. 6.1101(c), (d), (f).

STATEMENT OF THE CASE

On August 28, 2020, Riley Drive Entertainment I, Inc. dba Tonic Bar, Riley Drive Entertainment XVI, Inc. dba Saints Pub + Patio Waukee filed their Petition in the Iowa District Court for Polk County. On September 1, 2020, Plaintiffs filed their Brief in Support of Plaintiff's Petition for Temporary Injunction and Appendix in Support of Brief. On September 2, 2020, Plaintiffs filed their Amended Petition ("Amended Petition"). In the Amended Petition, AGB, L.L.C. dba Annie's Irish Pub, Cinderella Story, LLC d/a Shotgun Betty's, Kiss My Grits, LLC dba The Irish, and W. West Investments, L.L.C. dba Wellman's Pub & Rooftop were added as additional Plaintiffs. Collectively, the foregoing entities are referred to as "Plaintiffs".

On September 2, 2020, Defendants filed a Resistance to Plaintiffs' Request for Temporary Injunctive Relief. On September 2, 2020, the hearing was held on Plaintiffs' Request for Temporary Injunction. On September 3, 2020, Plaintiffs filed their Reply to Defendants' Resistance to Petition for Temporary Injunctive Relief. On September 4, 2020, the Honorable Judge William P. Kelly entered a Ruling and Order on Plaintiffs' Request for Temporary Injunction ("Temporary Injunction Ruling").

On September 4, 2020, Plaintiffs' filed their Notice of Interlocutory Appeal of Order on Plaintiffs' Request for Temporary Injunction

("Interlocutory Appeal"). On September 14, 2020, Defendants' filed their Motion to Dismiss ("Motion to Dismiss") and supporting Brief ("Defendants' Brief"). On September 24, 2020, Plaintiffs' filed their Resistance to Defendants' Motion to Dismiss and Request for Oral Argument ("Resistance to Motion to Dismiss"). On October 1, 2020, Defendants filed their Reply to Plaintiffs' Resistance. ("Reply"). On October 6, 2020, the Iowa Supreme Court denied Plaintiffs' Application for Interlocutory Appeal.

On November 16, 2020, Judge Kelly entered a Ruling granting Defendants' Motion to Dismiss ("Ruling"). On November 16, 2020, Plaintiffs filed their Notice of Appeal from the Ruling and all other adverse rulings during the pendency of this matter.

STATEMENT OF THE FACTS

A. The Parties.

Plaintiff Riley Drive Entertainment I, Inc. dba Tonic Bar ("RDE I") is an Iowa corporation. APP. 16 at ¶1. RDE I owns and operates Tonic Bar at 5535 Mills Civic Parkway, West Des Moines, Polk County, Iowa ("Tonic Bar"). APP. 17 at ¶13. RDE I is licensed to sell and serve alcoholic beverages pursuant to Iowa Code Chapter 123APP. 17 at ¶21.

Plaintiff Riley Drive Entertainment XVI, Inc. dba Saints Pub + Patio Waukee ("RDE XVI") is an Iowa corporation. APP. 16 at ¶2. RDE XVI owns

and operates Saint Pub + Patio Waukee at 87 NE Carefree Lane, Waukee, Dallas County, Iowa ("Saints Pub Waukee"). APP. 17 at ¶14. RDE XVI is licensed to sell and serve alcoholic beverages pursuant to Iowa Code Chapter 123. APP. 17at ¶21.

Plaintiff AGB, L.L.C. dba Annie's Irish Pub ("AGB") is an Iowa limited liability company. APP. 16 at ¶3. AGB owns and operates Annie's Irish Pub at 206 3rd Street, Des Moines, IA 50309 ("Annie's Irish Pub"). APP. 17 at ¶15. AGB is licensed to sell and serve alcoholic beverages pursuant to Iowa Code Chapter 123. APP. 17 at ¶21.

Plaintiff Cinderella Story, LLC dba Shotgun Betty's ("Cinderella Story") is an Iowa limited liability company. APP. 16 at ¶4. Cinderella Story owns and operates Shotgun Betty's at 5535 Mills Civic Parkway, Suite 100, West Des Moines, IA 50266 ("Shotgun Betty's"). APP. 17 at ¶16. Cinderella Story is licensed to sell and serve alcoholic beverages pursuant to Iowa Code Chapter 123. APP. 17 at ¶21.

Plaintiff Kiss My Grits, LLC dba The Irish ("Kiss My Grits") is an Iowa limited liability company. APP. 16 at ¶5. Kiss My Grits owns and operates The Irish at 560 Prairie View Dr., West Des Moines, IA 50266 ("The Irish"). APP. 17 at ¶17. Kiss My Grits is licensed to sell and serve alcoholic beverages pursuant to Iowa Code Chapter 123. APP. 17 at ¶21.

Plaintiff W. West Investments, L.L.C. dba Wellman's Pub & Rooftop ("WWI") is an Iowa limited liability company. APP. 16 at ¶7. WWI owns and operates Wellman's Pub & Rooftop at 597 Market St., West Des Moines, IA 50266 ("Wellman's Pub & Rooftop"). APP. 17 at ¶18. WWI is licensed to sell and serve alcoholic beverages pursuant to Iowa Code Chapter 123. APP. 17 at ¶21.

Defendant Kimberly K. Reynolds ("Governor Reynolds") is an individual and the duly-elected Governor of the State of Iowa. Amended Petition at ¶6. Defendant Iowa Department of Public Health ("IDPH") is a state administrative agency responsible for, among other duties, exercising "general supervision over the public health." Iowa Code § 135.11.

B. The August 27th Proclamation.

On March 9, 2020, Governor Reynolds, pursuant to "the Iowa Constitution, Art. IV §§1, 8 and Iowa Code §§29C.6(1), and all other applicable laws," proclaimed a "STATE OF DISASTER EMERGENCY for the entire state of Iowa" ("March 9th Proclamation"). See March 9th Proclamation emphasis in original). Prior to September 2020, Governor Reynolds had subsequently issued over twenty (20) additional Proclamations of Disaster Emergency.[1]

[1] March 13, 2020 ("March 13th Proclamation"); March 17, 2020 ("March 17th Proclamation") (APP. 5-11); March 19, 2020 ("March 19th Proclamation"); March 22, 2020 ("March 22nd Proclamation"); March

On August 27, 2020, Governor Reynolds issued a "Proclamation of Disaster Emergency" ("August 27th Proclamation"). *See* APP. 12-14. The August 27th Proclamation was purportedly issued pursuant to "the Iowa Constitution, Art. IV, §§ 1, 8 and Iowa Code §§ 29C.6(1), 135.140(6), and 135.144." APP. 18 at ¶24; APP. 12. Section Two of the August 27th Proclamation, is hereinafter referred to as the "Order of Closure." APP. 13-14.

The August 27th Proclamation includes a mandate that "[a]ll bars, taverns, wineries, breweries, distilleries, night clubs, and other establishments that sell alcoholic beverages for consumption on their premises shall be closed to the general public, except as permitted in this section" (the "Order of Closure"). APP. 18 at ¶25; APP. 13. Section 2(A)(3) purports to exempt "[a]n establishment that prepares and serves food, the sale of which results in at least half of the establishment's monthly revenues" from the Order of Closure, "provided that the establishment complies with all requirements for restaurants in paragraph B of this section" (collectively, "Exempt Establishments"). APP. 18 at ¶26; APP. 13. Establishments affected by the

26, 2020 ("March 26th Proclamation"); March 31, 2020 ("March 31th Proclamation"); April 2, 2020 ("April 2nd Proclamation"); April 6, 2020 ("April 6th Proclamation"); April 10, 2020 ("April 10th Proclamation"); April 16, 2020 ("April 16th Proclamation"); April 24, 2020 ("April 24th Proclamation"); May 6, 2020 ("May 6th Proclamation"); May 13, 2020 ("May 13th Proclamation"); May 20, 2020 ("May 20th Proclamation"); May 26, 2020 ("May 26th Proclamation"); June 10, 2020 ("June 10th Proclamation"); June 25, 2020 ("June 25th Proclamation"); July 17, 2020 ("July 17th Proclamation"); July 24, 2020 ("July 24th Proclamation"); and August 21, 2020 ("August 21st Proclamation").

Order of Closure are referred to, collectively, as "Targeted Establishments". By its terms, the Order of Closure applies only to establishments in Black Hawk, Dallas, Johnson, Linn, Polk, and Story Counties (collectively, the "Targeted Counties").

C. The Amended Petition.

Plaintiff recited a multitude of facts in their Amended Petition. For example, Plaintiffs noted that "[i]n contravention of Iowa law, Defendants did not set forth facts justifying the imposition of the Order of Closure." APP. 19 at ¶33. "Iowa Code Section 135.144 permits the IDPH, in conjunction with Governor Reynolds, to take a variety of potential actions if "a public health disaster exists. Iowa Code §135.144." APP. 19 at ¶35.

