No.

In The
Supreme Court of the United States

ORLANDO BAR GROUP LLC, a Florida limited liability company; DENNIS L. HACKER, INC., a Florida for profit corporation; THE BARLEY POP L.L.C., a Florida limited liability company; JAX BEACH BAR INVESTMENTS, LLC, a Florida limited liability company; CHRIS VILLAGE LOUNGE, INC., a Florida for profit corporation; and LAMP POST LOUNGE, INC., a Florida for profit corporation,

Petitioners,

v.

RON DESANTIS, in his official capacity as The Governor of the State of Florida; FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, an administrative agency of the State of Florida; and ORANGE COUNTY, FLORIDA, a subdivision of the State of Florida,

Respondents.

On Petition for a Writ of Certiorari to the Florida Fifth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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January 10, 2023

QUESTION PRESENTED FOR REVIEW

During a state of emergency, are there constitutional safeguards, under the Fifth Amendment to the United States Constitution, that prohibit the government from arbitrarily denying property owners substantially all economically beneficial use of their property without a due process opportunity to prove they are not a public nuisance and without providing just compensation?

PARTIES TO THE PROCEEDINGS[1]

The petitioners are Orlando Bar Group, LLC, a Florida limited liability company d/b/a The Basement, The Attic, and The Treehouse; Dennis L. Hacker, Inc., a Florida for profit corporation d/b/a Dizzy D's; The Barley Pop LLC, a Florida limited liability company d/b/a The Park Drive; Jax Beach Bar Investments, LLC, a Florida limited liability company d/b/a The Tavern on First Street and The Wreck Tiki Bar; Chris Village Lounge, Inc., a Florida for profit corporation d/b/a Chris' Village Lounge; and Lamp Post Lounge, Inc., a Florida for profit corporation d/b/a Kennedy's Lamp Post Tavern.

The respondents are Ron DeSantis, in his official capacity as the Governor of the State of Florida; Florida Department of Business and Professional Regulation, an administrative agency of the State of Florida; and Orange County, Florida, a subdivision of the State of Florida.

CORPORATE DISCLOSURE

There are no parent corporations or publicly held companies that own 10% or more of any of the Petitioners corporations' stock.

RELATED PROCEEDINGS

Florida Supreme Court, Case No.: SC22-881:

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[1] Although all parties are disclosed in the caption of the case, Petitioner is completing the Parties to the Proceeding to include Petitioners' DBAs.

Order Declining to Accept Jurisdiction for Discretionary Review, dated October 12, 2022). *Orlando Bar Group, LLC v. DeSantis*, SC22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022).

Florida Fifth District Court of Appeal, Case No.: 5D21-1248:

Order Denying Motions for Rehearing, Rehearing En Banc, and for Certification and Substituting Revised Opinion in Place of Original Opinion, dated June 3, 2022. *Orlando Bar Group., LLC v. DeSantis*, 339 So. 3d 487, 490 (Fla. Dist. Ct. App. 2022), *review denied*. No. SC22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022).

Opinion Affirming Trial Court's Dismissal, dated April 8, 2022. *Orlando Bar Grp., LLC v. DeSantis*, No. 5D21-1248, 2022 WL 1051484 (Fla. 5th DCA. Apr. 8, 2022), *opinion revised and superseded on denial of reh'g*, 339 So. 3d 487 (Fla. Dist. Ct. App. 2022), *review denied*. No. SC22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022).

Florida Ninth Judicial Circuit Court Case No. 2020-CA-010922-O:

Order Granting Motion to Dismiss, dated April 16, 2021. *Orlando Bar Group, LLC v. DeSantis*, No. 2020-CA-010922-O, 2021 WL 8821799 (Fla.Cir.Ct. Apr. 16, 2021).

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BASIS FOR JURISDICTION

This Court has discretionary appellate jurisdiction to review the Order Denying Motions for Rehearing, Rehearing En Banc, and for Certification and Substituting Revised Opinion in Place of Original Opinion, dated June 3, 2022. *Orlando Bar Group., LLC v. DeSantis*, 339 So. 3d 487, 490 (Fla. Dist. Ct. App. 2022), *review denied*, No. SC22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022).

CONSTITUTIONAL PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution provides in relevant part: ". . . nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case arises from a series of emergency orders (the "Orders") that Respondents issued in the early days of the COVID-19 pandemic that suspended the sale of alcoholic beverages for on-premises consumption at bars and nightclubs for approximately six (6) months.

The Petitioners are a group of bar owners who filed a complaint against Respondents, on October 30, 2020, to vindicate and protect their fundamental rights under the Fifth Amendment to the United States Constitution, as applied through the Fourteenth Amendment, and Article X, section 6(a) of the Florida Constitution, from a governmental taking of their properties through unreasonable and arbitrary processes. Petitioners' six-count complaint contains claims for inverse condemnation (counts I-III) and declaratory judgment (counts IV-VI). Respondents filed a motion to dismiss asserting that Petitioners' complaint failed to state a cause of action,

Importantly, the Florida Department of Business and Professional Regulation ("Fla. DBPR") in issuing its rules summarized what the State of Florida was doing: it suspected that bars were places where young people visited, and as such, effectively constituted public nuisances, and therefore they must be prohibited from selling alcohol for on-premises consumption. *See*, Fla. DBPR Order dated June 26, 2020, Ex. 2A to the complaint). The Governor's Task Force for Florida's Recovery referred to their effects as closures.

Thus, based upon mere suspicion and without giving the Petitioners the opportunity to adopt safety procedures, such as masks, taking temperatures of customers prior to their entry on the premises, hand sanitizing procedures, or a host of other preventative measures that would attack the Covid-19 virus rather than the businesses themselves, the Fla. DBPR "closed" these bar businesses. At the same

time, restaurants were permitted to continue operation at 50% capacity and then full capacity. As such, this was not a case of the Fla. DBPR not knowing what to do; it had a Task Force Report fully explaining the plan for reopening of businesses, but based on mere suspicion, closed bars. These bar closures remained in effect until Sept. 14, 2020. The Respondents admit that they damaged Petitioners.

Respondents' shutting down of the Petitioners' businesses resulted in an unconstitutional taking, as clearly alleged in Petitioners' complaint. The rights of the people of the United States are guaranteed by our U.S. Constitution. The judiciary should not relinquish its role to other branches of government as the defender of these constitutional rights. There will be more pandemics and other emergencies in the future. Business owners and public officials are entitled to more clear direction as to what the government can do in picking winners and losers, closing some businesses and not others, without any evidence that the businesses (here, bars) were acting as a public nuisance by allegedly not complying with health protocols with which other businesses, including restaurants, were given the opportunity to comply.

The facts alleged in Petitioners' complaint show they were effectively denied all economically beneficial use of their businesses while similarly situated restaurants were permitted to operate at 50% and then full capacity. As such, the Fla. DBPR, by precluding the on-premises sale of alcoholic beverages, effectively shut down the Petitioners' bars while restaurants were permitted to operate.

On April 16, 2021, the trial court entered its Order Granting Motion to Dismiss. The trial court held that the Petitioners "failed to identify a protected property interest" as "there is no property right to operate a particular business without being subject to the State's 'reasonable restraint in the interest of public welfare.'" The trial court dismissed Petitioners' complaint with prejudice holding that any amendment would be futile. Petitioners timely appealed to the Florida Fifth District Court of Appeal ("Florida Fifth DCA").

On April 8, 2022, the Florida Fifth DCA entered its Opinion affirming the trial court's dismissal of the action with prejudice. On April 25, 2022, Petitioners filed motions for rehearing, rehearing *en banc*, and certification. On June 3, 2022, the Florida Fifth DCA filed its Opinion denying the motions and substituting the revised opinion ("Opinion") in place of the original opinion. The Petitioners timely sought discretionary review by the Florida Supreme Court. On October 12, 2022, the Florida Supreme Court denied discretionary review.

Petitioners timely filed this petition for writ of certiorari, seeking discretionary review of the Florida Fifth DCA's Opinion.

REASON FOR GRANTING WRIT

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FLORIDA SUPREME COURT REFUSED TO REVIEW THE OPINION OF THE FLORIDA FIFTH DCA THAT

INCORRECTLY DECIDED AN IMPORTANT FEDERAL QUESTION REGARDING THE FUNDAMENTAL RIGHTS OF PERSONS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The decision of the Florida Fifth DCA erroneously interprets both *Cedar Point Nursery* and *Tahoe-Sierra* concerning fundamental Fifth Amendment rights. This Court has repeatedly recognized that: "[t]he Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Arkansas Game and Fish Commn. v. U.S.*, 568 U.S. 23, 31 (2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002) (citing *U.S. v. Pewee Coal Co.*, 341 U.S. 114 (1951)). This Court has "solidly established" that takings that are temporary in duration can be compensable. *Arkansas Game and Fish Commn.*, 568 U.S. at 32–33 (citing *U.S. v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 267 (1950)). Respondent, Governor Ron DeSantis, has recognized and proclaimed that the right to operate a business is a constitutionally protected right that should be free from governmental interference. The question that must be answered by this Court is the proper standard for protecting businesses' constitutionally protected property rights from governmental closure.

The facts of this case are squarely within the reasoning and the protections set forth in *Cedar Point Nursery*. *See Cedar Point Nursery v. Hassid*, 141 U.S. 2063 (2021). Effectively closing a business is often far more intrusive than expropriating a landowner's right to exclude, which this Court correctly held to constitute a taking in *Cedar Point Nursery*.

The Florida Fifth DCA's Opinion acknowledges this Court's decision in *Cedar Point Nursery* held that the right to exclude is "one of the most treasured rights of property ownership." *Orlando Bar Grp., LLC v. DeSantis*, 339 So. 3d 487, 491–92 (Fla. Dist. Ct. App. 2022), *rev. den.*, No. SC22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022) (citing *Cedar Point Nursery,* 141 S. Ct. at 2072; citing *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982)). Commentators have stated that the right to admit persons is in fact a subset or corollary of the right to exclude. Even more so, when government forces the exclusion of virtually all visitors, it dramatically impacts a property right equally as valuable as the owner's right to exclude described in *Cedar Point Nursery*. Logically, the government's shutting down of a business for the duration imposed on Petitioners constitutes a *per se* taking. In a grave error, however, the Florida Fifth DCA held that the converse, the right to admit persons to a business' premises, was not supported or protected by the Supreme Court's holding in *Cedar Point Nursery*.

The right of a business or property owner to admit visitors can be equally as important as the right to

exclude as discussed in the Fifth DCA's opinion. In fact, logically speaking, depriving a business of the right to admit virtually all customers is tantamount to shutting down the business. Thus, this U.S. Supreme Court should accept jurisdiction of this case in order to correct the Florida Fifth DCA's over-restrictive and erroneous interpretation of *Cedar Point Nursery*.

The Florida Fifth DCA also erroneously interpreted *Tahoe-Sierra Pres. Council, Inc.* Rather than limiting *Tahoe-Sierra* to its unique facts and circumstances as being a land planning moratoria case, the Florida Fifth DCA applied it broadly to business closures without requiring any proof that the businesses were creating a public nuisance by continuing to operate, and implying that a shutdown can last for up to almost three years.

Simply stated, the Opinion by the Florida Fifth DCA incorrectly interprets *Cedar Point Nursery* and misapplies this Court's holding in *Tahoe-Sierra*. Thus, this Supreme Court should grant review of this case to correct the Florida Fifth DCA's erroneous interpretation of the judicial precedent set by this Court.

This Court should also clarify the proper standard that courts throughout the United States must apply when, as occurred regarding the Covid-19 pandemic, local governments and states take the drastic action of shutting down businesses without any due process determinations that those businesses constitute a public nuisance; and shut down those businesses without any controls defining what is a rational

distinction between different types of businesses. The citizens of the United States are in desperate need of a set of standards that will define the rights of our citizens, including businesses, when there are recurrences of the Covid-19 pandemic -- and during any future pandemic or other real or imagined emergency, which there certainly will be.

This Court should adopt a test similar to that pronounced by Justices Clarence Thomas and Rehnquist in their dissent in *Tahoe-Sierra* and as alluded to in *Roman Cath. Diocese of Brooklyn v. Cuomo,* 208 L. Ed. 2d 206, 141 S. Ct. 63, 70 (2020) and specifically discussed by Justices Gorsuch and Kavanaugh in their concurring opinions.

The issue is broader than asking whether the denial of the right to admit visitors is worthy of the same constitutional protections as the right to exclude individuals, which can amount to a *per se* physical taking as explained in *Cedar Point Nursery*. As *Cedar Point Nursery* shows, logic and common sense should control the analysis of this case. Substance should control over form. As such, the denial of the right to admit visitors to a business can be in reality tantamount to closing the business. The United States' constitutional protections, as properly interpreted by this Court, require that governments orders that shutdown businesses must show that those businesses were causing or contributing to the public nuisance (spreading the COVID virus).

So, what is the standard that this Court should adopt to explain the proper standards to apply when states and local governments effectively shut down

businesses for months or even years, severely injuring or destroying those businesses? Petitioners suggest that the Court adopt the standard as stated in Justice Thomas's dissent in *Tahoe-Sierra Preservation Council, Inc.*: "I would hold that regulations prohibiting all productive uses of property are subject to *Lucas'* per se rule, regardless of whether the property so burdened retains theoretical useful life and value if, and when, the "temporary" moratorium is lifted." *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 356. *see also*, Justices Gorsuch's and Kavanaugh's concurrences in *Roman Catholic Diocese of Brooklyn. Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 69–75.

Another well-reasoned statement of the standard is set forth in the Florida Supreme Court's opinion in *Keshbro v. City of Miami*, 801 So. 2d 864 (Fla. 2001*)*. In *Keshbro*, the Florida Supreme Court adopted a similar, workable test to which Justices Thomas, Gorsuch, and Kavanaugh have alluded. The Florida Fifth DCA did not mention the *Keshbro* case, apparently because the Respondents erroneously argued that *Tahoe-Sierra* "vitiated" *Keshbro*. *Keshbro* is consistent with rulings in other states, and it was not "vitiated" by *Tahoe-Sierra.*

The Florida Supreme Court in *Keshbro* held that: "It is well settled in this State that injunctions issued to abate public nuisances must be specifically tailored to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise. *Keshbro, Inc.*, 801 So. 2d at 876 (citing *Brower v. Hubbard,* 643 So.2d 28, 30 (Fla. 4th DCA 1994); *see also City of Seattle v. McCoy*, 101

Wash. App. 815, 4 P.3d 159 (2000). In *Keshbro,* the court flatly rejected the application of *Tahoe-Sierra* to the closure of a business. *Id.* at 874 (temporary regulations in the land planning arena are based on an "entirely different set of considerations… from those in the context of nuisance abatement where the landowner is deprived of a property's dedicated use"). As such, shutting down or closing a business for more than a few weeks is effectively a physical invasion or expropriation of the business, and can be a *per se* taking of that business.

It is time for this Court to set forth the proper standard in order to preserve the Fifth Amendment constitutional rights of Americans in general, and business owners in particular. Applying *Tahoe-Sierra* so as to permit the closure of businesses for almost three years as occurred in Tahoe-Sierra, without any proof that the businesses are a public nuisance, is a path to authoritarianism and autocracy.

This Court should apply a standard that requires governmental entities to show that a business is a public nuisance, in which the business is given at least some rudimentary due process right to prove it is not a public nuisance, in order to shut down a business. The temporary shutting down of businesses for more than a few weeks without any due process, for the perceived public good, requires that the public bear the burden of such shutdowns. If due process is not given to businesses alleged to be a public nuisance as transmitting Covid-19, while other similar businesses are permitted to operate, there is an arbitrary application of police powers for

which the public must bear the burden of shutting them down.