Under Iowa law:

> 'Public health disaster,' means a state of disaster emergency proclaimed by the governor in consultation with the department pursuant to section 29C.6 for a disaster which specifically involves an ***imminent threat of an illness or health condition*** that meets any of the following conditions . . .
> b. Poses a ***high probability*** of any of the following:
> (1) A ***large*** number of deaths in the affected population.
> (2) A ***large*** number of serious or long-term disabilities in the affected population.
> (3) Widespread exposure to an infectious or toxic agent that poses a ***significant risk of substantial future harm*** to a ***large*** number of the affected population.
> (4) Short-term or long-term physical or behavioral health consequences to a ***large*** number of the affected population.

Iowa Code § 135.140 (emphasis added).

APP. 19-20 at ¶36 (emphasis in original). "Defendants again entirely failed to set forth specific facts establishing the existence of a public health disaster in Polk and Dallas County, Iowa." APP. 20 at ¶37. With respect to the requirements of Iowa Code section 135.140, "Defendants cannot substantively demonstrate that COVID-19 poses a "high probability" of any of the four enumerated categories in Polk or Dallas County, Iowa." APP. 20 at ¶38; see also APP. 20 at ¶¶42-44.

> Iowa Code Subsection 135.144(3) permits the IDPH, in conjunction with the governor, to "[t]ake ***reasonable measures*** as ***necessary*** to prevent the transmission of infectious disease ***and*** to ensure that all cases of communicable disease are properly identified, controlled, and treated." Iowa Code §135.144(3) (emphasis added).

APP. 21 at ¶47 (emphasis in original). Plaintiffs set forth facts that the Order of Closure was not a "reasonable measure." *See* APP. 21-24at ¶¶46-73. Plaintiffs set forth facts that the Order of Closure was not "necessary." *See* APP. 24- 25 at ¶¶74-78. "Instead of attempting to ensure that "all" cases of COVID-19 are "controlled," the Order of Closure improperly attempts to limit individuals' potential exposure in six counties solely if those people would have, absent the Order of Closure, frequented what has now been deemed a Non-Exempt Establishment." APP. 21 at ¶48. On November 16, 2020, Judge Kelly erred when he entered the Ruling.

ARGUMENT

I. DISTRICT COURT ERRED WHEN IT GRANTED DEFENDANTS' MOTION TO DISMISS.

A. Preservation for Review.

Plaintiffs preserved this issue for review by filing a Resistance to Motion to Dismiss and supporting documentation, presenting argument at the October 9, 2020 hearing on the Motion to Dismiss, and filing a timely Notice of Appeal on November 16, 2020.

B. Scope and Standard of Review.

The Iowa Supreme Court "certainly do[es] not recommend the filing of motions to dismiss in litigation, the viability of which is in any way debatable. Neither do we endorse sustaining such motions, even when the ruling is eventually affirmed. Both the ruling and the sustaining are poor ideas." *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991).

> We recognize the temptation is strong for a defendant to strike a venerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the [rules governing motions to dismiss] dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial."

Id. "Nearly every case will survive a motion to dismiss under notice pleading." APP. 40 (quoting *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009)).

"In determining whether to grant the motion to dismiss, a court views the well pled facts of the petition 'in the light most favorable to the plaintiff with doubts resolved in that party's favor.'" (quoting *Geisler v. City Council*, 769 N.W.2d 162, 165 (Iowa 2009) (citing *Haupt v. Miller*, 514 N.W.2d 905, 911 (Iowa 1994))). "A motion to dismiss admits, and is decided solely upon, all facts well pleaded. It is only sustainable *when it appears to a certainty* the pleader has failed to state a claim on which relief may be granted." *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 831 (Iowa 1983) (citations omitted) (emphasis added). "'A motion to dismiss is sustainable only when it appears to a certainty that the plaintiff would not be entitled to relief under *any state of facts that could be proved* in support of the claims asserted.'" APP. 41 (emphasis in original) (quoting *Penn. Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 810 (Iowa 2002)).

"We review a district court's order granting a motion to dismiss for correction of errors at law." *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 108 (Iowa 2011) (citing *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009)). "In conducting our review, '[w]e view the petition in the light most

favorable to the plaintiff, and will uphold dismissal only if the plaintiff's claim could not be sustained under *any state of facts* provable under the petition.'" *Berry*, 803 N.W.2d at 108 (quoting *Griffen v. State*, 767 N.W.2d 633, 634 (Iowa 2009)) (emphasis added). "In testing the legal sufficiency of the petition, we accept the facts alleged in the petition as true." *Berry*, 803 N.W.2d at 108 (citations omitted).

C. Argument.

1. The Trial Court Erred When it Wrongfully Considered Alleged Facts Not Included in the Petition and Failing to Permit Plaintiffs to be Heard Before Taking Judicial Notice of Certain Facts.

A motion to dismiss "*cannot be based upon facts not alleged in the pleading which is assailed*, unless judicial notice can be taken of additional facts." *Curtis v. Bd. of Sup'rs of Clinton Cty.*, 270 N.W.2d 447, 448 (Iowa 1978) (emphasis added). The Court "must disregard" any other facts. *Id.* Despite referencing the applicable standard for a motion to dismiss in the Brief they filed in support of their Motion for Summary Judgment, Defendants then ignored the same, and instead improperly spent the remaining two dozen pages of their Brief arguing the merits of Plaintiffs' claims. Defendants' Brief at pp. 3-4. Unfortunately, this tactic was successful.

In direct contravention of the standard for a motion to dismiss, the trial court impermissibly considered alleged facts not included in the Petition of

which it could not take judicial notice. For instance, on page 20 of the Ruling, the trial court improperly referenced statements made by Dr. Caitlyn Pedati, IDPH's Director, at the temporary injunction hearing. APP. 56. The Court subsequently stated that it "needs to examine the pleadings and the referenced documents for the rational explanation." These actions are in direct contravention of the standard for a motion to dismiss. The only "pleading" the Court is permitted to examine is the Amended Petition.

In its Temporary Injunction Order, the trial court even recognized that "It is important to look at the facts and law surrounding the pandemic and determine whether Iowa's Governor followed the law in the exercise of her duties." Temporary Injunction Order at p. 11. In its Temporary Injunction Order, the trial court proceeded to analyze a multitude of alleged facts which it may not consider for purposes of the Motion to Dismiss. *Id*. at pp. 3-4, 11-12, 16-18, 27.

It is self-evident that if it was important for the trial court to engage in this analysis to "determine whether Iowa's Governor followed the law in the exercise of her duties," then in the absence of any "facts . . . surrounding the pandemic" outside the well pled facts in the Amended Petition, the trial court could not "determine whether Iowa's Governor followed the law in the exercise of her duties" for purposes of the Motion to Dismiss. *Id*. However,

in the Ruling the trial court purports to do just that. Without improperly relying on alleged facts outside the Amended Petition, the trial court could not have granted Defendants' Motion to Dismiss.

Further, in their Brief in support of their Resistance to Motion to Dismiss, Plaintiffs explicitly stated:

> If the Court is going to consider taking judicial notice of any facts, Plaintiffs respectfully request that they be given an opportunity to be heard pursuant to Rule 5.201. Iowa R. Civ. P. 5.201(e) ("On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.").

Plaintiffs' Brief in Support of Resistance to Motion to Dismiss at p. 5. In direct contravention of Iowa law and Plaintiff's request, in its Ruling the Court decided to take judicial notice of a variety of "facts." *See, e.g.*, APP. 51, n. 4.

2. This Court Should Determine the Issues Raised by Plaintiffs Even if the Request for Injunctive Relief in the Amended Petition Would Otherwise be Moot.

On September 15, 2020, Governor Reynolds issued another Proclamation of Disaster Emergency ("September 15th Proclamation"). APP. 43;[2] October 1 Reply; APP. 12-14. The September 15th Proclamation removed establishments in Black Hawk, Dallas, Linn, and Polk Counties from being subject to sections 2(A)(1), 2(A)(2), 2(A)(3), 2(A)(4), and 2(B)(1) and

[2] Plaintiffs do not dispute that the trial court taking judicial notice of the September 15, 2020 Proclamation was appropriate.

2(B)(3) of the August 27th Proclamation. *Compare* August 27th Proclamation at §2, *with* September 15 Proclamation at §3. Other than removing establishments in Black Hawk, Dallas, Linn, and Polk Counties from being subject to sections 2(A)(1), 2(A)(2), 2(A)(3), 2(A)(4), and 2(B)(1) and 2(B)(3), by its explicit terms, the September 15th Proclamation provides that the August 27th Proclamation remained in full force and effect. APP. 35 at §6. Accordingly, *all* establishments in Iowa, including Plaintiffs, remained subject to the balance of the August 27th Proclamation, including sections 2(B)(2) and 2(B)(4). *Compare* August 27th Proclamation at §§2(B)(2), 2(B)(4), *with* September 15th Proclamation at §§2(A)(1) and 2(A)(2).

Until sections 2(B)(2) and 2(B)(4) of the August 27th Proclamation (i.e. sections 2(A)(1) and 2(A)(2) of the September 15th Proclamation) were rescinded and no longer being enforced, neither Plaintiffs' interlocutory appeal nor Plaintiffs' request for temporary injunction are moot. Regardless, this Court should still determine the issues raised by Plaintiffs because they are of substantial public importance. The Court shall also determine such issues under the voluntary cessation doctrine.

a. The issues raised by Plaintiffs are of substantial public interest.

"Mootness is not a question of power but rather one of restraint." *City of Des Moines v. Public Employment Relations Bd.*, 275 N.W.2d 753, 759

(Iowa 1979) (citing *Rush v. Ray*, 332 N.W.2d 325, 326 (Iowa 1983)). "[I]n actions where injunctive relief is sought, the cessation or completion of the objectionable act *does not necessarily render the issue moot*." *Bd. of Directors of Indep. Sch. Dist. of Waterloo v. Green* 147 N.W.2d 854, 856 (Iowa 1967) (emphasis added). Instead, under the "public interest exception" to the mootness doctrine, "moot questions might be considered when (1) they are of great public importance and (2) are likely to recur." *City of Des Moines,* 275 N.W.2d at 759 (citing *Rush*, 332 N.W.2d at 326).

> Among the recognized criteria for determination of existence of the requisite degree of public interest are:
> (1) the public or private nature of the question presented,
> (2) desirability of an authoritative adjudication for future guidance of public officials, and
> (3) likelihood of future recurrence of the same or similar problem.

Green 147 N.W.2d at 856 (noting that "[w]hen the issue presented is of substantial public interest there exists a permissible exception to the general rule that a case which has become moot or presents only an academic question will be dismissed on appeal.").

In *Green*, in deciding to rule on an issue which was otherwise moot, the Iowa Supreme Court noted that "the very urgency which presses for prompt action by public officials makes it probable any similar case arising in the future will likewise become moot by ordinary standards before it can be

resolved by this court." *Id.* at 857. In the present case, the same considerations referenced in *Green* clearly apply.

i. The issues Plaintiffs have raised are undeniably of public importance.

In the six months between the March 9th Proclamation and the filing of the Amended Petition Governor Reynolds had issued almost two dozen proclamations. These proclamations affected essentially every aspect of Iowans' lives. *See e.g.*, April 2nd Proclamation (containing 105 sections). Among other adverse effects, the proclamations infringed on the public's fundamental rights to assemble, due process, equal protection, privacy, and interstate and intrastate travel. It is difficult to imagine issues of greater public importance. Even if the issues raised by Plaintiffs in their Amended Petition were otherwise moot at present, "[b]oth publicly and privately, interest still exists". *Vislisel v. Bd. of Adjustment of Cedar Rapids*, 372 N.W.2d 316, 318 (Iowa Ct. App. 1985). The public is entitled to know whether some or all of the proclamations, or the mandates and prohibitions therein, are, or were, as Plaintiffs have alleged, void or of no effect, or otherwise ultra vires or improper.

ii. Authoritative adjudication for future guidance of public officials is undeniably desirable.

The trial court acknowledged that "[a]n authoritative adjudication

would probably be useful to guide public officials on their future conduct relating to COVID-19 orders. . . .” APP. 44. However, the trial court posited that “that along is not enough for the Court to hear the claims.” *Id*. Similarly:

> Even if Governor Reynolds issues a future order forcing some establishments to close, the Court cannot say with any certainty that the legal issues will be framed the same way. The Court cannot know whether a future order would impose restrictions on Polk or Dallas counties, would close Plaintiffs’ businesses or those similarly situated, or would contain language Plaintiffs find objectionable or deficient.

APP. 45. These comments constitute unduly narrow readings of the substantial public interest exception to the mootness doctrine.

In making these assessments, the trial court failed to recognize the issue of guidance to public officials is not limited solely to guidance with respect to “COVID-19 orders,” or the current pandemic, but instead to *any* actions purportedly taken under Iowa Code section 29C.6, 135.140(6), or 135.144. There is no case law in Iowa addressing Iowa Code sections 29C.6, 135.140(6), or 135.144, under which Governor Reynolds purports to act in issuing the proclamations. Aside from Attorney General Thomas J. Miller’s 1979 Attorney Opinion, 1979 Iowa Op. Atty. Gen 349 (Iowa A.G.), No. 79-8-11, 1979 WL 21043 (August 14, 1979) (the “1979 Attorney General Opinion”), there are no secondary sources addressing any of these statutes. Notably, despite the 1979 Attorney General Opinion being a substantial legal

basis for Plaintiffs' arguments in support of their request for temporary injunctive relief and in response to the Motion to Dismiss, the trial court completely ignored the 1979 Attorney General Opinion in its 28-page Ruling, never referencing, let alone analyzing the same. Guidance on these issues is not merely "desirable," as required, but important or imperative.

Not only the public at large, but also both the Iowa governor and the IDPH will benefit from authoritative adjudication on the issues raised by Plaintiffs. If this Court provides authoritative adjudication there will be no, or at least substantially fewer, challenges to future proclamations. If the Court holds that the proclamations were lawfully issued, prospective plaintiffs will undeniably be deterred from making future challenges. If the Court finds that any or all of the proclamations were not lawfully issued, the Iowa governor and IDPH will have clear guidance as to how to avoid future unlawful actions.

According to Governor Reynolds, a "public health disaster emergency" existed in Iowa for almost a year. It is Plaintiffs' respectful position that both public officials and the general public could use an authoritative adjudication on, among others, the following issues, which would remain unresolved if this Court declined to consider the same due to mootness:

1. **Question 1** – Does the pandemic constitute a "disaster" as defined under Iowa Code section 29C.2(4)?
2. **Question 2** – In order for a "public health disaster" to exist, does there only need to be one "imminent threat of an illness or health

condition" as referenced in Iowa Code section 135.140(6)(a) *or* 135.140(6)(a), or, must there be at least one condition in Iowa Code section 135.140(6)(a) *and* at least one condition in Code section 135.140(6)(b)?

3. **Question 3** – Was there ever a "public health disaster" emergency in the entire State of Iowa as defined under Iowa law?
4. **Question 4** – Under what circumstances does a "public health disaster" emergency cease under Iowa law?
5. **Question 5** – Must, as Attorney Miller stated in the 1979 Attorney General Opinion, the validity of the proclamation "be measured by the stated reasons" and "stand or fall on the basis of the reasons stated"?
6. **Question 6** – Is Attorney Miller correct that, as stated in the 1979 Attorney General Opinion, it is improper for a court to "consider unstated factual premises in determining the lawfulness of executive action"?
7. **Question 7** – Did Governor Reynolds usurp the IDPH's authority in issuing any or all of the proclamations or parts thereof?
8. **Question 8** – Was the Order of Closure a "*reasonable* measure[s] as *necessary* to *prevent* the transmission of infectious disease *and* to *ensure* that *all* cases of communicable disease are properly identified, controlled, and treated"? Iowa Code §135.144(3) (emphasis added).
9. **Question 9** – Because the entire State of Iowa has been declared a "public health disaster emergency," is it permissible for Defendants' actions to affect only certain establishments in certain counties?

The majority of these issues need to be resolved in *general*, even if the issues relating specifically to the August 27th Proclamation are moot. "There is a need for an answer in this situation to grant authoritative guidance to [Defendants] now and in the future . . . ." *Vislisel*, 372 N.W.2d at 318 (Iowa Ct. App. 1985). Authoritative adjudication on these issues from the court is in the best interest of both public officials and the general public.

iii. These contested mandates and prohibitions or similar issues will undoubtedly reoccur.

The trial court claimed that "[i]t is speculation to guess how the COVID-19 pandemic will evolve and whether the factual circumstances giving rise to the Proclamation will recur." APP. 44. However, as Plaintiffs noted in their October 1, 2020 Statement Regarding the Effect of the September 15th Proclamation filed in Supreme Court Case No. 20-1156 ("October 1, 2020 Statement"), "[m]any experts and commentators, including Dr. Anthony Fauci, the head of the National Institute of Allergy and Infectious Diseases, anticipate that the arrival of fall and winter and flu season will result in a surge in coronavirus infections and deaths." This Court can take judicial notice of the fact that these experts' assessment was prescient. The opinions of epidemiologists and other professionals is not, and was not, simply "speculative." As of August 27, 2020, the State of Iowa had reported fewer than 1,100 deaths attributed to COVID-19. However, the State of Iowa currently attributes five times as many deaths to COVID-19.

An important consideration is determining whether a substantial public interest exists is whether "the situation is such that often the matter will be moot before it can reach an appellate court." *Dittmer v. Baker*, 280 N.W.2d 398, 399 (Iowa 1979) (quoting *Danner v. Hass*, 134 N.W.2d 534, 539 (Iowa 1965)). As Plaintiffs noted in their October 1, 2020 Statement:

> If this Court does not address these issues establishments in Iowa which hold alcoholic beverages licenses will be stuck in a cycle where: (1) Defendants continue to issue proclamations, including closing or otherwise adversely affecting such establishments; (2) such establishments file a lawsuit; (3) by the time the issues are addressed Defendants have rescinded the contested part of the proclamations; and (4) Defendants claim the issues are moot. Plaintiffs will be deprived of any ultimate relief.