Even if this Court were to agree with the Florida Fifth DCA's application of *Tahoe-Sierra* as a valid measure of what the government can do in a pandemic, and hold that governmental regulations denying access to a business (i.e., effectively shutting down a business) does not constitute a *per se* taking of property for the time period of the shutdown, this Court should still grant the writ because the facts alleged in Petitioners' complaint support both a categorical regulatory taking and an as-applied regulatory taking under the *Penn Central* test.

The Florida Fifth DCA wrongly applies *Tahoe-Sierra* and *Cedar Point Nursery* to permit the effective closing of businesses with no accountability by government and with no recourse to the business owners. To make matters worse, these closures were accomplished without any opportunity for the businesses to prove that they were not part of the problem of spreading the Covid-19 virus.

Additionally, the Florida Fifth DCA's Opinion misapplies *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) and holds that the temporary nature of the State of Florida's Orders did not amount to a categorical taking. Even if the Orders at issue in this case were not categorical, per se takings for the time of closure, they still deprived Petitioners of all economically beneficial use of their property. Thus, under *Lucas*, the Orders constitute a categorical taking entitling Petitioners to

compensation. The temporary nature of the Orders should not affect this analysis.

Even assuming that the as-applied regulatory taking analysis applies, Petitioners' complaint still sets forth a viable claim for inverse condemnation. When determining whether a use restriction amounts to a taking, the flexible test developed in *Penn Central* requires the balancing of factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *Cedar Point Nursery*, 141 U.S. at 2072 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Even a valid exercise of its police power may result in a taking. *Dept. of Agric. and Consumer Services v. Mid-Fla. Growers, Inc.*, 521 So. 2d 101, 103 (Fla. 1988). At least under the allegations of the complaint in this case, Petitioners should be given the opportunity to prove an as applied taking.

This Court should seize the opportunity to make clear that *Tahoe-Sierra* must be limited to its unique facts and circumstances. Businesses are more than simple parcels of real property that have been subject to a development moratorium while a comprehensive plan was being completed, as in *Tahoe-Sierra*. Most businesses cannot survive being closed for more than a few weeks or months. Employees must be paid; inventories must be filled; customers must be maintained; and mortgages must be paid. A development moratorium for a reasonable duration permits the existing businesses to continue to operate (they are non-conforming uses that are

constitutionally entitled to continue to operate) and delays future development of real property.

In the present case, the Orders were not a valid exercise of police power. There was no evidence that the consumption of alcohol at bars or nightclubs created any greater risk relating to the spread of COVID-19 than the consumption of alcohol at restaurants or other places where people gather. The application of the government-imposed restrictions was arbitrary because restaurants were permitted to continue to operate and serve alcohol on premises in Florida, while Petitioners were prohibited from doing the same. Thus, the Orders constituted an unconstitutional taking as the Orders were not a proper exercise of police power as they were arbitrarily applied.

CONCLUSION

For the foregoing reasons Petitioners respectfully request this Court grant this petition for a writ of certiorari and reverse the decision of the Florida Fifth DCA, so that the erroneous interpretations of this Court's precedent can be corrected.

Respectfully submitted,

/s/David H. Simmons
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App. A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ORLANDO BAR GROUP, LLC D/B/A THE BASEMENT, THE ATTIC AND THE TREEHOUSE,

Appellants,

v

Case No. 5D21-1248

LT Case No. 2020-CA-010922-O

RON DESANTIS, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, ORANGE COUNTY, ET AL.,

Appellees.

_____/

Opinion filed June 3, 2022

Appeal from the Circuit Court for Orange County, John E. Jordan, Judge.

David H. Simmons, Deborah I. Mitchell, and Caitlin N. Emling, of de Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, Orlando, and Spencer R. Munns, Joseph C. Shoemaker, and Jonathan G. Dulaney, of Bogin, Munns & Munns, P.A., Orlando for Appellants.

Raymond F. Treadwell, of Executive Office of the Governor, Tallahassee, for Appellee, Ron DeSantis.

David Axelman and Joseph Yauger Whealdon, III, of Department of Business and Professional Regulation, Tallahassee, for Appellee, for Department of Business and Professional Regulation.

Scott Robert McHenry, of Orange County Attorney's Office, Orlando, for Appellee, Orange County, Florida.

No Appearance for Remaining Appellees

EDWARDS, J.

ON MOTION FOR REHEARING, REHEARING EN BANC, AND CERTIFICATION

We deny Appellants' motions for rehearing, rehearing en banc, and for certification. However, we substitute the following revised opinion in place of the original opinion.

In early response to the COVID-19 pandemic,

various state and local officials issued executive orders, some of which closed or severely restricted the operation of bars. Appellants, Orlando Bar Group, LLC d/b/a The Basement, The Attic, and The Treehouse, sued Appellees, Governor Ron DeSantis, in his official capacity as the governor of the State of Florida, the Florida Department of Business and Professional Regulations ("DBPR"), and Orange County, Florida, seeking money damages for inverse condemnation. Here, Appellants appeal the trial court's order which granted Appellees' motions to dismiss with prejudice. Appellants raise multiple issues on appeal; several merit discussion, whereas others do not. Based on existing law, we affirm as explained below and as to all other issues as well.

Executive COVID-19 Orders

In March of 2020, Governor DeSantis, employing executive orders, declared a state of emergency and temporarily suspended all sales of alcoholic beverages for vendors who derived more than fifty percent of their gross revenue from the sale of alcoholic beverages. Three days later, the Governor issued another executive order that suspended the sale of alcoholic beverages for on-premises consumption but allowed bars and restaurants to sell sealed, unopened, alcoholic beverages for off-premises consumption. Later-issued orders limited the operation of bars to seated service and reduced permissible operational capacity to half the normal occupancy previously permitted by law. The DBPR and Orange County's mayor issued other orders which temporarily prohibited or limited the normal operation of bars. After a period

of time, bars were allowed to resume normal operation. Appellants' complaint alleged that they were among the bars whose business operations were adversely affected by the various executive orders.

In their complaint, Appellants claimed that the temporary closure and later restrictions of their businesses constituted governmental takings that amounted to inverse condemnation entitling them to compensation. Appellees responded with motions to dismiss. Following a hearing, the trial court entered a lengthy order dismissing Appellants' complaint with prejudice.[1] Appellants did not move to amend their complaint, nor did they move for rehearing. They did timely appeal the trial court's order.

Analysis

Under the Florida Constitution, private property cannot be taken by the government unless it is for public use and the owner of the property is fully compensated. Art. X, § 6, Fla. Const.[2] "Inverse

[1] Appellants' claim for declaratory relief was also dismissed with prejudice. We affirm that portion of the trial court's order without further discussion

[2] The Takings Clause of the Fifth Amendment of the United States Constitution is interpreted by Florida courts to operate coextensively with article X, section 6(a) of the Florida Constitution. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011), *rev'd on other grounds*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 596 (2013)

condemnation is a cause of action by a property owner to recover the value of property that has been *de facto* taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken." *Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d 463, 471 (Fla. 5th DCA 2014) (quoting *Osceola Cnty. v. Best Diversified, Inc.*, 936 So. 2d 55, 59–60 (Fla. 5th DCA 2006)).

Penn Central vs. *Cedar Point* Test

As explained by the Supreme Court, there are two categories of governmental takings: physical and regulatory. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). "The government commits a physical taking when it uses its power of eminent domain to formally condemn property." *Id.* (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 374– 75 (1945); *U.S. ex rel. TVA v. Powelson*, 319 U.S. 266, 270–71 (1943)). The government also commits a physical taking where it "takes possession of property without acquiring title to it." *Id.* (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–17 (1951)). When a physical taking has occurred, the rule is simple: "The government must pay for what it takes." *Id.*

On the other hand, a regulatory taking may occur when the government "imposes regulations that restrict an owner's ability to use his own property " *Id.* (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321–22 (2002)). "To determine whether a use restriction effects a taking,

this Court has generally applied the flexible test developed in *Penn Central,*[3] balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Id.* at 2072. However, "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." *Id.*

Appellants contend that they sufficiently alleged that the COVID executive orders complained of constituted a per se taking because the orders deprived them of their right to regulate access to their businesses. Thus, Appellants argue that the *Penn Central* test, employed by the trial court, does not apply to their claim and that the simple per se rule—the government must pay for what it takes—applies to the COVID orders.

Appellants' initial argument is that the trial court should have denied Appellees' motion to dismiss based upon the Supreme Court's recent *Cedar Point* decision. In *Cedar Point*, a California regulation allowed labor organizations the right to access an agricultural employer's property in order to petition support for unionization. *Id.* at 2069. Specifically, the regulation mandated that agricultural employers allow union organizers onto their property for up to three hours a day for 120

[3] *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).

days a year. *Id*. The Court held that this regulation "appropriate[d] a right to invade the growers' property and therefore constitute[d] a *per se* physical taking." *Id*. at 2072. Significantly, the Supreme Court reasoned that the California regulation violated "'one of the most treasured' rights of property ownership": the right to exclude. *Id*. (citation omitted).

Here, Appellants do not allege that the COVID orders violated their right to exclude; rather, they argue the opposite and claim that the orders violated "the right of property owners to allow others access to their properties." The Supreme Court's holding in *Cedar Point* did not address and does not support this alleged right.

The COVID orders at issue here did not permit third parties to access Appellants' property; they did the opposite by preventing Appellants from having patrons on their premises and temporarily prohibiting Appellants from selling alcohol for on-premises consumption. As such, the COVID orders did not result in a physical appropriation and per se taking of Appellants' property; rather, the COVID orders regulated Appellants' use of their property. Consequently, Appellants are incorrect that the simple per se rule governs their takings claims. Since the COVID orders were regulations affecting Appellants' ability to use their property, the *Penn Central* test was appropriate to employ in determining whether the COVID orders amounted to a taking. Thus, Appellants' argument that the trial court erred in employing the *Penn Central* test rather than the *Cedar Point* test is unavailing.

App. A

Categorical Regulatory Taking

Appellants next argue that their inverse condemnation claim should have survived based upon *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The Supreme Court found a categorical regulatory taking in *Lucas* because the "[governmental] regulation denies all economically beneficial or productive use of land." *Id*. In *Lucas*, a landowner purchased property and intended to build homes on the property. *Id*. at 1006–07. Before the landowner could build any homes, South Carolina passed legislation which barred him from erecting any permanent and habitable structures on the property. *Id*. at 1007. The Supreme Court held that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses . . . he has suffered a taking." *Id*. at 1019.[4]

As the Court later explained in *Tahoe*, *Lucas*' holding was "limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017). "The emphasis on the word 'no' in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Id*. (citing *Lucas*, 505 U.S. at 1019 n.8).

[4] Appellants did not allege in their complaint that they owned the land on which their businesses operated.

Taking Appellants' allegations in their complaint to be true, the economic impact of the COVID orders on their business was significant. However, the impact of the orders amounted to a complete prohibition on the sale of alcoholic beverages for only seventeen days, following which Appellants' businesses were incrementally permitted to return to limited sales and operation before being allowed to return to their pre-pandemic mode in approximately six months.

In *Tahoe*, an owner's planned development was delayed for a period of thirty-two months to allow for a study of the impact of all nearby real estate development on the water quality of Lake Tahoe. 535 U.S. at 306. The Supreme Court found that the thirty-two-month moratorium did not constitute a taking. *Id.* at 319. The First District has similarly held that a temporary moratorium on development did not amount to a compensable taking. *Leon Cnty. v. Gluesenkamp*, 873 So. 2d 460, 466 (Fla. 1st DCA 2004); *Bradfordville Phipps Ltd. P'ship v. Leon Cnty.*, 804 So. 2d 464, 471 (Fla. 1st DCA 2001). The challenged executive orders here resulted in temporary cessation and limitation of Appellants' businesses, not a complete or permanent loss of the ability to do business. Accordingly, Appellants' second argument is likewise unavailing.

<u>As-Applied Regulatory Taking</u>

Appellants claim that even if their previous arguments fail, the executive orders nevertheless amounted to a governmental taking when analyzed using the *Penn Central* test. In *Ocean Palm Golf*

Club Partnership, this Court laid out the factors to be considered when determining whether an as-applied taking has occurred:

> In *Penn Central*, the Court identified three factors to apply when engaging in an analysis of whether a regulation constitutes a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

139 So. 3d at 473 (quoting *Leon Cnty.*, 873 So. 2d at 460).

In *Scott v. Galaxy Fireworks, Inc.*, 111 So. 3d 898 (Fla. 2d DCA 2012), the Second District employed the *Penn Central* test to determine whether an executive order from Florida's governor, which prohibited the sale of fireworks from June 25 to July 9, 1998, constituted a taking. *Id.* at 898. Looking at the first factor, economic impact on the claimant, the Second District found that the fireworks sellers were not totally denied the value of their property, since they could have sold their fireworks out-of-state and also could sell the fireworks after the prohibition ended. *Id.* at 900. When analyzing the second factor, interference with the firework seller's investment-backed expectations, the Second District noted that fireworks are a highly regulated business and the sellers should have been on notice that further regulations could be enacted from time to time. *Id.* When considering the third factor, character of the governmental action, the Second District found that the executive order was a

valid exercise of the state's police power, which was necessary to limit the dangerous conditions that existed in Florida due to a dry period causing an increased susceptibility to wildfires. *Id.*; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest."). Thus, the Second District held that the executive order in question did not amount to a compensable taking. *Id.* at 901.

Applying the *Penn Central* factors to the case at hand, it is clear that the COVID orders did not constitute a taking. For the first factor, it is undisputed that Appellants, along with numerous other businesses, were financially impacted by the COVID orders. For the second factor, just like firework sellers, sellers of alcohol are also in a highly regulated business. *See generally* Ch. 561-568, Fla. Stat. (2021). For example, one of the emergency powers granted to the Governor by statute is the ability to halt the sale of alcohol during an emergency. *See* § 252.36(6)(h), Fla. Stat. (2021) (granting governor ability to suspend or limit the "sale, dispensing, or transportation of alcoholic beverages"). Thus, Appellants should have also been on notice that further regulations could be enacted. Lastly, in consideration of the third factor, the COVID orders represented a valid use of the state's police power to protect the general welfare, as noted by the trial court with citations to several other contemporary COVID decisions. If the state can use its police power to temporarily prohibit the sale of

fireworks to prevent wildfires during an exceptionally dry period in Florida, it stands to reason that the state can also use its police powers to temporarily prohibit or restrict the sale of alcohol in an effort to limit the spread of a then poorly understood, highly contagious and deadly virus.

As such, the impact of the COVID orders does not amount to a compensable taking under the *Penn Central* test. Thus, because Appellants' complaint did not state a cause of action for an inverse condemnation claim under an as-applied taking theory, the motions to dismiss were properly granted.

Dismissal Without Leave to Amend

None of the Appellees answered the complaint. Appellants' complaint was dismissed with prejudice based on the Appellees' motions to dismiss. Appellants correctly argue that plaintiffs typically have the ability to amend their complaint as a matter of right once prior to an answer being filed. *See Boca Burger, Inc. v. F.*, 912 So. 2d 561, 567 (Fla. 2005). However, Appellants did not move for leave to amend, did not file a proposed amended complaint, and appealed rather than moving for rehearing on the dismissal being with prejudice.

In *Vorbeck v. Betancourt*, the Third District discussed several cases, including this Court's opinion in *Jelenc v. Draper*, 678 So. 2d 917, 918 n.1 (Fla. 5th DCA 1996), in reaching the conclusion that "[i]t is now well settled that the rule of preservation applies to the improper dismissal of a complaint with

prejudice." 107 So. 3d 1142, 1147–48 (Fla. 3d DCA 2012). "In the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal." *Keech v. Yousef*, 815 So. 2d 718, 719 (Fla. 5th DCA 2002). We hold that this issue has not been preserved for appellate review.

AFFIRMED.

EVANDER and HARRIS, JJ., concur.