See October 1, 2020 Statement. This has also proven prescient.

The pending case will (hopefully) be this Court's last opportunity to decisively rule on the general issues raised by Plaintiffs under Iowa Code sections 29C.6, 135.140(6), and 135.144 for a number of years. However, it cannot be seriously disputed both that other pandemics will occur, and that the governor of Iowa will be faced with more situations which some will claim constitute "public health disasters," "disaster emergencies," or "public health disaster emergencies." This Court should make an authoritative adjudication on the issues referenced by Plaintiffs, or such additional issues as this Court deems appropriate. *See, e.g., Hamilton v. City of Urbandale*, 291 N.W.2d 15, 17 (Iowa 1980); *Maghee v. State*, 773 N.W.2d 228, 235 (Iowa 2009); *First Nat. Bank in Lenox v. Heimke*, 407 N.W.2d 344, 346 (Iowa 1987); *Catholic Charities of Archdiocese of Dubuque v. Zalesky*, 232 N.W.2d 539, 543 (Iowa 1975); *Burns v. Siebenmann*, 266 N.W.2d 11, 13 (Iowa 1978); *Ashenfelter v. Mulligan*, 792 N.W.2d 665, 670 (Iowa 2010); *In Interest of E.C.G.*, 345 N.W.2d 138, 141 (Iowa 1984); *Virginia Manor, Inc. v. City of Sioux City*, 261

N.W.2d 510, 514 (Iowa 1978); *One Certain Pers. Named In Indictment 7B5122 v. 1970 Grand Jury of Johnson Cty.*, 207 N.W.2d 33, 34 (Iowa 1973).

b. Under the Voluntary Cessation Doctrine, This Court Should Still Determine the Issues Raised by Plaintiffs.

"Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further relief is or could be claimed." Iowa R. Civ. P. 1.1101. "Voluntary cessation" occurs where a party ends its own allegedly unlawful conduct. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 92 (2013). The United States Supreme Court has recognized that a party cannot automatically render a case moot through voluntary cessation, because the party could simply continue the unlawful conduct after the case is dismissed. *Id.*

Courts may still decide a case on its merits if the controversy in the case is "capable of repetition yet evad[es] review." *Arkansas AFL–CIO v. F.C.C.*, 11 F.3d 1430, 1435 (8th Cir.1993) (en banc). "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave (t)he defendant ... free to return to his old ways." *United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968) (internal quotations and citations omitted). Under the voluntary cessation doctrine, in order for a case to be moot, the party claiming the case is moot

must show "that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Aladdin's Castle, Inc.,* 455 U.S. 283, 289 n. 10 (1982) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000)) (emphasis added); see also *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 989 (S.D. Iowa 2019).

Iowa state courts do not appear to have directly addressed the voluntary cessation doctrine. This may be due to the fact that much of the analysis under the voluntary cessation doctrine seemingly overlaps with the public interest exception. However, the two doctrines are separate and distinct, including because the public interest exception can apply even in the absence of voluntary cessation. Accordingly, this court should confirm that the voluntary cessation doctrine applies in Iowa.

By issuing the September 15th Proclamation, Defendants voluntarily removed establishments in Black Hawk, Dallas, Linn, and Polk Counties from being subject to sections 2(A)(1), 2(A)(2), 2(A)(3), 2(A)(4), and 2(B)(1) and 2(B)(3) of the August 27th Proclamation. Defendants subsequently took this a step further, recently removing all establishments from prior pandemic-related restrictions. In order for the issues raised by Plaintiffs to be moot, it must be "absolutely clear" that such issues "could not reasonably be expected"

to issue any similar mandates or prohibitions in the future. *Aladdin's Castle, Inc.*, 455 U.S. at 289 n. 10. However, it cannot be seriously disputed that our State will face similar situations in the future.

If this Court were to determine that the issues raised by Plaintiffs are moot, Defendants could enact further prohibitions or mandates, Plaintiffs would need to file another lawsuit, and the issues would be moot by the time Plaintiffs were able to be heard on the merits. This repetitious cycle of litigation must be avoided, as Plaintiffs will be deprived of effective relief.

3. The *King* Case, the Basis for the Trial Court's Claim that Plaintiffs Failed to State a Claim Upon Which Relief Can Be Granted, is Inapposite.

In its Ruling, the trial court relied on the 2012 Iowa Supreme Court decision in *King v. State*, 818 N.W.2d 1 (Iowa 2012), in support of its general holding that Plaintiffs failed to state a claim upon which relief can be granted. However, *King* does not stand for the broad propositions claimed by the trial court. *King* is also readily distinguishable.[3]

The trial court first cites *King* for the proposition that "[w]hether Governor Reynolds exceeded her statutory authority or violated Plaintiffs'

[3] In addition to the issues discussed, below, it is important to note that *King* was decided in an obviously contentious opinion filed by the Chief Justice Cady and joined by Justices Zager and Waterman, along with separate concurrences by Justices Zager and Waterman, a dissent by Justice Wiggins joined by Justices Hecht and Appel, and a separate dissent by Justices Hecht and Appel. *King*, 818 N.W.2d at 36.

constitutional rights are questions of law that the Court can properly decide on a motion to dismiss." APP. 48 (citing *King*, 818 N.W.2d at 28). However, a review of page 28 of *King*, cited by the trial court, reveals only: (1) references to cases in which Iowa courts have resolved a rational basis challenge on a motion to dismiss; and (2) a list of plaintiffs' allegations in *King* which the *King* Court found did not constitute legal conclusion. *King*, 818 N.W.2d at 28.

King did not involve any alleged ultra vires activities. Instead, *King* involved a challenge to Iowa's education clause, article IX, division 2, section 3 of the Iowa Constitution. *Id*. at 12. In *King*, the Plaintiffs contended that "the education clause imposes judicially enforceable *obligations* on Iowa's legislature to promote education by 'all suitable means.'" *Id*. at 13 (emphasis added). As succinctly stated by Justice Mansfield, in *King*, the plaintiff "asks us, in effect, to require the state to *impose* additional public school standards, urging that such action is both constitutionally and statutorily required. *Id*. at 5 (emphasis added). In response, the defendants posited that "plaintiffs' claims under the clause present a nonjusticiable political question." *Id*.

Unlike the plaintiffs in *King*, Plaintiffs are not seeking a mandatory injunction. The present case does not involve a nonjusticiable political question. *King* did not involve any of the statutes at issue in this matter.

Another distinguishing factor is that, as the Iowa Supreme Court held in *King*, "[d]isparate treatment by someone *other than the state* (which the state, because of inaction, failed to prevent) generally does not amount to an equal protection violation." *King*, 818 N.W. 2d at 25. In the present case, Plaintiffs alleged disparate treatment by the State.

Ultimately, with respect to precedential value, *King* is, for the most part, limited to issues involving Iowa's education clause. As noted by one court:

> In *King*, the Iowa Supreme Court determined because this statute only stated 'goals,' rather than educational requirements, "[p]ermitting a private right of action under [this section] would likely unleash a multiplicity of future lawsuits that would transform aspirational goals into a series of specific mandates.' Rather than illustrating a clearly-defined public policy, *King* instead demonstrates the Iowa Supreme Court's unwillingness to proscribe liability based on general aspirations, rather than particular regulations or statutes. As the *King* Court noted, '[w]hile [we] acknowledg[e] the undeniable importance of education, our court has previously characterized it as an area where there is no true consensus and where needs change over time. Thus, we have said that 'education is defined as a broad and comprehensive term with a variable and indefinite meaning.' Therefore, although the *King* decision may have articulated a general, state-wide desire for education, the Iowa Supreme Court declined to allow such a goal to form the basis of tort liability.

Strehlow v. Marshalltown Cmty. Sch. Dist., 275 F. Supp. 3d 1006, 1020–21 (S.D. Iowa 2017) (internal citations omitted). The pending action has nothing to do with education.

Finally, in *King*, the deciding issue for the majority on plaintiffs' equal

protection claim was that "the petition contains *no allegations of disparate treatment*." *King*, 818 N.W.2d at 25 (emphasis added). Unlike *King*, Plaintiffs' Amended Petition cites numerous allegations of disparate treatment. *See* APP. *inter alia* at 18 ¶¶26; 21 at ¶48, ¶51, ¶55; 24 at ¶71, ¶73; 25 at ¶84; 26 at ¶86. *King* also involved a challenge to Iowa's standards for public schools, not a gubernatorial action. *Id*. at 5. In *King*, the majority did not even reach the issue of whether the governor was a proper defendant. *Id*. at 5. *King* did not involve any alleged purported public health disaster. *King* is generally irrelevant to the pending action.