App. B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ORLANDO BAR GROUP, LLC D/B/A THE BASEMENT, THE ATTIC AND THE TREEHOUSE,

Appellants,

v

Case No. 5D21-1248

LT Case No. 2020-CA-010922-O

RON DESANTIS, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, ORANGE COUNTY, ET AL.,

Appellees.

_____/

Opinion filed April 8, 2022

App. B

Appeal from the Circuit Court for Orange County, John E. Jordan, Judge.

David H. Simmons, Deborah I. Mitchell, and Caitlin N. Emling, of de Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, Orlando, and Spencer R. Munns, Joseph C. Shoemaker, and Jonathan G. Dulaney, of Bogin, Munns & Munns, P.A., Orlando for Appellants

Raymond F. Treadwell, of Executive Office of the Governor, Tallahassee, for Appellee, Ron DeSantis

David Axelman and Joseph Yauger Whealdon, III, of Department of Business and Professional Regulation, Tallahassee, for Appellee, for Department of Business and Professional Regulation

Scott Robert McHenry, of Orange County Attorney's Office, Orlando, for Appellee, Orange County, Florida

No Appearance for Remaining Appellees.

EDWARDS, J.

In early response to the COVID-19 pandemic, various state and local officials issued executive orders, some of which closed or severely restricted the operation of bars. Appellants, Orlando Bar Group, LLC d/b/a The Basement, The Attic, and The Treehouse, sued Appellees, Governor Ron DeSantis, in his official capacity as the governor of the State of Florida, the Florida Department of Business and

Professional Regulations ("DBPR"), and Orange County, Florida, seeking money damages for inverse condemnation. Here, Appellants appeal the trial court's order which granted Appellees' motions to dismiss with prejudice. Appellants raise multiple issues on appeal; several merit discussion, whereas others do not. Based on existing law, we affirm as explained below and as to all other issues as well.

Executive COVID-19 Orders

In March of 2020, Governor DeSantis, employing executive orders, declared a state of emergency and temporarily suspended all sales of alcoholic beverages for vendors who derived more than fifty percent of their gross revenue from the sale of alcoholic beverages. Three days later, the Governor issued another executive order that suspended the sale of alcoholic beverages for on-premises consumption but allowed bars and restaurants to sell sealed, unopened, alcoholic beverages for off-premises consumption. Later-issued orders limited the operation of bars to seated service and reduced permissible operational capacity to half the normal occupancy previously permitted by law. The DBPR and Orange County's mayor issued other orders which temporarily prohibited or limited the normal operation of bars. After a period of time, bars were allowed to resume normal operation. Appellants' complaint alleged that they were among the bars whose business operations were adversely affected by the various executive orders.

In their complaint, Appellants claimed that the temporary closure and later restrictions of their

businesses constituted governmental takings that amounted to inverse condemnation entitling them to compensation. Appellees responded with motions to dismiss. Following a hearing, the trial court entered a lengthy order dismissing Appellants' complaint with prejudice.[1] Appellants did not move to amend their complaint, nor did they move for rehearing. They did timely appeal the trial court's order.

Analysis

Under the Florida Constitution, private property cannot be taken by the government unless it is for public use and the owner of the property is fully compensated. Art. X, § 6, Fla. Const.[2] "Inverse condemnation is a cause of action by a property owner to recover the value of property that has been *de facto* taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken." *Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d 463, 471 (Fla. 5th DCA 2014)

[1] Appellants' claim for declaratory relief was also dismissed with prejudice. We affirm that portion of the trial court's order without further discussion.

[2] The Takings Clause of the Fifth Amendment of the United States Constitution is interpreted by Florida courts to operate coextensively with article X, section 6(a) of the Florida Constitution. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011), *rev'd on other grounds*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 596 (2013).

(quoting *Osceola Cnty. v. Best Diversified, Inc.*, 936 So. 2d 55, 59–60 (Fla. 5th DCA 2006)).

Penn Central vs. *Cedar Point* Test

As explained by the Supreme Court, there are two categories of governmental takings: physical and regulatory. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). "The government commits a physical taking when it uses its power of eminent domain to formally condemn property." *Id.* (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 374– 75 (1945); *U.S. ex rel. TVA v. Powelson*, 319 U.S. 266, 270–71 (1943)). The government also commits a physical taking where it "takes possession of property without acquiring title to it." *Id.* (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–17 (1951)). When a physical taking has occurred, the rule is simple: "The government must pay for what it takes." *Id.*

On the other hand, a regulatory taking may occur when the government "imposes regulations that restrict an owner's ability to use his own property…" *Id.* (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321–22 (2002)). "To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central,*[3] balancing factors such as the economic impact of the regulation, its

[3] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

interference with reasonable investment-backed expectations, and the character of the government action." *Id.* at 2072. However, "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." *Id.*

Appellants contend that they sufficiently alleged that the COVID executive orders complained of constituted a per se taking because the orders deprived them of their right to regulate access to their businesses. Thus, Appellants argue that the *Penn Central* test, employed by the trial court, does not apply to their claim and that the simple per se rule—the government must pay for what it takes—applies to the COVID orders.

Appellants' initial argument is that the trial court should have denied Appellees' motion to dismiss based upon the Supreme Court's recent *Cedar Point* decision. In *Cedar Point*, a California regulation allowed labor organizations the right to access an agricultural employer's property in order to petition support for unionization. *Id.* at 2069. Specifically, the regulation mandated that agricultural employers allow union organizers onto their property for up to three hours a day for 120 days a year. *Id.* The Court held that this regulation "appropriate[d] a right to invade the growers' property and therefore constitute[d] a *per se* physical taking." *Id.* at 2072. Significantly, the Supreme Court reasoned that the California regulation violated "'one of the most treasured' rights of

property ownership": the right to exclude. *Id.* (citation omitted).

Here, Appellants do not allege that the COVID orders violated their right to exclude; rather, they argue the opposite and claim that the orders violated "the right of property owners to allow others access to their properties." The Supreme Court's holding in *Cedar Point* did not address and does not support this alleged right.

The COVID orders at issue here did not permit third parties to access Appellants' property; they did the opposite by preventing Appellants from having patrons on their premises and temporarily prohibiting Appellants from selling alcohol for on-premises consumption. As such, the COVID orders did not result in a physical appropriation and per se taking of Appellants' property; rather, the COVID orders regulated Appellants' use of their property. Consequently, Appellants are incorrect that the simple per se rule governs their takings claims. Since the COVID orders were regulations affecting Appellants' ability to use their property, the *Penn Central* test was appropriate to employ in determining whether the COVID orders amounted to a taking. Thus, Appellants' argument that the trial court erred in employing the *Penn Central* test rather than the *Cedar Point* test is unavailing.

Categorical Regulatory Taking

Appellants next argue that their inverse condemnation claim should have survived based upon *Lucas v. South Carolina Coastal Council*, 505

U.S. 1003, 1015 (1992). The Supreme Court found a categorical regulatory taking in *Lucas* because the "[governmental] regulation denies all economically beneficial or productive use of land." *Id*. In *Lucas*, a landowner purchased property and intended to build homes on the property. *Id*. at 1006–07. Before the landowner could build any homes, South Carolina passed legislation which barred him from erecting any permanent and habitable structures on the property. *Id*. at 1007. The Supreme Court held that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses . . . he has suffered a taking." *Id*. at 1019.[4]

As the Court later explained in *Tahoe*, *Lucas*' holding was "limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017). "The emphasis on the word 'no' in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Id*. (citing *Lucas*, 505 U.S. at 1019 n.8).

Taking Appellants' allegations in their complaint to be true, the economic impact of the COVID orders on their business was significant. However, the impact of the orders amounted to a complete prohibition on the sale of alcoholic

[4] Appellants did not allege in their complaint that they owned the land on which their businesses operated.

beverages for only seventeen days, following which Appellants' businesses were incrementally permitted to return to limited sales and operation before being allowed to return to their pre-pandemic mode in approximately six months.

In *Tahoe*, an owner's planned development was delayed for a period of thirty-two months to allow for a study of the impact of all nearby real estate development on the water quality of Lake Tahoe. 535 U.S. at 306. The Supreme Court found that the thirty-two-month moratorium did not constitute a taking. *Id.* at 319. The First District has similarly held that a temporary moratorium on development did not amount to a compensable taking. *Leon Cnty. v. Gluesenkamp*, 873 So. 2d 460, 466 (Fla. 1st DCA 2004); *Bradfordville Phipps Ltd. P'ship v. Leon Cnty.*, 804 So. 2d 464, 471 (Fla. 1st DCA 2001). The challenged executive orders here resulted in temporary cessation and limitation of Appellants' businesses, not a complete or permanent loss of the ability to do business. Accordingly, Appellants' second argument is likewise unavailing.

<u>As-Applied Regulatory Taking</u>

Appellants claim that even if their previous arguments fail, the executive orders nevertheless amounted to a governmental taking when analyzed using the *Penn Central* test. In *Ocean Palm Golf Club Partnership*, this Court laid out the factors to be considered when determining whether an as-applied taking has occurred:

In *Penn Central*, the Court identified three factors to apply when engaging in an analysis of whether a regulation constitutes a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

139 So. 3d at 473 (quoting *Leon Cnty*., 873 So. 2d at 460).

In *Scott v. Galaxy Fireworks, Inc*., 111 So. 3d 898 (Fla. 2d DCA 2012), the Second District employed the *Penn Central* test to determine whether an executive order from Florida's governor, which prohibited the sale of fireworks from June 25 to July 9, 1998, constituted a taking. *Id*. at 898. Looking at the first factor, economic impact on the claimant, the Second District found that the fireworks sellers were not totally denied the value of their property, since they could have sold their fireworks out-of-state and also could sell the fireworks after the prohibition ended. *Id*. at 900. When analyzing the second factor, interference with the firework seller's investment-backed expectations, the Second District noted that fireworks are a highly regulated business and the sellers should have been on notice that further regulations could be enacted from time to time. *Id*. When considering the third factor, character of the governmental action, the Second District found that the executive order was a valid exercise of the state's police power, which was necessary to limit the dangerous conditions that

existed in Florida due to a dry period causing an increased susceptibility to wildfires. *Id.*; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest."). Thus, the Second District held that the executive order in question did not amount to a compensable taking. *Id.* at 901.

Applying the *Penn Central* factors to the case at hand, it is clear that the COVID orders did not constitute a taking. For the first factor, it is undisputed that Appellants, along with numerous other businesses, were financially impacted by the COVID orders. For the second factor, just like firework sellers, sellers of alcohol are also in a highly regulated business. *See generally* Ch. 561-568, Fla. Stat. (2021). For example, one of the emergency powers granted to the Governor by statute is the ability to halt the sale of alcohol during an emergency. *See* § 252.36(6)(h), Fla. Stat. (2021) (granting governor ability to suspend or limit the "sale, dispensing, or transportation of alcoholic beverages"). Thus, Appellants should have also been on notice that further regulations could be enacted. Lastly, in consideration of the third factor, the COVID orders represented a valid use of the state's police power to protect the general welfare, as noted by the trial court with citations to several other contemporary COVID decisions. If the state can use its police power to temporarily prohibit the sale of fireworks to prevent wildfires during an exceptionally dry period in Florida, it stands to

reason that the state can also use its police powers in an effort to limit the spread of a highly infectious and deadly virus.

As such, the impact of the COVID orders does not amount to a compensable taking under the *Penn Central* test. Thus, because Appellants' complaint did not state a cause of action for an inverse condemnation claim under an as-applied taking theory, the motions to dismiss were properly granted.

Dismissal Without Leave to Amend

None of the Appellees answered the complaint. Appellants' complaint was dismissed with prejudice based on the Appellees' motions to dismiss. Appellants correctly argue that plaintiffs typically have the ability to amend their complaint as a matter of right once prior to an answer being filed. *See Boca Burger, Inc. v. F.*, 912 So. 2d 561, 567 (Fla. 2005). However, Appellants did not move for leave to amend, did not file a proposed amended complaint, and appealed rather than moving for rehearing on the dismissal being with prejudice.

In *Vorbeck v. Betancourt*, the Third District discussed several cases, including this Court's opinion in *Jelenc v. Draper*, 678 So. 2d 917, 918 n.1 (Fla. 5th DCA 1996), in reaching the conclusion that "[i]t is now well settled that the rule of preservation applies to the improper dismissal of a complaint with prejudice." 107 So. 3d 1142, 1147–48 (Fla. 3d DCA 2012). "In the absence of fundamental error, an appellate court will not consider an issue that has

been raised for the first time on appeal." *Keech v. Yousef*, 815 So. 2d 718, 719 (Fla. 5th DCA 2002). We hold that this issue has not been preserved for appellate review.

AFFIRMED.

EVANDER and HARRIS, JJ., concur.

App. C

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

ORLANDO BAR GROUP, LLC, et al., Case No: 2020-CA-010922-0

Plaintiffs,

v.

RON DESANTIS, in his official capacity as The Governor of the State of Florida, et al.,

Defendants.
_____/

THIS CAUSE came before the Court on the Motion to Dismiss by Defendants Ron DeSantis, as Governor of Florida, and the Florida Department of Business and Professional Regulation (the "Motion").[1] The Court having reviewed the Motion and related filings,[2] having heard the argument of counsel on

[1] Orange County, the third defendant in this case, filed a Notice of Joinder in the Motion on January 13, 2021.

[2] The Court has reviewed and considered Plaintiffs' response in opposition to the Motion, Defendants' reply in support of the Motion, and the parties' other submission, which included Plaintiffs' requests for judicial notice (and the partis' related briefs) and the parties' notices of supplemental authorities. With regard to Plaintiffs' requests for judicial notice, the Court will take judicial notice of Executive order 20-316, but declines to take judicial notice of the news reports of the Governor's statements. These statements are not referenced in the Complaint, and Plaintiffs cannot amend their Complaint by way of a request for judicial notice. *See, e.g., Migliazzo v. Wells Fargo Bank, N.A.,* 290 So. 3d 577, 579 (Fla. 2d DCA 2020). Moreover, the governor's reported comments that people have a right to work cannot plausibly be construed as an admission or

April 8, 2021, and being fully advised in the premises, it is hereby ORDERED and ADJUDGED that the Motion is GRANTED and the Complaint is DISMISSED WITH PREJUDICE for the reasons that follow.

BACKGROUND

This case arises from a series of emergency orders (the "Orders") that Defendants issued in the early days of the COVID-19 pandemic. As they pertain to Plaintiffs, the Orders temporarily suspended (on a statewide basis) the privilege of selling alcoholic beverages for on-premises consumption. Plaintiffs, a group of bar owners,[3] allege that the Orders effectuated an unconstitutional taking without compensation.

COVID-19 is a severe acute respiratory illness that can spread among humans through respiratory transmission. (Compl., ¶ 39, Ex. lB.) On March 9, 2020, the Governor declared a state of emergency in Florida as a result of the COVID-19 pandemic. *(Id.)* The declaration of a state of emergency implicated the State Emergency Management Act, Section 252.31, *et seq.,* Florida Statutes. Under the State Emergency Management Act, the Governor is authorized to "[s]uspend or limit the sale, dispensing, or transportation of alcoholic beverages" during a state of emergency. § 252.36(5)(h), Fla. Stat. (the "Suspension Statute"). The State Emergency Management Act further authorizes the Governor to

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acknowledgment that the temporary restrictions that form the basis of this action constituted a taking.

[3] Plaintiffs are licensed to sell alcoholic beverages for on-premises consumption. (Compl., ¶¶ 6-20.) Four of the six Plaintiffs also hold active permanent food service licenses. (Compl., ¶¶ 7, 12, 15, 18.)

issue executive orders having "the force and effect of law" to effectuate his responsibilities in responding to an emergency, and to delegate such emergency powers as he deems prudent. § 252.36(1), Fla. Stat.