4. Plaintiffs Stated a Claim for Declaratory Relief.

Count I of Plaintiffs' Petition contains Plaintiff's request for a declaratory judgment. APP. 25. "A motion to dismiss admits, and is decided solely upon, all facts well pleaded. It is only sustainable when it appears to a certainty the pleader has failed to state a claim on which relief may be granted." *Ewurs v. Irving*, 344 N.W.2d 273, 275 (Iowa Ct. App. 1983) (quoting *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 831 (Iowa 1983)). "These principles apply to declaratory judgment actions as well as other actions." *Ewurs*, 344 N.W.2d at 275 (citing *Wright v. Thompson*, 117 N.W.2d 520, 523 (Iowa 1962)). "The issue on a motion to dismiss a petition for declaratory relief is whether plaintiffs have stated a claim for declaratory relief, not

whether the relief could be granted on the theory of the contract." *Id.* In assessing a motion to dismiss a claim for declaratory relief, the underlying question is "whether the facts alleged show there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment." *Erickson v. Christensen,* 261 N.W.2d 171, 172 (Iowa 1978).

Declaratory judgment is discretionary. "The court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding." Iowa R. Civ. P. 1.1105.

> 'The discretion to grant or refuse declaratory relief is broad in nature, and should be liberally exercised to effectuate the purpose of the statute, * * *. This discretion may be exercised only at such time during the trial when the court has the evidence before it and can properly make such a final determination, and can be exercised only on the record as it exists when the entry of a judgment would be appropriate. *Such discretion should not be exercised on motion to dismiss* * * * unless the court is fully satisfied that on its allegations the bill must be dismissed after a hearing on the merits, as discussed infra § 142.'

Wright v. Thompson, 117 N.W.2d 520, 525 (Iowa 1962) (emphasis added).

In *Wright*, the Iowa Supreme Court ultimately held that "the merits of the controversy *should not be determined on a motion to dismiss* an action for declaratory relief in advance of trial." *Id*. at 527. Similarly, in *Ewurs* the Iowa Court of Appeals ultimately held that "the trial court erred in sustaining the

motion to dismiss." *Ewurs v. Irving*, 344 N.W.2d 273, 275 (Iowa Ct. App. 1983). In the present case, the requested declaratory judgment "would terminate the uncertainty or controversy giving rise to the proceeding." Iowa R. Civ. P. 1.1105. The trial court erred when it granted Defendants' Motion to Dismiss.

5. Plaintiffs Stated a Claim for Defendants' Ultra Vires Activities.

In their Amended Petition, Plaintiffs alleged that the August 27th Proclamation is void and of no effect including, but not limited to, because: (1) the August 27th Proclamation does not state sufficient facts upon which it is based; (2) a public health disaster does not exist as defined under Iowa law; (3) the August 27th Proclamation unlawfully affects only certain establishments in certain counties; and (4) the August 27th Proclamation does not set forth *reasonable* measures as *necessary* to prevent the transmission of infectious disease and to ensure that *all* cases of communicable disease are properly identified, controlled, and treated. APP. 19 at ¶¶30-34, 19-21 at ¶¶35-45, 21-22 at ¶¶46-58, APP. 23-24 at ¶¶67-73, APP. 24-25 at ¶¶74-78, and APP. 25-26 at ¶¶85-86. Despite these well pled facts, the trial court claimed that it "can decide whether Iowa Code sections 29C.6 and 135.144 encompass[sic] the authority to issue the [August 27th] Proclamation, and whether the closure order is a reasonable measure necessary to prevent the

transmission of COVID-19." APP. 49. Upon what well pled facts in the Amended Petition can the trial court purport to make these decisions?

In making this assertion, the trial court completely flipped the standard for a motion to dismiss on its head by not only improperly *considering* the factual assertions *Defendants* made in their Motion to Dismiss and other documents, but also by essentially *accepting Defendants' allegations as true*. Instead, under the applicable standard for a motion to dismiss, the trial court should not have even considered any factual assertions made by Defendants of which it cannot take judicial notice, much less accepted such assertions as true.

The trial court continues by referencing governmental struggles, "possibilities" for procedures, and "political debate" about what should be done with the pandemic. APP. 49. None of these issues has any bearing on the fact Plaintiffs stated a claim for relief in their Amended Petition.

a. Plaintiffs stated a claim that a public health disaster as defined in Iowa Code section 135.140 does not exist.

Iowa Code Section 135.144 permits the IDPH, in conjunction with Iowa's governor, to take a variety of potential actions if "a public health disaster exists." Iowa Code §135.144.

> 'Public health disaster,' means a state of disaster emergency proclaimed by the governor in consultation with the department

> pursuant to section 29C.6 for a disaster which specifically involves an *imminent threat of an illness or health condition* that meets any of the following conditions . . .
> b. Poses a *high probability* of any of the following:
> (1) A *large* number of deaths in the affected population.
> (2) A *large* number of serious or long-term disabilities in the affected population.
> (3) Widespread exposure to an infectious or toxic agent that poses a *significant risk of substantial future harm* to a *large* number of the affected population.
> (4) Short-term or long-term physical or behavioral health consequences to a *large* number of the affected population.

Iowa Code § 135.140 (emphasis added). It has been the law in Iowa for over eight decades that our courts review a finding of emergency to determine whether such asserted emergency exists. *See First Tr. Joint Stock Land Bank of Chicago v. Arp*, 283 N.W. 441, 443 (Iowa 1939).

In paragraphs 38-45 of their Amended Petition Plaintiffs alleged that Defendants could not prove the existence of a public health disaster as defined in Iowa Code section 135.140. APP. 19-21 at ¶¶38-45. As even the trial court acknowledged, Plaintiffs explicitly pled that Defendants cannot "demonstrate that COVID-19 poses 'a high probability' of any of the four enumerated categories in Polk or Dallas County, Iowa." APP. 50(citing APP. 20 at ¶38). Accepting these well-pled facts as true, under the standard for a motion to dismiss, there was no public health disaster, and Defendants' actions were ultra vires. The inquiry should cease there.

In response the trial court ignored Plaintiffs' well-pled facts, instead making the conclusory assertion that "[t]he express language of the [August 27th] Proclamation and prior proclamations support a finding that a public health disaster exists in Iowa." APP. 41. This statement is the antithesis of the standard for a motion to dismiss. It is self-evident that mere "express language"—particularly language *added by Defendants to a document issued by Defendants*—cannot be grounds for categorically accepting the underlying premise advocated for by Defendants as true. The trial court's own conclusory summary, that Plaintiffs "cannot legally claim that there are not sufficient facts to show that COVID-19 was *not* a public health disaster as defined under Iowa law on August 27" does not even make sense. APP. 51 (emphasis added).

To further illustrate this point, in its Ruling, the trial court stated that "[i]t is speculation to guess how the COVID-19 pandemic will evolve . . ." APP. 44. However, the trial court in its subsequent discussion of Iowa Code section 135.140, and in reaching the aforementioned conclusion, necessarily speculated that there *was* an imminent threat of an illness or health condition. And that there was a high probability of a large number of deaths in the affected population. Or that there was a high probability of a large number of serious or long-term disabilities in the affected population. Or that there was

a high probability of widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of the affected population. Or that there was a high probability of short-term or long-term physical or behavioral health consequences to a large number of the affected population. In doing so, the trial court clearly erred under the standard for a motion to dismiss.

b. Plaintiffs stated a claim that no authority exists permitting additional restrictions on only a portion of an "area affected" by a public health disaster emergency.

Assuming arguendo a public health disaster exists, Iowa law provides that a proclamation of a state of disaster emergency "shall be in writing, indicate the area affected and the facts upon which it is based, be signed by the governor, and be filed with the secretary of state." Iowa Code §29C.6(1). "If the state of disaster emergency specifically constitutes a public health disaster as defined in section 135.140, the written proclamation shall include a statement to that effect." *Id*.

As the trial court recognized, with respect to the "area affected," the March 9th Proclamation declared a "STATE OF DISASTER EMERGENCY for the *entire state of Iowa*." March 9th Proclamation (italicized emphasis added). APP. 49. As recognized by the trial court, in the March 17th Proclamation, Governor Reynolds, for the first time, purported to act under

Iowa Code sections 135.140(6) and 135.144, and declared a "STATE OF PUBLIC HEALTH DISASTER EMERGENCY throughout the *entire state of Iowa*." APP. 6 (italicized emphasis added); APP. 49. While the August 27th Proclamation referenced only the Targeted Counties, the "area affected" of the "state of public health disaster emergency" continued to remain in effect for the entire State of Iowa.

In the Ruling, the trial court made the conclusory assertion that [t]he Governor has authority to impose restrictions on only a portion of an area affected by a public health disaster under section 29C.6(1)." APP. 51. However, neither the trial court nor Defendants have cited any authority permitting additional restrictions on only a portion of a larger area which has already been declared a public health disaster emergency. To the contrary, Iowa Code section 135.144(3) only permits the *IDPH*, "in conjunction with the governor," to "[t]ake reasonable measures as necessary to prevent the transmission of infectious disease and to ensure that *all* cases of communicable disease are properly identified, controlled, and treated." Iowa Code §135.144(3) (emphasis added). As Plaintiffs pled in their Amended Petition, the August 27th Proclamation does not ensure that "all" cases of COVID-19 are properly identified, controlled, and treated. APP. 21 at ¶48.