In accordance with the foregoing statutory authority, the Governor issued Executive Order 20-68 on March 17, 2021, ordering all bars to suspend the sale of alcoholic beverages and delegating to the Department the authority to implement and enforce these restrictions and to "take additional measures with respect to bars, pubs and nightclubs as necessary to protect the public health, safety and welfare." (CompI., ¶ 40, Ex. 1C.) Three days later, the Governor ordered all restaurants to suspend the sale of food and beverages for on-premises consumption, but he restored the ability of bars and granted the ability of restaurants to sell alcoholic beverages for off-premises consumption. *(Id.* ¶ 42, Ex. lD.) Accordingly, since March 20, 2020, these locations could sell food and beverages (including sealed alcoholic beverages) for off-premises consumption. *(Id.)*

On March 24, 2020, the Defendant Orange County issued Emergency Executive Order No. 2020-04, in which it ordered the temporary closure of non-essential businesses (including bars). (Compl., Ex. 3A, p. 3 § 2.) By its own terms, the County' s order expired on April 9, 2020. *(Id.* at p. 6 § 7.)

On April 29, 2020, citing the achievement of critical benchmarks in the State's response to the pandemic, the Governor issued Executive Order 20-112 for the stated purpose of beginning the process of re-opening Florida's economy by initiating "Phase One" of the recovery plan. (Compl., ¶¶ 48, Ex. 1H.) Under Executive Order 20-112, restaurants could reopen for on-premises consumption of food and

beverages, so long as each restaurant adopted appropriate social distancing measures and limited its indoor occupancy to 25% of its building capacity. (Compl., ¶ 49.) But bars, pubs, and nightclubs that derived more than 50% of their gross revenues from the sale of alcoholic beverages were directed to continue to suspend the sale of alcoholic beverages for on-premises consumption. *(Id.)*

On June 3, 2020, the Governor issued Executive Order 20-139, which allowed bars and other vendors licensed to sell alcoholic beverages for consumption on the premises to operate at 50% of their indoor capacity, with seated service only, as part of "Phase Two" of the recovery plan. (Compl., Ex. 2A.) The Governor directed the Department to implement and enforce the provisions of Executive Order 20-139 as appropriate. (Compl., ¶ 56.) However, following a significant spike in the rate of COVID-19 infections in Florida, particularly among younger individuals, the Department issued Emergency Order 2020-09 on June 26, 2020, in which it directed all licensed vendors deriving more than 50% of their gross revenue from sales of alcoholic beverages to suspend sales of alcoholic beverages for on-premises consumption. (Compl., Ex. 2A.) Vendors subject to this restriction were allowed to continue selling alcoholic beverages in sealed containers for consumption off the premises. *(Id.)* Restaurants licensed under chapter 509, Florida Statutes, were permitted to serve food and alcoholic beverages at tables for on-premises consumption, so long as gross revenue from alcohol sales did not exceed 50%. *(Id.)*

On July 1, 2020, the Department issued Amended Emergency Order 2020- 09, eliminating the 50% revenue threshold and allowing any

establishment with a food service license, including some of the Plaintiffs, to operate regardless of their volume of alcohol sales. (Compl., Ex. 2B (referencing Amended Emergency Order 2020-09.)) But bars such as those operated by certain other Plaintiffs-licensed to sell alcohol but not licensed to offer food service - were required to continue to suspend sales of alcoholic beverages for consumption on the premises. *(Id.)*

On September 10, 2020, the Department issued Emergency Order 2020-10, which expressly rescinded its Amended Emergency Order 2020-09 as of September 14, 2020 and permitted bars to reopen at 50% capacity. (Compl., ¶ 60, Ex. 2B.) Then, on September 25, 2020, the Governor issued Executive Order 20- 244, which expressly and immediately "supersede[d] and eliminate[d] any and all restrictions of Executive Order[] ... 20-139" and thereby eliminated all statewide COVID-19 restrictions on bar operations. (Compl., 61, Ex. IK.)

The foregoing Orders did not suspend or revoke any alcoholic beverage licenses; did not authorize or direct the seizure of any real or personal property, including any inventory; and did not authorize or direct the occupation, physical invasion, or use of any private property.

ANALYSIS

When considering a motion to dismiss for failure to state a cause of action pursuant to Rule 1.l40(b)(6), Florida Rules of Civil Procedure, the factual allegations of the Complaint are accepted as true, and the allegations are considered in the light most favorable to Plaintiffs. *Siegle v. Progressive Consumers Ins. Co.,* 819 So. 2d 732, 734- 35 (Fla. 2002). To survive a motion to dismiss, a complaint must allege sufficient ultimate facts showing

entitlement to relief. *Stein v. BBX Capital Corp.,* 241 So. 3d 874, 876 (Fla. 4th DCA 2018). Conclusory allegations are insufficient. *Id.*

Notwithstanding several references in the Complaint to the allegedly arbitrary and discriminatory treatment of bars compared to other types of businesses (Compl., ¶¶ 50- 59, 69, 77-80, 84-87), Plaintiffs allege only a takings claim.[4] The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. U.S. Const. amend. V. Similarly, the Florida Constitution provides, "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Art. X, § 6(a), Fla. Const. The Takings Clauses in the United States and Florida Constitutions are interpreted coextensively. *See St. Johns River Water Mgmt. Dist. v. Koontz,* 77 So. 3d 1220, 1226 (F la. 2011), *rev'd on other grounds, Koontz v. St. Johns River Water Mgmt. Dist.* 570 U.S. 596 (2013).

Plaintiffs' claims under the Takings Clause fail for multiple reasons. First, Plaintiffs have not

[4] Specifically, in Counts I-III, Plaintiffs allege inverse condemnation and seek damages against the Governor, DBPR, and Orange County, respectively. In counts IV-VI, Plaintiffs reassert those inverse condemnation claims in the form of claims for declaratory judgment. There are no claims alleged under the Equal Protection Clause related to the differential treatment of bars versus other types of business establishments. Nevertheless, as this Court has ruled previously, the State's classification between bars and other businesses "was rational in light of the State's legitimate interest in fighting this pandemic." *Church Street Ventures, Inc., v. DeSantis*, Case No. 2020-CA-007080-O (Fla. Cir. Ct. Aug. 26, 2020).

identified a constitutionally protected property interest that was taken as a result of the Orders. Second, even assuming that Plaintiffs could identify such a property interest, they have not stated (and cannot state) a claim for a regulatory taking, regardless of which type of taking is alleged.

I. Plaintiffs fail to identify a protected property interest.

The first step in analyzing a claim under the Takings Clause is to "refer to [state property] law to determine what" property interest the government "took." *United States v. Certain Property Located in the Borough of Manhattan,* 306 F.2d 439, 444-45 (2d Cir. 1962); *see also TLC Props., Inc. v. Dept. of Transp.,* 292 So. 3d 10, 14 (Fla. 1st DCA 2020) (beginning analysis of inverse condemnation claim by considering whether Florida law recognizes the asserted property right). If Plaintiffs cannot establish that the property interest they invoke is "a stick in the bundle of property rights" under state law, then no taking occurred. *M & J Coal Co. v. United States,* 47 F.3d 1148, 1154 (Fed. Cir. 1995) (quotation omitted).

Plaintiffs contend that they have a property interest in the operation of their alcoholic beverage businesses. *See, e.g.,* Compl., ¶ 109-C (alleging that Plaintiffs' "rights were vested in their operations" and that they had "valid permits and licenses to operate"). However, Florida law is clear that the operation of an alcoholic beverage business is not a right but instead is a privilege subject to the exercise of the state's police power. *Astral Liquors, Inc. v. Dept. of Bus. & Prof'l Regulation,* 463 So. 2d 1130, 1132 (Fla. 1986); *see also Morey 's Lounge, Inc. v. Dept. of Bus. & Prof 'l Regulation, 673 So. 2d 538, 540 (Fla. 4th DCA 1996)*

("The selling of liquor is a privilege, not a right[.]"), rev. denied, 680 So. 2d 423 (Fla. 1996).

More generally, there is no property right to operate a particular business without being subject to the State' s "reasonable restraint in the interest of public welfare." *Dep't of Bus. Regulation v. Nat ' / Manufactured Housing Fed'n, Inc.,* 370 So. 2d 1132, 1136 (Fla. 1979); *see also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 675 (1999) (explaining in the context of the Due Process Clause that while a business's assets are " property," "business in the sense of the activity of doing business, or the activity of making a profit is not property at all…") (emphasis in original).

Relatedly, Plaintiff s appear to assert in their response brief that they have a protected property right in their general business "enterprises." But the decision on which they rely involved an actual eminent-domain taking- i.e., an appropriation--of real property, rather than a regulatory taking of an amorphous "enterprise." *System Components Corp. v. Fla. Dept. of Transp.,* 14 So. 3d 967, 971 (Fla. 2009)).[5]

To the extent that Plaintiffs identify their purported property interests as their alcoholic beverage licenses rather than the operation of their

[5] Moreover, the issue on appeal in *System Components* was not whether a taking occurred, but how to calculate statutory business damages in an eminent domain case after the condemnee relocated its business. *Id.* at 975. The parties agreed that the property owner "qualified for statutory business damages… which are *not* part of the "full compensation" guaranteed by the Florida Constitution." *Id.* "emphasis in original).

businesses,[6] "a bar's license to sell alcohol is not a property interest in Florida for the purposes of a constitutional claim." *Lexra, Inc. v. City of Deerfield Beach, 593 F. App'x 860,* 864 (11th Cir. 2014) (citing *Walling Enters., Inc. v. Mathias,* 636 So. 2d 1294, 1296-97 (Fla. 1994)); *see also State ex rel. First Presbyterian Church of Miami v. Fuller*, 187 So. 148, 150 (1939) (explaining that a liquor license "is not property in a constitutional sense."). And more fundamentally, it is clear from the Orders attached to the Complaint that the Orders did not effectuate or direct the suspension or revocation of alcoholic beverage licenses. Accordingly, Defendants could not have "taken" Plaintiffs' licenses by virtue of the Orders, even assuming arguendo that such licenses constitute property that can be taken within the meaning of the Takings Clause. Indeed, Plaintiffs do not actually allege in their Complaint that their alcoholic beverage licenses were taken, and their own allegations establish otherwise because each Plaintiff alleges that it continues to hold an active alcoholic beverage license. (Compl., ¶¶ 6, 9, 11, 14, 17, 20.)

Finally, Plaintiffs assert that they have a protected property interest in the right to access their bars. The decisions on which Plaintiffs rely are inapposite, as they involved a highway authority's physical destruction of the right of access and a statutorily required eminent domain proceeding. In *Florida State Turnpike Authority v. Anhoco Corp.,* 116 So. 2d 8 (Fla. 1959), the owners of real property alleged that a road-widening project "shut off direct ingress and egress to and from their property." Id. at

[6] Plaintiffs devote several pages of their response brief to argument that the Orders impacted, and even "suspended," their liquor licenses. Response at 13-15.

11. The Court explained that "[t]he right of access [was] not being regulated but [was] being destroyed[,]" and that the state highway authority was statutorily required to "obtain[] the property and the property rights in fee simple as the legislature directed." Id. at 14. Here, by contrast, the Orders did not effectuate a physical destruction of any real property or of any right to access real property. Instead, the Orders did nothing more than temporarily suspend the privilege of selling alcoholic beverages for on-premises consumption. Even if this could somehow be characterized as a regulation of the right to access property (and Plaintiffs have presented no authority suggesting that it can), the temporary restriction on the privilege of selling alcoholic beverages plainly is not a physical destruction of the right to access property.

Plaintiffs ' reliance on *Anhoco Corp. v. Dade County,* 144 So. 2d 793 (Fla. 1962), which arose out of the ensuing condemnation proceeding, is similarly unavailing. *Anhoco* concerned the calculation of damages. *Id.* at 794. Notably, the Court contrasted the destruction of access with the mere "exercise of police power to regulate" traffic, which would " require no compensation to abutting owners" even if it regulated some use of their properties. *Id.* at 798. Here, Defendants did not even regulate access to Plaintiffs' bars, let alone destroy it. And again, even accepting *arguendo* Plaintiffs' novel theory that the Orders can be recharacterized as regulating the right to access bars, *Anhoco* recognizes that the regulation of access to property in accordance with state police powers does not require compensation. There can be no question here that Defendants acted in accordance

with their police powers to protect the public health, safety, and welfare when they issued the Orders.

In sum, the Orders did not destroy access to Plaintiffs' bars, but instead only suspended the privilege of selling alcoholic beverages for on-premises consumption as authorized by the Suspension Statute. Plaintiffs' inability to identify a protected property interest is dispositive of their takings claims. But even assuming that Plaintiffs could identify such a property interest that was taken, they fail to state a takings claim for the additional reasons that follow.

II. Plaintiffs otherwise cannot state a takings claim.

The Supreme Court has long distinguished between "between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other[.]" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 325 (2002)). The taking alleged in the instant case is of the latter type, commonly known as a regulatory taking. Among the types of regulatory takings, the Supreme Court has further distinguished "categorical" or *"per se"* takings from other types of regulatory takings.[7]

The Supreme Court recognizes the following categories of per se takings: (1) where the government directly appropriates property for its own use, *Horne v. Dep't of Agric.,* 576 U.S. 350, 357 (2015); (2) when the government causes "a permanent physical

[7] Although not entirely clear from the Complaint whether Plaintiffs allege a per se taking of their property, the Court will analyze the takings claim under both that framework and the as-applied takings framework because Plaintiffs have indicated that they assert both types of taking.

occupation" of property, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 427 (1982); and (3) when the government "denies all economically beneficial or productive use of land," *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). There is no allegation that Defendants directly appropriated Plaintiffs ' property or permanently occupied their property. Accordingly, Plaintiffs invoke only the third type of categorical regulatory taking (if any). Whether Plaintiffs' claims are analyzed as claims for a categorical "total taking" under *Lucas* or for a non-categorical taking under the *Penn Central* framework applied in Part II-B of this Order, the claims fail for a multitude of reasons.

A. Plaintiffs fail to state a claim for a total taking.

Although Plaintiffs complaint of "a total or substantial deprivation or diminution of access for potential patrons or customers to their premises" *(see, e.g.,* Compl., 104), a temporary land use regulation (assuming *arguendo* that the Orders can even be characterized as such) can "rarely, if ever, completely deprive the owner of *all* economically beneficial use" as required to establish a per se "total taking" under *Lucas.*[8] *Bradfordville Phipps Ltd. P'ship v. Leon Cty.,* 804 So. 2d 464, 471 (Fla. 1st DCA 2001) (emphasis added). As the Supreme Court has explained, *"Lucas* carved out a *narrow exception* to the rules governing

[8] *Lucas* involved real property rather than personal property, and its applicability seems to be limited to the former. *Lucas,* 505 U.S. at 2027-28; *Horne,* 576 U.S. at 361 (noting "different treatment of real and personal property" in regulatory takings cases governed by *Lucas).* If *Lucas* applies only to takings of real property, then even a total taking of personal property is not governed by *Lucas* and must instead be analyzed under the *Penn Central* framework applied in Part II-B, *infra.*

regulatory takings for the '*extraordinary circumstance*' of a *permanent* deprivation of *all* beneficial use." *Tahoe-Sierra,* 535 U.S. at 324 n. 19 (emphasis added). Assuming that *Lucas* governs Plaintiffs ' claims, the claims fail for at least the following three reasons.