Section 135.144(3) does not permit Defendants to take reasonable measures as necessary to prevent the transmission of infectious disease and to ensure that only "some" cases of COVID-19 are properly identified, control, and treated. The reason for this is self-evident – COVID-19, like other communicable diseases - does not care about our invisible county lines, or whether we are in a bar, restaurant, or other establishment. There is no legal basis for providing additional restrictions on only a portion of the "area affected" by a "public health disaster emergency" – the entire State of Iowa.

c. Plaintiffs stated a claim that the Governor's Proclamations fail as a matter of law due to the lack of assertion of facts justifying their issuance.

Black's Law Dictionary defines "fact" as "[a]n actual and absolute reality, as distinguished from mere supposition or opinion." Fact, Black's Law Dictionary (6th Ed. 1990). Assuming arguendo that: (1) a public health disaster exists; and (2) Governor Reynolds had the authority to issue additional restrictions on only a portion of the State of Iowa, in contravention of the explicit mandate in Section 29C.6(1), the August 27th Proclamation did not indicate "the facts upon which it is based" justifying the Order of Closure. Iowa Code §29C.6(1).

There is no case law addressing Section 29C.6(1). However, in 1979, after then-Governor Robert Ray issued a proclamation of disaster emergency

due to a shortage of fuel and disruptions of supply (the "1979 Proclamation"), the Iowa Attorney General issued the 1979 Attorney General Opinion explicitly addressing proclamations of disaster under Chapter 29C, the limitations on the suspension-of-statute powers, and other issues relevant to the pending proceeding. *See* 1979 Iowa Op. Atty. Gen. 349 (Iowa A.G.), No. 79-8-11, 1979 WL 21043 (Aug. 14, 1979).

While an opinion of the attorney general is not binding on the Iowa Supreme Court, the attorney general's opinion is "entitled to our respectful consideration." *State v. Garland*, 94 N.W.2d 122, 126 (Iowa 1959) (citations omitted). Further, one of the benefits of having the longest-serving state attorney general in United States history is that the current Attorney General of Iowa, Thomas J. Miller, whose office is representing Defendants, also authored the 1979 Attorney General Opinion. The 1979 Attorney General Opinion was also a substantial basis for Plaintiffs' arguments in support of their request for temporary injunctive relief and in response to the Motion to Dismiss. In spite of the foregoing, as opposed to giving the 1979 Attorney General Opinion—*authored by Defendants' own counsel*—"respectful consideration," or *any* consideration, the trial court instead completely ignored the 1979 Attorney General Opinion in its 28-page Ruling, never referencing, let alone analyzing the same.

In the 1979 Attorney General Opinion, Attorney General Miller explicitly held that the 1979 Proclamation "provides inadequate findings in that the reasons stated establish only a threat to the public health and safety but do not additionally establish that a catastrophe has occurred or is imminently threatened as required by sections 29C.2 and 29C.6(1)." 1979 Iowa Op. Atty. Gen 349 (Iowa A.G.), No. 79-8-11, 1979 WL 21043 (August 14, 1979).

> Since the statute requires a statement of reasons, *the validity of the proclamation must be measured by the stated reasons*. When there is a requirement of law that reasons be stated by executive officials or administrative agencies responsible for decisions, there is an implicit corollary that *the decision must stand or fall on the basis of the reasons stated*.

Id. (emphasis added).

Unlike the limited findings in the 1979 Proclamation,[4] which themselves were held insufficient, the August 27th Proclamation provides essentially no findings. Instead, the facts supporting the August 27th Proclamation:

1. Do not explain the meaning of the statement "especially in Black Hawk, Dallas, Johnson, Linn, Polk, and Story counties."
2. Do not cite any evidence that COVID-19 is "especially" spreading in the Targeted Counties.
3. Do not link the spread of COVID-19 to any particular age group or class of individuals.

[4] Footnote 3 of the 1979 Attorney General Opinion quotes the findings in the 1979 Proclamation.

4. Do not cite any evidence that establishments that sell alcoholic beverages for consumption on their premises are the cause of the spread of COVID-19.
5. Do not cite any evidence supporting restrictions on only a single type of business – establishments that sell alcoholic beverages for consumption on their premises.
6. Do not reference alcoholic beverages.
7. Do not even *reference* bars, restaurants, or any other particular establishment as a cause of the spread of COVID-19.
8. Do not reference the percentage of monthly revenue an establishment generates from the sale of food the establishment prepares and serves on the premises as a cause of the spread of COVID-19.
9. Do not cite any evidence that the Order of Closure is necessary, without regard to whether any specific establishment that sells alcoholic beverages for consumption on its premises: (1) only serves customers on outside premises; (2) has a perfect record of health and safety violations; (3) has complied with past proclamations limiting such establishments; or (4) has taken additional steps to attempt to prevent the transmission and spread of COVID-19.
10. Do not link *any* of the aforementioned factors to any increase in the spread of COVID-19 *in the Targeted Counties*.

The lone statement in the August 27th Proclamation with respect to recent events was the conclusory allegation that "the continued spread of COVID-19 in the state of Iowa, especially in Black Hawk, Dallas, Johnson, Linn, Polk, and Story counties warrants taking additional reasonable measures to reduce the transmission of COVID-19." APP. 12. Ultimately, the August 27th Proclamation does not set forth sufficient "facts upon which it is based" of an "*imminent threat* of an illness or health condition" that provides a "high probability of any of the four enumerated categories" justifying the

declaration of a public health disaster and the Order of Closure in only the Targeted Counties.

Despite these obvious shortcomings, in its Ruling the trial court simply makes the conclusory allegations that the August 27th Proclamation "laid out the facts that constituted a public health disaster as defined in Iowa Code section 135.140(6)." APP. 49. The trial court references the March 9th Proclamation, noting that Governor Reynolds "declared that a public health disaster exists throughout the entire state of Iowa due to the community spread of COVID-19 and the potential of the virus to cause severe illness, disability, and death to Iowans." *Id*. These are not "facts," and it is entirely unclear what alleged "facts" the trial court believes Governor Reynolds laid out in any Proclamation. Notably, in the trial court's Temporary Injunction Order, issued just weeks before the Ruling, the trial court even acknowledged that the August 27th Proclamation "*does not allege specific facts* explaining the reasoning behind its particular restrictions . . . ." Temporary Injunction Order at p. 12 (emphasis added).

The trial court incorrectly concludes that its "function is not to determine the wisdom of the Proclamation, only the legal effect of the meaning of the Proclamation." APP. 52. Instead, for purposes of the Motion to Dismiss, the trial court's job was, in part, to determine whether the well-

pled facts in the Amended Petition state a claim upon which relief can be granted.

Under the trial court's Ruling, the Iowa Governor's proclamation is essentially, and wrongfully, unassailable. Given the well-pled facts in the Amended Petition, the aforementioned recitations are insufficient to support a motion to dismiss. Moreover, they are insufficient as a matter of law. The Proclamations indisputably "fall on the basis of the reasons stated," or rather, lack thereof.

Defendants' subsequently attempted to belatedly support their Proclamations. However, Defendants' own counsel already made it clear that such additional purported facts are insufficient as a matter of law:

> We observe that the Governor and his staff doubtless concluded that they were faced with an urgent situation requiring expeditious action. It is possible and, indeed, quite likely that the Governor possessed additional information not recited in the proclamation which contributed to the decision to declare an emergency. For example, a significant truck strike was emerging at the time of the proclamation. Although this office and a reviewing court may as citizens be aware of such facts, *it is rather clearly established that a court could not consider unstated factual premises in determining the lawfulness of executive action*.

1979 Iowa Op. Atty. Gen 349 (Iowa A.G.), No. 79-8-11, 1979 WL 21043, fn 1 (August 14, 1979) (emphasis added). Even if this Court disregards the 1979 Attorney General Opinion, under the standard for a motion to dismiss

Defendants would still not be able to belatedly attempt to justify the existence of the August 27th Proclamation. Despite this fact, in an attempt to justify the Ruling, the trial court improperly referenced Dr. Pedati's statements at the temporary injunction hearing and her affidavit. APP. 56. The allegations by Defendants at a temporary injunction hearing and in affidavits cannot be considered for purposes of a motion to dismiss. *Curtis v. Bd. of Sup'rs of Clinton Cty.*, 270 N.W.2d 447, 448 (Iowa 1978) (holding that motion to dismiss "cannot be based upon facts not alleged in the pleading which is assailed, unless judicial notice can be taken of additional facts.").

d. Plaintiffs stated a claim that the Order of Closure was not a reasonable measure necessary to preven the transmission of infectious disease and to ensure that all cases of communicable disease were properly identified, controlled, and treated.

In paragraphs 48-58 of the Amended Petition Plaintiffs pled a litany of facts why the Order of Closure was not a "reasonable measure." APP. 21-22 at ¶¶48-58. In paragraphs 67-73 of the Amended Petition Plaintiffs pled several facts as to why there was no rational basis for the application of the Order of Closure to Dallas and Polk Counties. In paragraphs 67-73 of the Amended Petition Plaintiffs pled several facts as to why there was no rational basis for the application of the Order of Closure to Dallas and Polk Counties.

In paragraphs 74-77 of the Amended Petition Plaintiffs pled facts as to why the Order of Closure was not "necessary."

Unlike other states, and other statutes, section 135.144 does not merely require that the measure taken be "reasonably necessary." Instead, the actions must be both "reasonable measures" and "necessary." Iowa Code §135.144(3) "The word necessary means '*indispensably requisite*: that *cannot be otherwise* without preventing the purpose intended.'" *A. Wolf & Son v. Indep. Sch. Dist. of Pleasant Valley Twp.*, 1 N.W. 695, 697 (Iowa 1879) (emphasis added); *see also* Iowa R. Civ. P. 1.234 (entitled "Necessary parties," and referencing "definition of indispensable party"); Amended Petition at ¶74. The requirement under Iowa law that an action pursuant to section 135.144(3) be "necessary" is unambiguous, thus a Court may not search for additional or alternative meaning in the statute. *See Stroup v. Reno*, 530 N.W.2d 441, 444 (Iowa 1995) (noting that courts should not "speculate as to the probable legislative intent apart from the wording used in the statute . . . We must look to what the legislature said *rather than what it should or might have said*") (emphasis added); *see also State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998) ("When a statute is plain and its meaning clear, courts are *not permitted* to search for meaning beyond its express terms") (emphasis added).

Notably, in the August 27th Proclamation Governor Reynolds did not even *claim* that the actions taken in the Order of Closure were "necessary." August 27th Proclamation (positing only that "the continued spread of COVID-19 in the state of Iowa, especially in Black Hawk, Dallas, Johnson, Linn, Polk, and Story counties warrants taking additional reasonable measures to reduce the transmission of COVID-19"). The Order of Closure was not, by any means "indispensable."

Finally, as discussed above, any "reasonable" and "necessary" measures taken by Defendants must also "ensure that *all* cases of communicable disease are properly identified, controlled, and treated." Iowa Code §135.144(3) (emphasis added). It is self-evident that the Order of Closure had nothing to do with "identifying" or "treating" COVID-19. Further, instead of attempting to ensure that "all" cases of COVID-19 were "controlled," the Order of Closure simply potentially limited people's potential exposure in six counties if those people would, absent the Order of Closure, have frequented what was deemed a Non-Exempt Establishment.

6. Plaintiffs Stated a Claim for Violation of Plaintiffs' Rights to Equal Protection.

Article I, section 6 of the Iowa Constitution is referred to as the equal protection clause and provides, "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or

class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." *Iowa Const.* art. I, § 6. Iowa's equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." *AFSCME Iowa Council 61 v. State*, No. 17-1841, 2019 WL 2147339, at *6 (Iowa Ct. App. May 17, 2019) (unpublished opinion) (*quoting Varnum v. Brien*, 763 N.W.2d 862, 878–79 (Iowa 2009) (*quoting Racing Ass'n of Cent. RACI)*, 675 N.W.2d 1, 7 (Iowa 2004))).

> The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning'

Ex parte Virginia, 100 U.S. 339, 347 (1879). While legislative decisions are afforded deference, no Iowa court has held that gubernatorial proclamations are afforded the same, or any deference. "Any government that has made the grave decision to suspend the liberties of free people during a health emergency should welcome the opportunity to demonstrate—both to its citizens and to the courts—that its chosen measures are *absolutely necessary*

to combat threat of overwhelming severity." *In re Salon A La Mode, et al*, No. 200340, 2020 WL 2125844 (Tex. May 5, 2020) (unpublished opinion) (emphasis added).

To prove an equal protection violation, a plaintiff must first establish that the statute treats similarly situated individuals differently. *Id.* (citing *McQuistion v. City of Clinton*, 872 N.W.2d 817, 830 (Iowa 2015)). Generally, however, determining whether classifications involve similarly situated individuals is intertwined with whether the identified classification has any rational basis. *Id, citing State v. Dudley*, 766 N.W.2d 606, 616 (Iowa 2009). The rational basis standard, while deferential, "'is not a toothless one' in Iowa.'" *Varnum* 763 N.W.2d at 879 (*quoting RACI*, 675 N.W.2d at 9).

In the Ruling, citing *King v. State*, 818 N.W.2d 1 (Iowa 2012), the trial court claimed that "[A] rational basis challenge can be resolved on a motion to dismiss."APP. 54. However, the full quote from *King* is "*[d]epending on the circumstances*, a rational basis challenge can be resolved on a motion to dismiss." *King*, 818 N.W.2d at 28. Notably, none of the five cases the *King* court cites in support of this proposition involve a claim of rational basis for promulgation of a proclamation. *Id.* (citing *Sanchez v. State*, 692 N.W.2d 812, 817–20 (Iowa 2005); *Johnston v. Veterans' Plaza Auth.*, 535 N.W.2d 131,

131–32 (Iowa 1995); *Gard v. Little Sioux Intercounty Drainage Dist.*, 521 N.W.2d 696, 698–99 (Iowa 1994)' *Seivert v. Resnick*, 342 N.W.2d 484, 485 (Iowa 1984); *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007). Instead, all involved challenges to a statute or ordinance. *Id.* Because it cannot, the trial court has not cited any Iowa case law under which a court granted a motion to dismiss a challenge to a gubernatorial proclamation.

As Plaintiffs pled in their Amended Petition, the Order of Closure treats similarly situated establishments differently in multiple respects. APP. 18 at ¶¶25-29, 21 at ¶¶48-49, 21-22 ¶¶52-58, 23-24 ¶¶68-73. Plaintiffs have well-pled facts that, for purposes of a motion to dismiss, establish that the Order of Closure's classifications are both irrationally overinclusive and underinclusive to achieve any asserted interest with respect to limiting the spread of COVID-19.

The State of Iowa is rightfully proud of its position at the forefront of many important equal protection issues. *See Varnum v. Brien*, 763 N.W.2d 862, 877–78 (Iowa 2009) (citing *In re Ralph*, 1 Morris 1 (Iowa 1839); *Clark v. Board of Directors*, 24 Iowa 266 (Iowa 1868), and *Coger v. North West. Union Packet Co.*, 37 Iowa 145 (Iowa 1873)). To be clear, no one is asserting that the instant matter is as generally important as the issues in the

aforementioned cases. However, the guarantee of equal protection under the Constitution of Iowa extends to all, even persons and industries often held in disfavor by others. While Defendants have chosen the wrong side of history and trampled on the establishments' rights to equal protection, the Court must not do the same. The Order of Closure deprives Plaintiffs of their right to Equal Protection under the Iowa Constitution.

7. Plaintiffs Stated a Claim for Violation of Plaintiffs' Due Process Rights.

Procedural due process constrains government decisions that deprive constitutionally provided "liberty" or "property" interests. *Mathews v. Eldridge*, 424 U.S. 391 (1976). Procedural due process "is not a technical conception with a fixed content unrelated to time, place[,] and circumstances." *Id*. at 334. It is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471 (1972). In most cases, "'a meaningful time' means prior to the deprivation of the liberty or property right at issue." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

"Substantive law creates, defines and regulates rights. Procedural law, on the other hand, 'is the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective.'" *Baldwin v. City of Waterloo,* 372 N.W.2d 486, 491 (Iowa 1985) (quoting *State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330, 332 (Iowa 1976).

> A substantive statute creates, defines, and regulates rights. A substantive statute also takes away a vested right. A procedural statute affords the practice, method, procedure, or legal machinery by which a person may enforce the substantive law.

City of Waterloo v. Bainbridge, 749 N.W.2d 245, 249 (Iowa 2008) (citations omitted).

"A person is entitled to procedural due process when state action threatens to deprive the person of a protected liberty or property interest." *653 *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 690 (Iowa 2002). In order to demonstrate that its procedural due process rights have been violated, a plaintiff must provide that "1) it had a protected liberty or property interest at stake; and 2) Defendants deprived Plaintiff[s] of this interest without due process of law." *Hopkins v. Saunders*, 199 F.3d 968, 975 (8th Cir.1999). "Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....'" *Bennett v. City of Redfield,* 446 N.W.2d 467, 472 (Iowa 1989) (quoting *Board of Regents v. Roth,* 408 U.S. 564, 570-71 (1972)).

"The power to establish licenses and permits and levy taxes as imposed in this chapter is vested *exclusively* with the state." Iowa Code § 123.37(1) (emphasis added). "It is unlawful to . . . sell, offer or keep for sale . . . alcoholic liquor, wine, or beer *except upon the terms, conditions, limitations, and*

restrictions enumerated in this chapter." Iowa Code § 123.2. The "administrator" of the Alcoholic Beverages Division of the Department of Commerce ("ABD") is tasked with leading the ABD. Iowa Code § 123.3.