First, Plaintiffs allege neither a permanent nor a total deprivation of all beneficial use of their property. To the contrary, Plaintiffs admit in the Complaint that the Orders "no longer restrict" them (and no longer restricted them at the time they filed the Complaint). (Compl., ¶62.) And rather than allege that their property was permanently destroyed, Plaintiffs allege only that the now-expired restrictions "threaten[] the future viability and sustainability" of their businesses. Response at 6 (citing Compl., ¶ 68). The purpose of noting these deficiencies in the Complaint is not to minimize the impact of temporary COVID-19 regulations on Plaintiffs or on other business owners whose business operations were interrupted. Instead, the foregoing allegations preclude a claim for a categorical, total taking under *Lucas* because *Lucas* instructs that a regulatory taking is treated as a *per se* taking only when the taking is permanent and *total-thus,* "the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Tahoe-Sierra,* 535 U.S. at 330 (citing *Lucas,* 505 U.S. at 1019 n. 8). In other words, a claim based on even a 95% reduction in value must be analyzed under the *Penn Central* test. *Id.*

Second, and relatedly, Plaintiffs cannot state a claim for a total taking under *Lucas* because they admit that the restrictions no longer bind them, and therefore that the restrictions were temporary. The

Supreme Court has instructed that temporary government action cannot form the basis of a "total taking" claim under *Lucas*. *Tahoe-Sierra,* 535 U.S. at 331.

In *Tahoe-Sierra,* the property owner challenged a moratorium that prohibited any economic use of land for a 32-month period and alleged that this restriction constituted a total taking under *Lucas*. *Id.* at 306, 331. The Supreme Court explicitly rejected the analytical framework that Plaintiffs would have the Court adopt here-that the period of time during which a temporary regulation is in effect can itself support a categorical "total taking" for that particular time period. *Id.* at 331. Specifically, the Supreme Court rejected the argument that it could "effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria." *Id.* As the Supreme Court pointed out, "[w]ith property so divided, every delay would become a total ban." *Id.* Thus, the Supreme Court held that "the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period." *Id.* at 331. That is precisely what Plaintiffs would have the Court do here.

In sum, this Court cannot treat a period of several months in which Plaintiffs were prevented from selling alcoholic beverages as its own, distinct property right that was totally taken. Doing so would be inconsistent with the Supreme Court's application of *Lucas* and would lead to the untenable outcome that even a one-day suspension or interruption of

business operations could be treated as a "total taking" with regard to that single day. *See, e.g., Excel Fitness Fair Oaks, LLC v. Newsom,* No. 2:20-cv-02153-JAM-CKD, 2021 WL 795670, at *5 (E.D. Cal. Mar. 2, 2021) (slip op.) (applying *Tahoe-Sierra* in dismissing with prejudice a takings claim based on "a few months of gym closures" resulting from the state's response to the COVID-19 pandemic).

Third, *Lucas* instructs that even if a property owner can establish a permanent deprivation of all economic use or value of a protected property interest, the Takings Clause does not require compensation where the regulations "do no more than duplicate the result that could have been achieved in the courts" in the context of a nuisance claim *"or otherwise."* *Lucas,* 505 U.S. at 1029 (emphasis added). As explained above, _ the Suspension Statute-which Plaintiffs have not addressed in their brief or during oral argument-explicitly authorizes the Governor (and his delegees) to suspend sales of alcoholic beverages during times of emergency. Defendants having done nothing more than that, *Lucas* instructs that even the total deprivation of value of Plaintiffs' property would not be actionable because the emergency restrictions " inhere ... in the restrictions that background principles of the State' s law of property and nuisance already place upon land ownership."[9] *Id.*

The authorities that Plaintiffs cite are unavailing. *See Keshbro, Inc. v. City of Miami,* 801 So.

[9] Notably, if the Suspension Statute is not viewed as a regulation of property rights, then the Orders likewise cannot be viewed as regulations of property rights because they did no more than what the Suspension Statute authorized. It follows that Plaintiffs' claims would fail because the Orders would not have affected any property rights, as explained in Part I, *supra.*

2d 864, 871 (Fla. 2001); *Abu-Khadier v. City of Fort Myers,* No. 2D18-3068, 2020 WL 6370331 (Fla. 2d DCA Oct. 30, 2020). The issue in *Keshbro* was "whether temporary closures ordered by nuisance abatement boards to abate public nuisances as defined by section 893.138(1), Florida Statutes (1995), and the corresponding city code provisions constitute compensable takings." *Keshbro ,* 801 So. 2d at 866. *Keshbro* thus involved a public nuisance statute that defines nuisance by reference to specific criminal conduct and that necessarily applies to specific nuisance claims against specific properties. The same is true of *Abu- Khadier,* which likewise applied a traditional nuisance analysis where a particular property hosted pervasive drug activity. 2020 WL 6370331 at *4. *Cf Lucas,* 505 U.S. at 1023 (citing prior cases in which regulations did not require compensation because they "were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable *to all similarly situated property.")* (quotation omitted).

The instant case does not involve a regulation (let alone a closure) of real property, nor does it involve the application of nuisance law. And as the Court noted in *Keshbro,* the orders closing the properties "proscribed all uses of the respective properties, both legal and illegal." *Keshbro,* 801 So. 2d at 875. By contrast, the Orders here did not proscribe any legal use of Plaintiffs' property because the Suspension Statute makes it illegal to sell alcohol during a state of emergency when the Governor so orders. Similarly, even if *Keshbro* were applicable, it merely applied *Lucas* as understood at the time,[10] and

[10] *Keshbro* was decided while the *Tahoe-Sierra* case was pending before the Supreme Court. Thus, while *Keshbro* suggested that

Lucas instruct s that the Suspension Statute is a background principle of state law that precludes any requirement to pay compensation under the Takings Clause.

The citrus canker cases on which Plaintiffs rely are similarly unavailing. *See Dept. of Agric. and Consumer Svcs. v. Mid-Fla. Growers, Inc.,* 521 So. 2d 10I (Fla. 1988)). In *Mid-Florida Growers,* the state *destroyed* healthy citrus trees, and did so even after testing of samples found no evidence of citrus canker. *Id.* at 102. By contrast, there was no destruction of property here (nor is there a protected property interest akin to the indisputably protected property interest in trees). Plaintiffs do not allege that Defendant s destroyed their real property, their inventory, their alcoholic beverage licenses, or any constitutionally recognized property. Plaintiffs do not even allege that their business operations were destroyed, alleging only that the now-expired restrictions "threaten[] the future viability and sustainability" of their businesses. (CompI., 68).

Although the Court noted in *Mid-Florida Growers* that a regulatory taking is to be determined from the facts of each case, *id.* at 104, Plaintiffs go too far in suggesting that this means every takings claim necessarily survives dismissal regardless of the nature of the takings claim and regardless of the allegations. The discussion in *Mid-Florida Growers* regarding factual issues was whether the destroyed trees had been healthy or infected with citrus canker, an issue that obviously would require fact-finding. *Id.* at 104-05. No fact-finding is necessary to conclude

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a categorical-taking claim under *Lucas* might be available even on the basis of a temporary regulation, the Supreme Court clarified in its subsequent *Tahoe-Sierra* decision that it is not.

that a categorical takings claim under *Lucas* does not lie where, as here, background principles of state law expressly provide for the suspension of the sale of alcohol during an emergency. And numerous courts have rejected similar claims. *See, e.g., AJE Enter, LLC v. Justice,* No. 1:20-CV-229, 2020 WL 6940381, at *7-8 (N.D. W. Va. Oct. 27, 2020) (temporary inability to sell goods and services during public health emergency does not constitute a taking).

Although the Court recognizes that the dismissal of a complaint usually should be without prejudice, dismissal with prejudice is appropriate where any amendment would be futile. *See Fla. Nat. Org. for Women, Inc. v. State,* 832 So. 2d 911, 915 (Fla. 1st DCA 2002) (affirming dismissal of claim with prejudice where amendment would have been futile). Here, no amended allegations could change the temporary nature of the restrictions that the Orders imposed because those restrictions have been rescinded (and were rescinded even before Plaintiffs filed the Complaint). As a temporary restriction cannot give rise to a claim for a categorical total taking as a matter of law, no amended pleading could state a claim for a categorical total taking resulting from the Orders. Similarly, no amended pleading could dispose of the Suspension Statute, which constitutes and represents a background principle of state property law that authorizes the government action at issue. Accordingly, Plaintiffs' claims for a categorical taking are dismissed with prejudice.

B. Plaintiffs fail to state a claim for an as-applied taking.

Claims for non-categorical regulatory takings are analyzed under the three- factor *Penn Central* framework, which requires the Court to consider

"[t]he economic impact of the regulation on the claimant, (2) the character of the governmental action, and (3) the extent to which the regulation has interfered with distinct investment-backed expectations." *Scott v. Galaxy Fireworks , Inc.,* 111 So. 3d 898, 900 (Fla. 2d DCA 2012) (citing *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978)) (internal quotations omitted).

Of course, there is little doubt that Plaintiffs, along with many thousands of similarly situated businesses, were impacted economically as a result of the temporary emergency restrictions that the early days of the pandemic necessitated. But this alone does not give rise to a cognizable takings claim, nor is it sufficient to withstand dismissal because Plaintiffs cannot satisfy the latter two parts of the *Penn Central* standard. Plaintiffs have not presented the Court with any authority for the proposition that a property owner can state a claim under *Penn Central* merely by satisfying the first of the three factors.

With regard to the character of the governmental action, it cannot reasonably be disputed that the temporary governmental action at issue here was taken in response to an emerging and deadly pandemic. It was therefore, as in *Galaxy Fireworks,* "a valid exercise of the state's police power" that was needed in light of the "dangerous conditions that temporarily existed in the state at that particular time"- specifically, a pandemic that was claiming the lives of Floridians.[11] *Id.* The

[11] The dangerous condition that gave rise to the temporary prohibition of the sale or use of fireworks in *Galaxy Fireworks* was a dry summer that led to brush fires. The Court finds that the emergence of a rapidly spreading, deadly virus is at least as dangerous a condition as the one that the court in

Supreme Court has long recognized that states have inherent police powers to protect the public health and safety, as well as considerable discretion to prescribe the mode or manner in which those goals are to be accomplished. *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 25-26 (1905).[12] *See also Lucas,* 505 U.S. at 1023 ("where State reasonably conclude[s] that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany prohibition") (quoting *Penn Central,* 438 U.S. at 125) (internal quotations omitted).

The Orders represented a valid exercise of police powers during a time of emergency in direct response to the onset of a deadly pandemic. This exercise of police powers merely prohibited Plaintiffs, on a temporary basis, from selling alcoholic beverages in a particular manner that was determined to be contrary to the public health, safety, and welfare.[13]

Galaxy Fireworks found to be a constitutionally sufficient justification for the regulation at issue there.

[12] Indeed, *"Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency." *In re Abbott,* 954 F.3d 772, 786 (5th Cir. 2020) (emphasis in original); *see also Support Working Animals, Inc. v. DeSantis,* 457 F. Supp. 3d 1193, 1215 (N.D. Fla. 2020) ("The Takings Clause does not require compensation unless private property has been taken for public use[,]" and "[i]t is well-settled that there is no taking for ' public use' where the government acts pursuant to its police power.").

[13] Specifically, the temporary suspension of the privilege of selling alcohol for on- premises consumption at bars is reasonably related to the State' s asserted goal of preventing crowding at venues where groups of people congregate and thereby preventing or limiting transmission of a highly communicable virus. *See Wilson v. Williams,* 961 F.3d 829,

The protection of the health and welfare of Floridians, particularly during a pandemic, is a legitimate and necessary exercise of Defendants' police powers. *See, e.g., Friends of Danny DeVito v. Wolf,* 227 A.3d 872, 895-96 (Pa. 2020) (holding that temporary restriction on use of business premises for purpose of combating COVID-19 was not a regulatory taking) (citing *Tahoe-Sierra).*

This Court joins the others that have found that the exercise of police powers in response to the COVID-19 pandemic "overwhelmingly… favor[s]" the government in the context of this prong of the *Penn Central* test. *TJM 64, Inc. v. Shelby County Mayor,* No. 2:20-cv-02498-JPM-tmp, 2021 WL 863202, at *5 (W.D. Tenn. Mar. 8, 2021) (citing cases).[14] Indeed, courts have found that this factor alone "outweighs any other considerations warranting a finding that the Order amounts to a taking." *Id.* (quoting *TJM 64, Inc. v. Harris,* 475 F. Supp. 3d 828, 840 (W.D. Tenn.)). Importantly, no amended pleading would change the nature of the COVID-19 emergency or the fact that the Orders were issued in response to that emergency. Plaintiffs cannot establish that the character of the government action would support a takings claim.

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833 (6th Cir. 2020) ("The COVID-19 virus is highly infectious and can be transmitted easily from person to person."); *Gayle v. Meade,* No. 20-21553-CIV-COOK.E/GOODMAN,2020 WL 2086482, at *I (S.D. Fla. Apr. 30, 2020) ("COVID-19 is a highly communicable respiratory disease that spreads among people who are in close contact-less than six feet apart.").

[14] Although the court in *TJM* found that temporary restnct10ns interfered the plaintiffs' reasonable investment-backed expectations, it does not appear that *TJM* involved an underlying statute such as the Suspension Statute.

With regard to the third *Penn Central* factor, as in *Galaxy Fireworks,* "the limitation was not an interference with [Plaintiffs'] investment-backed expectations." *Id.* "Regardless of the executive order, the sale of fireworks is a heavily regulated business." *Id.* So too is the sale of alcoholic beverages, and not just as a general matter (as is readily apparent from the numerous regulations and restrictions found in Chapters 561- 568, Florida Statutes). Instead, Florida law *expressly provides for the outright suspension of the sale of alcohol during times of emergency.* § 252.36(5)(h), Fla. Stat. Again, Plaintiffs have failed entirely to address this Suspension Statute.

Against this statutory backdrop, Plaintiffs simply cannot establish that the Orders interfered with their reasonable investment-backed expectations.[15] Nor could Plaintiffs do so in the form of an amended complaint, because no additional fact pleading or discovery can change the existence or nature of the Suspension Statute. As in *Galaxy Fireworks,* Plaintiffs "invested in their inventories knowing that the regulation of the sale and use of such was subject to change from time to time"-in particular, during times of emergency as the Suspension Statute provides. *Galaxy Fireworks,* 111 So. 3d at 901. Indeed, this point is even stronger in the instant case because the Suspension Statute specifically authorizes the government action of which Plaintiffs complain, whereas there appears to have been no such specific statute at issue in *Galaxy Fireworks.*

[15] As the Supreme Court has recognized, the investment-backed expectation must be "reasonable." *See, e.g., Tahoe-Sierra,* 535 U.S. at 342.

The Court concludes as a matter of law that a property owner cannot have a reasonable, investment-backed expectation to do something that a Florida statute prohibits-here, to sell alcoholic beverages during a declared state of emergency in contravention of the Governor's lawful orders. Accordingly, Plaintiffs cannot satisfy the third factor of the *Penn Central* test.

Like Plaintiffs' claim for a categorical taking, their claim for an as-applied taking likewise is subject to dismissal with prejudice based on the futility of any amendment. No facts that might be pied in an amended complaint, and no discovery that might be taken, can change the Court's conclusions that Plaintiffs have no reasonable, investment-backed expectation to sell alcoholic beverages during a state of emergency in contravention of the Suspension Statute, and that the character of the government action was a valid exercise of police powers in response to a deadly pandemic. Accordingly, Plaintiffs' claim for an as-applied taking is dismissed with prejudice.

II. Plaintiffs' declaratory judgment claims are subject to dismissal.

Under Florida law, the decision whether to entertain a claim for declaratory relief is a matter of the court's discretion. *Travelers Ins. Co. v. Emery,* 579 So. 2d 798, 800 (Fla. 1st DCA 1991); *YMD Records, LLC v. Ultra Enterprises, Inc.,* 361 F. Supp. 3d 1258, 1267 (S.D. Fla. 2019). Thus, "the Court may exercise that discretion against entertaining the claim" where, as here, the underlying substantive claims "would address the issues covered by a declaratory judgment claim." *YMD Records,* 351 F. Supp. 3d at 1267; *see also Knights Armament Co. v. Optical Sys. Tech., Inc.,*

568 F. Supp. 2d 1369, 1374-75 (M.D. Fla. 2008) (exercising discretion to dismiss declaratory judgment claim without leave to amend where underlying trademark infringement claims would "decide the issues at stake" in the declaratory judgment claim).

Having concluded that Plaintiffs have not stated a takings claim, the declaratory judgment claims are likewise dismissed with prejudice because they are based entirely on the takings claims. *See YMD Records,* F. Supp. 3d at 1267 (dismissing declaratory judgment claim where accompanying statutory and common-law claims failed).

III. Conclusion.

For the foregoing reasons, Plaintiffs' Complaint is DISMISSED WITH PREJUDICE, and it is ORDERED and ADJUDGED that Plaintiffs shall take nothing by this action and that Defendants shall go hence without day.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 16 day of April, 2021.

Honorable John Jordan
Orange County Circuit Judge

App. D

Supreme Court of Florida

WEDNESDAY, OCTOBER 12, 2022

CASE NO.: SC22-881

Lower Tribunal No(s).: 5D21-1248; 482020CA010922A001OX

ORLANDO BAR GROUP, LLC, ETC., ET AL.

vs. RON DESANTIS, GOVERNOR, ET AL.

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

POLSTON, LABARGA, COURIEL, GROSSHANS, and FRANCIS, JJ.,

Concur.

A True Copy Test:

App. D

John A. Tomasino
Clerk, Supreme Court

ks Served:

JOSEPH Y. WHEALDON III SPENCER R. MUNNS

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DEBORAH I. MITCHELL RAYMOND F. TREADWELL DAVID AXELMAN
JOSEPH C. SHOEMAKER SCOTT R. MCHENRY DAVID H. SIMMONS
HON. SANDRA B. WILLIAMS, CLERK
HON. JOHN E. JORDAN III, JUDGE
HON. TIFFANY MOORE RUSSELL, CLERK

App. E-1 (3/1/2020)

STATE OF FLORIDA
OFFICE OF THE GOVERNOR EXECUTIVE ORDER NUMBER 20-51

(Establishes COVID-19 Response Protocol and Directs Public Health Emergency)

WHEREAS, Coronavirus Disease 2019 (COVID- I9) is a severe acute respiratory illness that can spread among humans through respiratory transmission and presents with symptoms similar to those of influenza; and

WHEREAS, in late 2019, a new and significant outbreak ofCOVID-19 emerged in China; and

WHEREAS, the World Health Organization declared COVID-19 a Public Health Emergency of International Concern; and

WHEREAS, in response to the recent COVID-19 outbreak in China, Iran, Italy and South Korea, the Centers for Disease Control and Prevention ("CDC") has deemed it necessary to prohibit or restrict non-essential travel to or from those countries; and

WHEREAS, in response to the recent COVID-19 outbreak in Japan, the CDC has advised older travelers and those with chronic medical conditions to avoid nonessential travel and all travelers to exercise enhanced precautions; and

WHEREAS, the CDC currently recommends community preparedness and everyday prevention measures be taken by all individuals and families in the United States, including voluntary home isolation when

individuals are sick with respiratory symptoms, covering coughs and sneezes with a tissue and disposal of the tissue immediately thereafter, washing hands often with soap and water for at least 20 seconds, use of alcohol-based hand sanitizers with 60%-95% alcohol if soap and water are not readily available and routinely cleaning frequently touched surfaces and objects to increase community resilience and readiness for responding to an outbreak;

And

WHEREAS, two individuals in the State of Florida tested presumptively positive for COVID-19, including a resident of Manatee County and a resident of Hillsborough County; and

WHEREAS, the CDC currently recommends mitigation measures in communities with COVID-19 cases, including staying at home when sick, keeping away from others who are sick and staying at home when a household member is sick with respiratory disease symptoms or if instructed to do so by public health officials or a healthcare provider; and

WHEREAS, it is necessary and appropriate to take action to ensure that COVID-19 remains controlled and that residents and visitors in Florida remain safe and secure;

NOW, THEREFORE, I, **RON DESANTIS,** as Governor of Florida, by virtue of the authority vested in me by Article IV, Section (1)(a) of the Florida Constitution, and all other applicable laws, promulgate the following Executive Order to take immediate effect:

Section .1. Because. of the foregoing conditions, I direct the State Health Officer and Surgeon General, Dr. Scott Rivkees, to declare a public health emergency in the State of Florida, pursuant to his authority in section 381.00315, Florida Statutes. The State Health Officer is authorized and directed to use his judgment as to the duration of this public health emergency.

.. Section 2. In accordance with section 381.0011(7), Florida Statutes, I direct the State Health Officer to take any action necessary to protect the public health.

Section 3. I direct the State Health Officer to follow the guidelines established by the CDC in establishing protocols that. control the spread of COVlD-19 and edu cate the public on prevention.

Section 4. In accordance with section 381.0011(7), Florida Statutes, I designate the Florida Department of Health as the lead state agency to coordinate emergency response activities among the various state agencies and local governments. The State Health Officer, or his designee, shall advise the Executive Office of the Governor on the implementation of these emergency response activities.

Section 5. All actions taken by the State Health Officer with respect to this emergency before the issuance of this Executive Order are ratified.

Section 6. The Florida Department of Health will actively monitor, at a minimum, all persons meeting the definition of a Person Under Investigation (" PUI") as defined by the CDC for COVID-19 for a period of at least 14 days or until the PUI tests negative for COVID-19. Active

monitoring by the Florida Department of Health will include at least the following:

A. Risk assessment within 24 hours of learning an individual meets the criteria for a PUI.
B. Twice-daily temperature checks.

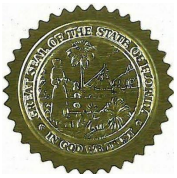
Section 7. The Florida Department of Health, pursuant to its authority in section 381.00315, Florida Statutes, will ensure that all individuals meeting the CDC's definition of a PUI are isolated or quarantined for a period of 14 days or until the person tests negative for COVID- 19.

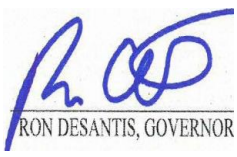
Section 8. I hereby direct the Florida Department of Health to make its own determinations as to quarantine, isolation and other necessary public health interventions as permitted under Florida law.

Section 9. I direct all agencies under the direction of the Governor to fully cooperate with the Florida Department of Health, and any representative thereof in furtherance of this Order.

Agencies not under the direction of the Governor are requested to provide such assistance as is required.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, this lst day of March, 2020.





ATTEST:

App. E-2 (3/9/2020)

STATE OF FLORIDA
OFFICE OF THE GOVERNOR EXECUTIVE ORDER NUMBER 20-52
(Emergency Management - COVID-19 Public Health Emergency)

WHEREAS, Novel Coronavirus Disease 2019 (COVID-19) is a severe acute respiratory illness that can spread among humans through respiratory transmission and presents with symptoms similar to those of influenza; and

WHEREAS, in late 2019, a new and significant outbreak of COVID-19 emerged in China; and

WHEREAS, the World Health Organization previously declared COVID-19 a Public Health Emergency of International Concern; and

WHEREAS, in response to the recent COVID-19 outbreak in China, Iran, Italy, Japan and South Korea, the Centers for Disease Control and Prevention ("CDC") has deemed it necessary to prohibit or restrict non-essential travel to or from those countries; and

WHEREAS, on March 1, 2020, I issued Executive Order number 20-51 directing the Florida Department of Health to issue a Public Health Emergency; and

WHEREAS, on March 1, 2020, the State Surgeon General and State Health Officer declared a Public Health Emergency exists in the State of Florida as a result of COVID-19; and

WHEREAS, on March 7, 2020, I directed the Director of the Division of Emergency

Management to activate the State Emergency Operations Center to Level 2 to provide coordination and response to the COVID-19 emergency; and

WHEREAS, as of March 9, 2020, eight counties in Florida have positive cases for COVID-19, and COVID-19 poses a risk to the entire state of Florida; and

WHEREAS, the CDC currently recommends community preparedness and everyday prevention measures be taken by all individuals and families in the United States, including voluntary home isolation when individuals are sick with respiratory symptoms, covering coughs and sneezes with a tissue and disposal of the tissue immediately thereafter, washing hands often with soap and water for at least 20 seconds, using of alcohol-based hand sanitizers with 60%-95% alcohol if soap and water are not readily available and routinely cleaning frequently touched surfaces and objects to increase community resilience and readiness for responding to an outbreak; and

WHEREAS, the CDC currently recommends mitigation measures for communities experiencing an outbreak including staying at home when sick, keeping away from others who are sick, limiting face-to-face contact with others as much as possible, consulting with your healthcare provider if individuals or members of a household are at high risk for COVID-19 complications , wearing a facemask if advised to do so by a healthcare provider or by a public health official, staying home when a household member is sick with respiratory disease symptoms

if instructed to do so by public health officials or a health care provider; and

WHEREAS, as Governor, I am responsible for meeting the dangers presented to this state and its people by this emergency.

NOW, THEREFORE, I, RON DESANTIS, as Governor of Florida, by virtue of the authority vested in me by Article IV, Section (l)(a) of the Florida Constitution, Chapter 252, Florida Statutes, and all other applicable laws, promulgate the following Executive Order to take immediate effect:

Section I. Because of the foregoing conditions, I declare a state of emergency exists in the State of Florida.

Section 2. I designate the Director of the Division of Emergency Management ("Director") as the State Coordinating Officer for the duration of this emergency and direct him to execute the State's Comprehensive Emergency Management Plan and other response, recovery, and mitigation plans necessary to cope with the emergency. Additionally, I designate the State Health Officer and Surgeon General as a Deputy State Coordinating Officer and State Incident Commander.

Pursuant to section 252.36(1)(a), Florida Statutes, I delegate to the State Coordinating Officer the authority to exercise those powers delineated in sections 252.36(5)-(10), Florida Statutes, which he shall exercise as needed to meet this emergency, subject to the limitations of section 252.33, Florida

Statutes. In exercising the powers delegated by this Order, the State Coordinating Officer shall confer with the Governor to the fullest extent practicable. The State Coordinating Officer shall also have the authority to:

A. Seek direct assistance and enter into agreements with any and all agencies of the United States Government as may be needed to meet the emergency.
B. Designate additional Deputy State Coordinating Officers, as necessary.
C. Suspend the effect of any statute, rule, or order that would in any way prevent, hinder, or delay any mitigation, response, or recovery action necessary to cope with this emergency.
D. Enter orders as may be needed to implement any of the foregoing powers; however, the requirements of sections 252.46 and 120.54(4), Florida Statutes , do not apply to any such orders issued by the State Coordinating Officer; however, no such order shall remain in effect beyond the expiration of this Executive Order, to include any extension.

Section 3. I order the Adjutant General to activate the Florida National Guard, as needed, to deal with this emergency.

Section 4. I find that the special duties and responsibilities resting upon some State, regional, and local agencies and other governmental bodies in responding to the emergency may require them to suspend the application of the statutes, rules, ordinances, and orders they administer.

Therefore, I issue the following authorizations:

A. Pursuant to section 252.36(1)(a), Florida Statutes, the Executive Office of the Governor may suspend all statutes and rules affecting budgeting to the extent necessary to provide budget authority for state agencies to cope with this emergency. The requirements of sections 252.46 and 120.54(4), Florida Statutes, do not apply to any such suspension issued by the Executive Office of the Governor; however, no such suspension shall remain in effect beyond the expiration of this Executive Order, to include any extension.

B. Each State agency may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of that agency, if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency. This includes, but is not limited to, the authority to suspend any and all statutes, rules, ordinances, or orders which affect leasing, printing, purchasing, travel, and the condition of employment and the compensation of employees. For the purposes of this Executive Order, "necessary action in coping with the emergency" means any emergency mitigation, response, or recovery action: (1) prescribed in the State Comprehensive Emergency Management Plan ("CEMP"); or (2) ordered by the State Coordinating Officer. The requirements of sections 252.46 and 120.54, Florida Statutes,

shall not apply to any such suspension issued by a State agency; however, no such suspension shall remain in effect beyond the expiration of this Executive Order, to include any extensions.

C. In accordance with section 465.0275, Florida Statutes, pharmacists may dispense up to a 30-day emergency prescription refill of maintenance medication to persons who reside in an area or county covered under this Executive Order and to emergency personnel who have been activated by their state and local agency but who do not reside in an area or county covered by this Executive Order.

D. In accordance with section 252.38, Florida Statutes, each political subdivision within the State of Florida may waive the procedures and formalities otherwise required of the political subdivision by law pertaining to:

1) Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community;

2) Entering into contracts; however, political subdivisions are cautioned against entering into time and materials contracts without ceiling as defined by 2 CFR 200.318(j) or cost plus percentage contracts as defined by 2 CFR 200.323(d);

3) Incurring obligations;

4) Employment of permanent and temporary workers;

5) Utilization of volunteer workers;

6) Rental of equipment ;
7) Acquisition and distribution, with or without compensation, of supplies, materials, and facilities; and,
8) Appropriation and expenditure of public funds.

E. All State agencies responsible for the use of State buildings and facilities may close such buildings and facilities in those portions of the State affected by this emergency, to the extent necessary to meet this emergency. I direct each State agency to report the closure of any State building or facility to the Secretary of the Department of Management Services. Under the authority contained in section 252.36, Florida Statutes, I direct each County to report the closure of any building or facility operated or maintained by the County or any political subdivision therein to the Secretary of the Department of Management Services. Furthermore, I direct the Secretary of the Department of Management Services to:

1) Maintain an accurate and up-to-date list of all such closures; and,
2) Provide that list daily to the State Coordinating Officer.

Section 5. I find that the demands placed upon the funds appropriated to the agencies of the State of Florida and to local agencies are unreasonably great and the funds currently available may be inadequate to pay the costs of

coping with this emergency. In accordance with section 252.37(2), Florida Statutes, I direct that sufficient funds be made available, as needed, by transferring and expending moneys appropriated for other purposes, moneys from unappropriated surplus funds, or from the Budget Stabilization Fund.

Section 6. All State agencies entering emergency final orders or other final actions in response to this emergency shall advise the State Coordinating Officer contemporaneously or as soon as practicable.

Section 7. Medical professionals and workers, social workers, and counselors with good and valid professional licenses issued by states other than the State of Florida may render such services in Florida during this emergency for persons affected by this emergency with the condition that such services be rendered to such persons free of charge, and with the further condition that such services be rendered under the auspices of the American Red Cross or the Florida Department of Health.

Section 8. All activities taken by the Director of the Division of Emergency Management and the State Health Officer and Surgeon General with respect to this emergency before the issuance of this Executive Order are ratified. This Executive Order shall expire sixty days from this date unless extended.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, this 9th day of March, 2020.

March, 20

RON DESANTIS, GOVERNOR

ATTEST:

App. E-3 (3/17/2020)

STATE OFFLORIDA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER NUMBER 20-68
(Emergency Management - COVID-19)

WHEREAS , Novel Coronavirus Disease 20 I 9 (COVID-19) is a severe acute respiratory illness that can spread among humans through respiratory transmission and presents with symptoms similar to those of influenza; and

WHEREAS, on March 1, 2020, I issued Executive Order number 20-51 directing the Florida Department of Health to issue a Public Health Emergency; and

WHEREAS, on March 1, 2020, the State Surgeon General and State Health Officer declared a Public Health Emergency exists in the State of Florida as a result of COVID-19; and

WHEREAS , on March 9, 2020, I issued Executive Order 20-52 declaring a state of emergency for the entire State of Florida as a result of COVID-19; and

WHEREAS, on March 16, 2020, President Donald J. Trump and the Centers for Disease Control and Prevention ("CDC") issued the 15 Days to Slow the Spread guidance advising individuals to adopt far-reaching social distancing measures, such as working from home and avoiding gatherings of more than 10 people; and

WHEREAS, as Governor, I am responsible for meeting the dangers presented to this state and its people by this emergency.