"The legislature delegated to the ABD the power to enforce, implement, and administer the laws concerning beer, wine, and alcoholic liquor contained in chapter 123 of the code." *Auen v. Alcoholic Beverages Div., Iowa Dep't of Commerce*, 679 N.W.2d 586, 590 (Iowa 2004). The administrator of the ABD has the explicit, and exclusive duty and power "[t]o *grant and issue* beer permits, wine permits, liquor control licenses, and other licenses; and to *suspend or revoke all such permits and licenses* for cause under this chapter." Iowa Code § 123.9(5) emphasis added). Plaintiffs are the current holders of alcoholic beverages permits. Plaintiffs had to comply with stringent requirements, and make payments of thousands of dollars, in order to obtain their permits. Iowa Code §§ 123.30, 123.36; APP. 17 at ¶21.

Iowa law has long held that "'when a business is inherently illegal [e.g., liquor, tobacco] a permit to operate may be granted or refused at the will of the licensing body [and] is a privilege rather than a property right.'" *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430 (8th Cir. 2007) (citation omitted). However, unlike *Vilsack* or other, distinguishable cases, the instant case does not involve a refusal to issue, a refusal to renew, or a termination of

an alcoholic beverages permit. Instead, once Plaintiffs were issued their alcoholic beverages permits, they had a "'legitimate claim of entitlement' . . . rather than 'a mere abstract desire or unilateral expectation;'" thus their interests are considered "a 'property interest' for purposes of procedural due process." *C. Line, Inc. v. City of Davenport*, 957 F. Supp. 2d 1012, 1037 (S.D. Iowa 2013) (citing *Greenwood Manor v. Iowa Dep't of Pub. Health, State Health Facilities Council*, 641 N.W.2d 823, 837 (Iowa 2002) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once licenses are issued ... their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.")). Iowa appellate courts have also "assume[ed] without deciding a retail beer permit amounts to a protected property interest." *New Midwest Rentals, LLC v. Iowa Dep't of Commerce, Alcoholic Beverages Div.*, 910 N.W.2d 643, 653 (Iowa Ct. App. 2018).

"The requirements of procedural due process are simple and well established: (1) notice; and (2) a meaningful opportunity to be heard." *Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W.2d 255, 264 (Iowa

2001). In addition to constitutional requirements, Chapter 123 also explicitly provides limitations on the ability to revoke or suspend a permit that has been issued:

> *Before suspension, revocation, or imposition of a civil penalty* by the administrator, the license, permit, or certificate holder *shall be given written notice and an opportunity for a hearing*. The administrator may appoint a member of the division or may request an administrative law judge from the department of inspections and appeals to conduct the hearing and issue a proposed decision. Upon the motion of a party to the hearing or upon the administrator's own motion, the administrator may review the proposed decision in accordance with chapter 17A. Upon review of the proposed decision, the administrator may affirm, reverse, or modify the proposed decision. A license, permit, or certificate holder aggrieved by a decision of the administrator may seek judicial review of the administrator's decision in accordance with chapter 17A.

Iowa Code § 123.39(e). Neither the location of an establishment nor the percentage of monthly revenue an establishment receives from the sale of food it prepares and serves on the premises is not one of the limited, enumerated reasons for which a license, permit, or certificate of compliance issued under Chapter 123 may be suspended or revoked, or for which a civil penalty may be imposed. Iowa Code § 123.39(b).

The trial court references *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) in support of its Ruling on this issue. However, as the trial court previously explicitly acknowledged in its Ruling and Order on Plaintiffs'

Request for Temporary Injunction, *Jacobson* "has never been adopted as Iowa law." Temporary Injunction APP. 50. Plaintiffs also previously distinguished *Jacobson* on several grounds. Reply to Resistance to Motion for Temporary Injunctive Relief at §I(A), pp. 3-8.

The trial court also references actions and cases from other jurisdictions to support several parts of its Ruling, including those relating to Plaintiffs' claims for violation of their rights to equal protection and due process. *See, e.g.*, APP. 52 ("There have been many cases provided for persuasive authority that show that the Defendants' tactics in the Proclamation are measures that other states are using as an approach to combat an evolving pandemic; 57 (Referencing "Courts in other jurisdictions . . . .")58('The equal protection arguments were not able to carry the day in other jurisdictions");60("An Illinois Court found . . . Courts in other jurisdictions have denied . . . Two recent federal cases out of Louisiana . . . "). Iowa Code section 29C.6, 135.140, and 135.144 are unique. Cases from other jurisdictions were decided on different facts, on different statutes, and on different terms. Some involved actions taken by the legislature, not governor. Of those that involved gubernatorial actions, most were by executive order, not proclamation. Neither the trial court nor Defendants have cited any identical statutes.

Ultimately, the trial court "accept[ed] as true that Plaintiffs did not receive either notice or any opportunity to be heard on the closure of their establishments." APP. 58. As the trial court noted, Plaintiffs asserted that "their rights were violated under the Iowa Constitution because they were not afforded notice and an opportunity to be heard prior to the closure order." *Id.* Plaintiffs stated a claim for violation of their procedural due process rights.

8. Plaintiffs Stated a Claim for Injunctive Relief.

> The party seeking the injunction must establish: (1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available.

Sear v. Clayton County Zoning Bd. of Adjustment, 590 N.W.2d 512, 515 (Iowa 1999). Accordingly, to state a claim for permanent injunction, a plaintiff must allege (1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available. *Opat v. Ludeking*, 666 N.W.2d 597, 603 (Iowa 2003). "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (citation omitted). The United States Supreme Court has even held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 474 (1975). As

the trial court also noted, "[t]he Plaintiffs rightly point out that, the ultimate 'balancing' of interest and 'likelihood of success' are not appropriate inquiries on a motion to dismiss." APP. 45. Plaintiffs' Amended Petition clearly states a claim for injunctive relief.

CONCLUSION

Due solely to Defendants' subsequent actions, the issues Plaintiffs raised regarding the August 27th Proclamation are now moot. However, under the substantial public interest exception to the mootness doctrine, and under the voluntary cessation doctrine, this Court should still decide the issues raised by Plaintiffs. Accepting the well-pled facts in the Amended Petition as true, under the standard for a motion to dismiss, Plaintiffs have stated claims: (1) for declaratory judgment; (2) that Defendants' actions are ultra vires; (3) that Defendants violated Plaintiffs' right to equal protection; and (4) that Defendants violated Plaintiffs' right to due process.

"'The Constitution is not suspended when the government declares a state of disaster.'" *In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844, at *1 (Tex. May 5, 2020) (unpublished opinion) (quoting *In re Abbott*, 601 S.W.3d 802 (2020). "All government power in this country, no matter how well-intentioned, derives only from the state and federal constitutions. Government power cannot be exercised in conflict with these constitutions,

even in a pandemic." *Id.*

> No court should relish being asked to question the judgment of government officials who were elected to make difficult decisions in times such as these. However, when constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. When properly called upon, the judicial branch must not shrink from its duty to require the government's anti-virus orders to comply with the Constitution and the law, no matter the circumstances.

Id.

"Iowa's state motto—'Our liberties we prize and our rights we will maintain'—is not just a slogan but reflects a libertarian spirit rather than state authoritarianism." *State v. Brown*, 930 N.W.2d 840, 882 (Iowa 2019). Defendants cannot demonstrate "to a certainty that the pleader has failed to state a claim upon which any relief may be granted under any set of facts provable under the allegations." *Harden v. State*, 434 N.W.2d 881, 883 (Iowa 1989) (emphasis added). Accepting the well-pled facts in Plaintiffs' Amended Petition as true, Plaintiffs have stated multiple claims upon which relief can be granted. Plaintiffs respectfully request that this Court reverse the trial court's Ruling dismissing Plaintiffs' Amended Petition, and remand this case to the trial court for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellants Riley Drive Entertainment I, Inc. dba Tonic Bar, Riley Drive Entertainment XVI, Inc. dba Saints Pub + Patio Waukee, Cinderella Story, LLC dba Shotgun Betty's; Kiss My Grits, LLC dba The Irish, AGB, L.L.C. dba Annie's Irish Pub, and W. West Investments, L.L.C. dba Wellman's Pub & Rooftop respectfully request that this matter be set for oral argument.

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that I have filed the attached Plaintiffs'/Appellants' Final Brief with the Clerk of the Iowa Supreme Court through the electronic document management system on May 26, 2021.

/s/ Daniel P. Kresowik
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CERTIFICATE OF SERVICE

I hereby certify that May 26, 2021, I served Plaintiffs'/Appellants' Final Brief through the electronic document management system upon the following attorneys:

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this Brief contains 12,965 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2018 edition of Microsoft Word in 14-point font plain style.

/s/ Daniel P. Kresowik
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CERTIFICATE OF ATTORNEY'S COSTS

I hereby certify that the cost of printing the foregoing Plaintiffs'/Appellants' Final Brief was $0.00 (exclusive of sales tax, postage and delivery).

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