NOW, THEREFORE, I, RON

DESANTIS , as Governor of Florida, by virtue of the authority vested in me by Article IV, Section (I)(a) of the Florida Constitution, Chapter 252, Florida Statutes, and all other applicable laws, promulgate the following Executive Order to take immediate effect:

Section I. Bars, Pubs and Nightclubs

A. Pursuant to sections 252.36(5)(g)-(h), Florida Statutes, any licensee authorized to sell alcoholic beverages for consumption on premises that derive more than 50% of its gross revenue from the sale of alcoholic beverages shall suspend all sale of alcoholic beverages for thirty days from the date of this order, effective at 5 p.m. today, March 17, 2020.
B. The Department of Business and Professional Regulation shall utilize its authorities under Florida law to further implement and enforce the provisions of this Section and shall take additional measures with respect to bars, pubs and nightclubs as necessary to protect the public health, safety and welfare.

Section 2. Beaches

Pursuant to section 252.36(5)(k), Florida Statutes, I direct parties accessing public beaches in the State of Florida to follow the CDC guidance by limiting their gatherings to no more than 10 persons, distance themselves from other parties by 6 feet, and support beach closures at the discretion of local authorities.

Section 3. Restaurants

A. Pursuant to section 252.36(5)(g), Florida Statutes, a restaurant shall immediately limit its occupancy to 50% of its current building occupancy.
B. Pursuant to section 252.36(5)(g), Florida Statutes, a restaurant shall follow the CDC guidance by ensuring, at minimum, a 6-foot distance between any group of patrons and limiting parties to no more than 10 individuals.
C. The Department of Business and Professional Regulation shall ensure all restaurants implement employee screening and prohibit any employee from entering the restaurant premises if they meet any of the criteria listed below:

1) Any person infected with COVID-19 who has not had two consecutive negative test results separated by 24 hours;
2) Any person showing, presenting signs or symptoms of, or disclosing the presence of a respiratory infection, including cough, fever, shortness of breath or sore throat;
3) Any person who has been in contact with any person(s) known to be infected with COVID- 19, who has not yet tested negative for COVID-19 within the past 14 days;
4) Any person who traveled through any airport within the past I 4 days; or
5) Any person who traveled on a cruise

ship within the past 14 days.

D. The Department of Business and Professional Regulation shall utilize its authorities under Florida law to further implement and enforce the provisions of this Section and shall take additional measures with respect to bars, pubs and nightclubs as necessary to protect the public health , safety and welfare.

For purposes of this section, "restaurant' · shall include any Food Service Establishment, licensed under Chapter 500, Florida Statutes, and Public Food Service Establishment, licensed under Chapter 509, Florida Statutes.

Section 4. This Executive Order shall expire thirty days from this date unless extended.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida 1xed at Tallahassee, this 17th day of March 2020.

RON DESANTIS, GOVERNOR

Laurel M Lee

2020 MAR 17

STATE OFFLORIDA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER NUMBER 20-71

(Emergency Management - COVID-19 - Alcohol Sales, Restaurants, and Gyms)

WHEREAS, on March 1, 2020, I issued Executive Order 20-51 directing the Florida Department of Health to issue a Public Health Emergency; and

WHEREAS, on March 1, 2020, the State Surgeon General and State Health Officer declared a Public Health Emergency exists in the State of Florida as a result of COVID-19; and

WHEREAS, on March 9, 2020, I issued Executive Order 20-52 declaring a state of emergency for the entire State of Florida as a result of COVID-19; and

WHEREAS, on March 16, 2020, President Donald J. Trump and the Centers for Disease Control and Prevention ("CDC") issued the "15 Days to Slow the Spread" guidance advising individuals to adopt far-reaching social distancing measures, such as avoiding gatherings of more than 10 people, and in states with evidence of community spread, bars, restaurants, food courts, gyms and other indoor and outdoor venues where groups of people congregate should be closed; and

WHEREAS, the State Surgeon General has advised me that gyms and fitness centers are establishments that attract gatherings of more than 10 people and are more susceptible for spreading COVID-19; and

WHEREAS, on March 17, 2020, I issued Executive Order 20-68 restricting bars, pubs, and

nightclubs from selling alcohol and ordered every restaurant to limit its occupancy to 50% of its current building occupancy and abide by the CDC's "social distancing" guidelines; and

WHEREAS, restaurants are increasing sales of orders for take-out and delivery for customers in order to meet demand while adhering to Executive Order 20-68; and

WHEREAS, I am committed to supporting retailers, restaurants and their employees as they pursue creative business practices that safely serve consumers during this temporary period of social distancing; and

WHEREAS, as Governor, I am responsible for meeting the dangers presente4 to this state and its people by this emergency.

NOW, THEREFORE, I, RON DESANTIS, as Governor of Florida, by virtue of the authority vested in me by Article IV, Section (l)(a) of the Florida Constitution, Chapter 252, Florida Statutes, and all other applicable laws, promulgate the following Executive Order to take immediate effect:

Section 1. Alcohol Sales

A. I hereby order all vendors licensed to sell alcoholic beverages for consumption on the premises to suspend the sale of alcoholic beverages by the drink or in sealed containers for consumption on the premises. Such vendors may continue to sell alcoholic beverages in sealed containers for consumption off-premises.
B. The restriction in section 561.20(2)(a)4., Florida Statutes, prohibiting a specially licensed food service establishment from selling package sales

of alcohol for delivery, take-out or consumption off-premises is suspended for restaurants complying with Executive Otder 20-68, through the expiration of the state of emergency declared in Executive Order 20-52, including any extensions, so long as the following conditions are met:

1) Any sale of an alcoholic beverage in a sealed container for consumption off- premises is accompanied by the sale of food within the same order; and

2) Any delivery of an alcoholic beverage complies with section 561.57, Florida Statutes.

C. The provisions of section 561.42, Florida Statutes, and Rules 61A-l.010, 61A- 1.0107, 61A-l.0108, Florida Administrative Code, are suspended for the limited purpose of allowing licensed vendors of alcoholic beverages to request the return of undamaged alcoholic beverages purchased for events cancelled in response to COVID-19, so long as:

1) The requests are made within 30 days of the expiration of the state of emergency declared in Executive Order 20-52, including any extensions.

2) Vendors shall make and keep records of all events cancelled in response to COVID-19 that comply with section 561.55, Florida Statutes, and Rule 61A-l.01028(2), Florida Administrative code, and also include:

a. the event name;

b. the date the event was to be held;

c. the date the event was cancelled;

d. the location of the event or gathering that was cancelled; and

e. the product returned to a distributor as a result of the cancellation of the event.

3) Licensed distributors shall make and keep records of all returns that comply with the record keeping requirements of section 561.55, Florida Statutes, and Rule 61A-l.01028(2), Florida Administrative code, and also include:

a. the request from the licensed vendors;

b. the date the request was made;

c. the identity of the licensed vendor making the request, including the licensed vendor's business name and address;

d. the license number of the licensed vendor making the request;

e. the product returned; and

f. whether the vendor received cash or credit.

4) Vendors receive cash or a credit against

outstanding indebtedness within sixty days from the date the distributor picks up the products.

5) The returned products were not initially purchased, sold, or otherwise obtained with either the privilege of return, or in any other manner that would be considered a violation of Florida's Beverage Law.

D. This Section does not prohibit retail stores and vendors that currently sell sealed containers of alcoholic beverages for off-premises consumption from continuing such sales for off premises consumption.

E. This Section amends and supersedes Executive Order 20-68, Section 1.

Section 2. Restaurants and Bars

I hereby order all restaurants and food establishments licensed under Chapters 500 and 509, Florida Statues, within the State of Florida to suspend on-premises food consumption for customers. Notwithstanding the foregoing, such establishments may operate their kitchens for the purpose of providing delivery or take-out services. Employees, janitorial personnel, contractors and delivery personnel shall be allowed access to such establishments for the purposes of delivery or take-out services. This Section amends and supersedes Executive Order 20-68, Sections 3(A)- (B).

Section 3. Gyms and Fitness Centers

I hereby order the closure of gymnasiums and fitness centers within the State of Florida.

This order shall not apply to gymnasiums and fitness centers which are: (i) amenities of hotels which have a capacity of 10 persons or less, (ii) are an amenity of a residential building, (iii) are interior to any fire or police stations or (iv) are located inside any single-occupant office building.

Section 4. Enforcement and Implementation

A. The Department of Business and Professional Regulation shall utilize its authorities under Florida law to further implement and enforce the provisions of this Executive Order and shall take additional measures as necessary to protect the public health, safety and welfare.
B. Pursuant to section 252.36(6), Florida Statutes, all state and local law enforcement shall further implement and enforce the provisions of this Executive Order.

Section 5. This Executive Order shall expire upon the expiration of Executive Order 20-52, including any extensions.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, this 20th day of March, 2020.

RON DESANTIS, GOVERNOR

ATTEST:

App. E-5 (4/29/2020)

STATE OF FLORIDA
OFFICE OF THE GOVERNOR EXECUTIVE ORDER NUMBER 20-112
(Phase 1: Safe. Smart. Step-by-Step. Plan for Florida's Recovery)

WHEREAS, on March 9, 2020, I issued Executive Order 20-52 declaring a state of emergency for the entire State of Florida as a result of COVID-19; and

WHEREAS, on April 3, 2020, I issued Executive Order 20-91 and Executive Order directing all persons in Florida to limit their movements and personal interactions outside of their home only to those necessary to obtain or provide essential services or conduct essential activities; and

WHEREAS, my administration has implemented a data-driven strategy devoted to high-volume testing and aggressive contact tracing, as well as strict screening protocols in long-term care facilities to protect vulnerable residents; and

WHEREAS, data collected by the Florida Department of Health indicates the State has achieved several critical benchmarks in flattening the curve, including a downward trajectory of hospital visits for influenza-like illness and COVID-19-like syndromic cases, a decrease in percent positive test results, and a significant increase in hospital capacity since March 1, 2020; and

WHEREAS, during the week of April 20, 2020, I convened the Task Force to Re-Open Florida to evaluate how to safely and strategically re-open the State; and

WHEREAS, the path to re-opening Florida must promote business operation and economic recovery while maintaining focus on core safety principles.

NOW, THEREFORE, I, RON DESANTIS, as Governor of Florida, by virtue of the authority vested in me by Article IV, Section (l)(a) of the Florida Constitution and Chapter 252, Florida Statutes, and all other applicable laws , promulgate the following Executive Order:

Section 1. Phase I Recovery

In concert with the efforts of President Donald J. Trump and the White House Coronavirus Task Force, and based on guidance provided by the White House and the Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA), and the Florida Surgeon General and State Health Officer, Dr. Scott Rivkees, I hereby adopt the following in response to the recommendations in Phase **1** of the plan published by the Task Force to Re-Open Florida.

Section 2. Responsible Individual Activity

A. All persons in Florida shall continue to limit their personal interactions outside the home; however, as of the effective date of this order, persons in Florida may provide or obtain:

1. All services and activities currently allowed, *i.e.,* those described in Executive Order 20-91 and its attachments, which include activities detailed in Section 3 of Executive Order 20-91, the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce and a list propounded by Miami-Dade County in multiple orders (as of April 1, 2020), as well as other services and activities approved by the State Coordinating Officer. Such services should continue to follow safety guidelines issued by the CDC and OSHA. If necessary, employee screening or use of personal protective equipment should continue.
2. Additional services responsibly provided in accordance with Sections 3 and 4 of this order in counties other than Miami-Dade , Broward and Palm Beach. In Miami-Dade, Broward and Palm Beach counties, allowances for services and activities from Sections 3 and 4 of thjs order will be considered in consultation with local leadership.

B. Except as provided in Section 2(A)(I) of this order, senior citizens and individuals with a significant underlying medical condition (such as chronic lung disease, moderate-to-severe asthma, serious heart conditions, immunocompromised status, cancer, diabetes,

severe obesity, renal failure and liver disease) are strongly encouraged to stay at home and take all measures to limit the risk of exposure to COVID-19.

C. For the duration of this order, all persons in Florida should:

1. Avoid congregating in large groups. Local jurisdictions shall ensure that groups of people greater than ten are not permitted to congregate in any public space that does not readily allow for appropriate physical distancing.
2. Avoid nonessential travel, including to U.S. states and cities outside of Florida with a significant presence ofCOVID-19.
3. Adhere to guidelines from the CDC regarding isolation for 14 days following travel on a cruise or from any international destination and any area with a significant presence of COVID-19.

D. This order extends Executive Order 20-80 (Airport Screening and Isolation) and Executive Order 20-82 (Isolation of Individuals Traveling to Florida) , with exceptions for persons involved in military, emergency, health or infrastructure response or involved in commercial activity. This order extends Sections l (C) and 1(D) of Executive Order 20-86 (Additional Requirements of Certain Individuals Traveling to Florida), which authorize the Department of Transportation, with assistance from the Florida Highway

Patrol and county sheriffs, to continue to implement checkpoints on roadways as necessary.

Section.3. Businesses Restricted by Previous Executive Orders

Unless I direct otherwise, for the duration of this order, the following applies to businesses directly addressed by my previous Executive Orders:

A. Bars, pubs and nightclubs that derive more than 50 percent of gross revenue from the sale of alcoholic beverages shall continue to suspend the sale of alcoholic beverages for on-premises consumption. This provision extends Executive Order 20-68, Section 1 as modified by Executive Order 20-71, Sections 1 and 2.
B. Restaurants and food establishments licensed under Chapters 500 or 509, Florida Statutes, may allow on-premises consumption of food and beverage, so long as they adopt appropriate social distancing measures and limit their indoor occupancy to no more than 25 percent of their building occupancy. In addition, outdoor seating is permissible with appropriate social distancing. Appropriate social distancing requires maintaining a minimum of 6 feet between parties, only seating parties of 10 or fewer people and keeping bar counters closed to seating. This provision extends Executive Order 20-68, Section 3 and supersedes the

conflicting provisions of Executive Order 20-71, Section 2 regarding on-premises food consumption.

C. Gyms and fitness centers closed by Executive Order 20-71 shall remain closed.
D. The prohibition on vacation rentals in Executive Order 20-87 remains in effect for the duration of this order.
E. The Department of Business and Professional Regulation shall utilize its authorities under Florida law to implement and enforce the provisions of this order as appropriate.

Section 4. Other Affected Business Services

Unless I direct otherwise, for the duration of this order, the following applies to other business services affected by my previous Executive Orders:

A. In-store retail sales establishments may open storefronts if they operate at no more than 25 percent of their building occupancy and abide by the safety guidelines issued by the CDC and OSHA.
B. Museums and libraries may open at no more than 25 percent of their building occupancy, provided, however, that (a) local public museums and local public libraries may operate only if permitted by local government, and (b) any components of museums or libraries that have interactive functions or exhibits, including child play areas, remain closed.

Section 5. Medical Procedures

Subject to the conditions outlined below, elective procedures prohibited by Executive Order 20-72 may resume when this order goes into effect. A hospital ambulatory surgical center, office surgery center, dental office, orthodontic office, endodontic office or other health care practitioners ' office in the State of Florida may perform procedures prohibited by Executive Order 20-72 only if:

A. The facility has the capacity to immediately convert additional facility-identified surgical and intensive care beds for treatment of COVID-19 patients m a surge capacity situation;
B. The facility has adequate personal protective equipment (PPE) to complete all medical procedures and respond to COVID-19 treatment needs, without the facility seeking any additional federal or state assistance regarding PPE supplies;
C. The facility has not sought any additional federal, state, or local government assistance regarding PPE supplies since resuming elective procedures; and
D. The facility has not refused to provide support to and proactively engage with skilled nursing facilities, assisted living facilities and other long-term care residential providers.

The Agency for Health Care Administration and

the Department of Health shall utilize their authority under Florida law to further implement and enforce these requirements. This order supersedes the conflicting provisions of Executive Order 20-72.

Section 6. Previous Executive Orders Extended

The Executive Order 20-69 (Local Government Public Meetings) is extended for the duration of this order.

Section 7. Enforcement

This order shall be enforced under section 252.47, Florida Statutes. Violation of this order is a second-degree misdemeanor pursuant to section 252.50, Florida Statutes, and is punishable by imprisonment not to exceed 60 days, a fine not to exceed $500, or both.

Section 8. Effective Date

This order is effective at 12:01 a.m. on May 4, 2020.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, this 29th day of April, 2020.

RON DESANTIS, GOVERNOR

ATTEST:

STATE OF FLORIDA
OFFICE OF THE GOVERNOR EXECUTIVE ORDER NUMBER 20-120
(Expanding Phase 1: Safe. Smart. Step-by-Step. Plan for Florida's Recovery)

WHEREAS, on March 9, 2020, I issued Executive Order 20-52 declaring a state of emergency for the entire State of Florida as a result of COVID-19; and

WHEREAS, on April 29, 2020, based on data showing a downward trajectory of hospital visits for influenza-like illness and COVID-19-like syndromic cases, a decrease in percent positive test results, and a significant increase in hospital capacity, I issued Executive Order 20-112 initiating Phase 1 of the Safe. Smart. Step-by-Step. Plan for Florida's Recovery; and

WHEREAS, data collected by the Florida Department of Health indicates the State continues to flatten the curve; and

WHEREAS, local leadership m Palm Beach County, citing data showing a downward trajectory of influenza-like illness and COVID-like illness and a low percent of new individuals testing positive, has requested that the County proceed to Phase I.

NOW, THEREFORE, I, RON DESANTIS, as Governor of Florida, by virtue of the authority vested in me by Article IV, Section (l)(a) of the Florida Constitution and Chapter 252, Florida Statutes, and all other applicable laws, promulgate the following Executive Order:

Section 1. Palm Beach County to Phase 1

Executive Order 20-112 is extended, with the following modification:

As of the effective date of this order, the restriction in Section 2(A)(2) of Executive Order 20-112 no longer applies to Palm Beach County.

Section 2. Barbershops, Cosmetology Salons, and Cosmetology Specialty Salons

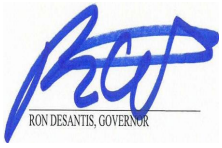
In addition to the Phase 1 services authorized under Sections 2, 3 and 4 of Executive Order 20-112, persons in Florida may provide or obtain services at the following establishments in counties I have authorized to proceed to Phase l :

Barbershops, cosmetology salons, and cosmetology specialty salons that adopt appropriate social distancing and precautionary measures as outlined by the Department of Business and Professional Regulation at the following link: www.myfloridalicense.com/emergency.

Section 3. Effective Date

This order is effective at 12:01 a.m. on May 11, 2020.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, this 9th day of May, 2020.



ATTEST:

STATE OF FLORIDA
OFFICE OF THE GOVERNOR EXECUTIVE ORDER NUMBER 20-244

(Phase 3; Right to Work; Business Certainty; Suspension of Fines.)

WHEREAS, on March 9, 2020, I issued Executive Order 20-52 declaring a state of emergency for the entire State of Florida as a result of COVID-19; and

WHEREAS, on April 29, 2020, I issued Executive Order 20-112 initiating Phase 1 of the Safe. Smart. Step-by-Step. Plan for Florida's Recovery; and

WHEREAS, on May 14, 2020, I issued Executive Order 20-123 for Full Phase 1; and

WHEREAS , on June 3, 2020, I issued Executive Order 20-139 initiating Phase 2 of the Safe. Smart. Step-by-Step. Plan for Florida's Recovery.

WHEREAS, the State of Florida has suffered economic harm as a result of COVID- 19-related closures, exacerbating the impacts of the State of Emergency, and Floridians should not be prohibited by local governments from working or operating a business.

NOW, THEREFORE, I, **RON DESANTIS,** as Governor of Florida, by virtue of the authority vested in me by Article IV, Section (l)(a) of the Florida Constitution and Chapter 252, Florida Statutes, and all other applicable laws, promulgate the following Executive Order:

Section 1. Phase 3

This order supersedes and eliminates any and all restrictions of Executive Orders 20- 112, 20-123 and 20-139, as well as Executive Orders 20-192, 20-214 and 20-223, except as modified herein.

Section 2. Right to Work and Operate a Business

No COVID-19 emergency ordinance may prevent an individual from working or from operating a business. This preemption is consistent with Executive Order 20-92.

Section 3. Restaurants

Pursuant to Chapter 252, including sections 252.36(5)(b), (g) and (h), Florida Statutes, and in order to safeguard the economic vitality of this state, any restaurant may operate as set forth below.

A. Restaurants, including any establishment with a food service license, may not be limited by a COVID-19 emergency order by any local government to less than fifty percent (50%) of their indoor capacity. If a restaurant is limited to less than one hundred percent (100%) of its indoor capacity, such COVID-19 emergency order must on its face satisfy the following:

   i. quantify the economic impact of each limitation or requirement on those restaurants; and
   ii. explain why each limitation or requirement is necessary for public

health.

B. Nothing in this order preempts or supersedes a non-COVID-19 municipal or county order.

Section 4. Suspension of COVID-19-related Individual Fines and Penalties

This order, consistent with Executive Order 20-92, suspends the collection of fines and penalties associated with COVID-19 enforced upon individuals.

Section. 5 Effective Date

This order is effective immediately.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, this 25th day of September, 2020.

RON DESANTIS, GOVERNOR

ATTEST:

SECRETARY OF STATE

STATE OF FLORIDADEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

EMERGENCY ORDER 2020-09

WHEREAS, Novel Coronavirus Disease 2019 (COVID-19) is a severe acute respiratory illness that can spread among humans through respiratory transmission and presents with symptoms similar to those of influenza; and

WHEREAS, all counties in Florida have positive cases for COVID-19, and COVID-19 poses a risk to the entire state of Florida; and

WHEREAS, the Governor issued Executive Order 20-52 on March 9, 2020, pursuant to the authority vested in him by Article IV, Section l(a) of the Florida Constitution, the State Emergency Management Act, s. 252.31, Florida Statutes, *et al.,* as amended, and all other applicable laws, and declared a state of emergency for the State of Florida; and

WHEREAS, the Governor, in Executive Order Number 20-52, authorized each State agency to suspend the provisions of any regulatory statute of that agency, if strict compliance with that statute would in any way prevent, hinder, or delay necessary action in coping with this emergency; and

WHEREAS, on April 29, 2020, the Governor issued Executive Order 20-112 initiating Phase l of the Safe. Smart. Step-by-Step. Plan for Florida's Recovery;

WHEREAS, on June 3, 2020, the Governor

issued Executive Order 20-139 initiating Phase 2 of the Safe. Smart. Step-by-Step. Plan for Florida's Recovery for 64 counties;

WHEREAS, under Phase 2, bars and other vendors licensed to sell alcoholic beverages for consumption on the premises were given permission to operate at fifty (50) percent of their indoor capacity, so long as they provided seated service only;

WHEREAS, the Governor directed the Department of Business and Professional Regulation to enforce the restrictions in Executive Order 20-139;

WHEREAS, during the month of June 2020, the number of individuals testing positive for COVID-19 increased significantly in the State of Florida, especially among younger individuals, and some of these cases involving younger individuals are suspected to have originated from visits to bars, pubs, or nightclubs who have disregarded the restrictions set forth in Phase 2 of the Safe. Smart. Step-by-Step. Plan for Florida's Recovery; and

WHEREAS, noncompliance by bars and other vendors licensed to sell alcoholic beverages for consumption on the premises is suspected throughout the State to such a degree as to make individualized enforcement efforts impractical and insufficient at this time;

NOW, THEREFORE, I, **HALSEY BESHEARS,** Secretary of Florida's Department of Business and Professional Regulation, pursuant to the authority granted by Executive Order Nos. 20-52, 20-71, 20-112, and 20-139, find the timely execution of the mitigation, response, and recovery aspects of the State's emergency management plan,

as it relates to COVID-19, is negatively impacted by the operation of certain regulatory statutes related to the Department of Business and Professional Regulation ("the Department"). Therefore, I order the following:

1. All vendors licensed to sell alcoholic beverages for consumption on the premises who derive more than 50% of gross revenue from such sales of alcoholic beverages shall suspend such sales of alcoholic beverages for consumption on the premises. Such vendors may continue to sell alcoholic beverages in sealed containers for consumption off the premises in accordance with Executive Order 20-7 I, Sections I and

2. Vendors who are also licensed as public food service establishments or "restaurants" under Chapter 509, Florida Statutes, may continue to operate for on-premises consumption of food and beverages at tables pursuant to the restrictions in Executive Order 20-139, so long as these vendors derive 50% or less of gross revenue from the sale of alcoholic beverages for on-premises consumption.

3. This Emergency Order shall take effect on the date of its filing.

Executed this 26th day of June, 2020, in Tallahassee, Leon County, Florida.

FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

/s/Halsey Beshears

Halsey Beshears, Secretary
2601 Blair Stone Road
Tallahassee, Florida 32399

Filed on this date, with
the designated Agency Clerk,
receipt of which is hereby
acknowledged.
/s/illegible
Agency Clerk's Office
Date: 6/26/2020

App. E-9 (9/10/2020)

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

EMERGENCY ORDER 2020-10

WHEREAS, the Governor issued Executive Order 20-52 on March 9, 2020, pursuant to the authority vested in him by Article IV, Section l(a) of the Florida Constitution, the State Emergency Management Act, s. 252.31, Florida Statutes, *et al.,* as amended, and all other applicable laws, and declared a state of emergency for the State of Florida as a result of the Novel Coronavirus Disease 2019 (COVID-19); and

WHEREAS, the Governor, in Executive Order Number 20-52, authorized each State agency to suspend the provisions of any regulatory statute of that agency, if strict compliance with that statute would in any way prevent, hinder, or delay necessary action in coping with this emergency; and

WHEREAS, on June 3, 2020, the Governor issued Executive Order 20-139 initiating Phase 2 of the Safe. Smart. Step-by-Step. Plan for Florida's Recovery for 64 counties; and

WHEREAS, under Phase 2, bars and other vendors licensed to sell alcoholic beverages for consumption on the premises were given permission to operate at fifty (50) percent of their indoor capacity, so long as they provided seated service

only; and

WHEREAS, the Governor directed the Department of Business and Professional Regulation to enforce the restrictions in Executive Order 20-139;

WHEREAS, on June 26, 2020, in response to an increase in the number of individuals testing positive for COVID-19 at that time, the Department of Business and Professional Regulation issued Emergency Order 2020-09, which was subsequently amended on July I, 2020, suspending the sale of alcoholic beverages for consumption on the premises by certain vendors;

NOW, THEREFORE, I, **HALSEY BESHEARS,** Secretary of Florida's Department of Business and Professional Regulation, pursuant to the authority granted by Executive Order Nos. 20-52, 20-68, 20-71, 20-112, 20-139, and 20-192, find the timely execution of the mitigation, response, and recovery aspects of the State's emergency management plan, as it relates to COVID-19 now, is negatively impacted by the continued operation of the Department's Emergency Order 2020-09, as amended. Therefore, I order the following:

1. Emergency Order 2020-09, as amended, is hereby RESCINDED as of 12:01am, Monday, September 14, 2020.
2. This Emergency Order shall take effect on the date of filing.

Executed this 10th day of September, 2020, in Tallahassee, Leon County, Florida.

FLORIDA DEPARTMENT OF BUSINESS AND

PROFESSIONAL REGULATION

/s/Halsey Beshears
Halsey Beshears, Secretary
2601 Blair Stone Road
Tallahassee, Florida 32399

Filed on this date, with
the designated Agency Clerk,
receipt of which is hereby
acknowledged.

/s/illegible
Agency Clerk's Office

Date: 9-10-2020

App. E-10 (3/24/2020)

ORANGE COUNTY, FLORIDA
EMERGENCY EXECUTIVE ORDER NO. 2020-04

Regarding
COVID-19

Non-Essential Travel and Safety Measures
and
Non-Essential Businesses and Essential Businesses

WHEREAS, on March 13, 2020, a State of Local Emergency was declared for seven (7) days under the Comprehensive Emergency Management Ordinance by Emergency Executive Order No. 2020-01 due to the serious threat posed by COVID-19; and

WHEREAS, Emergency Executive Order No. 2020-01 was extended seven (7) days to March 27, 2020 by Emergency Executive Order No. 2020-02, and it will be extended for additional periods of time; and

WHEREAS, COVID-19 is spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing increased infections to persons; and

WHEREAS, public health experts have consistently recommended avoiding close physical interaction between people in order to slow the spread of COVID-19, and the Centers for Disease Control ("CDC") has updated and further restricted its distancing guidelines; and

WHEREAS, despite measures previously taken, COVID-19 has rapidly spread in the State of Florida as well as in Orange County, necessitating updated and more stringent distancing guidelines; and

WHEREAS, while it is important to update and revise the social distancing guidelines to protect the public, it is also important to preserve the public's access to necessary services, such as food, prescriptions and health care, and to maintain the operation of critical infrastructure as identified by the federal government; and

WHEREAS, the emergency powers of this Office include establishing curfews, limiting public congregations and other powers necessary to secure the public health and safety; and

WHEREAS, this Emergency Executive Order is issued to protect the health and safety of the citizens, residents and visitors of Orange County, to assist the healthcare delivery system in its ability to serve those persons infected by COVID-19, and to preserve the public's · access to essential services and maintain the operation of critical infrastructure.

NOW, THEREFORE,

I, Jerry L Demings, County Mayor of Orange County, Florida, acting as the Director of Emergency Management, promulgate the following Emergency Executive Order:

Section 1. Non-Essential Travel and Safety Measures.

In the interest of preserving the public health and safety, individuals are ordered not to leave the premises of their primary residence or domicile except to conduct certain necessary activities, while

practicing social distancing where practical, which include, but are not limited to the following:

(a) *Basic Needs.* Visiting a health or veterinary care professional, obtaining medical supplies or medication, obtaining financial or legal services, obtaining food, grocery items or other household consumer products and products necessary to maintain the safety and sanitation of residences or buildings (whether commercial, office or industrial), for personal use or for use by others, including, without limitation, services related to providing food, groceries, household products, health services, shelter, care or assistance to minors, the elderly, dependents, persons with disabilities, other persons needing assistance, friends, family members, · pets or animals; attendance at public meetings or other government purposes; and for other like or similar purposes related to any of the foregoing.

(b) *Physical Activity and Exercise.* Engaging in outdoor activities and recreation, including, without limitation, golfing, walking, hiking, running, cycling, using scooters, roller skates, skateboards, or other personal mobility devices.

(c) *Travel related to Basic Needs and Physical Activity.* Travel to and from an individual's principal residence or domicile related to any of the basic needs described in Section l(a) above, or physical activity and exercise described in Section l(b) above.

(d) *Travel related to the Provision or Receipt of Essential Services.* Travel necessary for the provision or receipt of essential services described in Section 2, including employees, volunteers, and service recipients of these services.

(e) *Other Travel.* Travel to and from transportation facilities or hubs, airports, bus and train stations, and travel to return home from outside jurisdictions.

Section 2. Non-Essential Businesses and Essential Businesses.

(a) All non-essential retail and commercial businesses are hereby ordered temporarily closed, including but not limited to, whether indoors or outdoors, locations with amusement rides, carnivals, water parks, pools, zoos, museums, arcades, fairs, children's play centers, playgrounds, theme parks, bowling alleys, pool halls, movie and other theaters, concert and music halls, country clubs, social clubs and fraternal organizations.

(b) The following retail and commercial businesses are deemed essential, and may remain open:

(1) Healthcare providers, including, but not limited to, hospitals, doctors' and dentists' offices, urgent care centers, clinics, rehabilitation facilities, physical therapists, mental health professionals, psychiatrists, therapists, pharmacies, veterinarians and animal care providers;

(2) Grocery stores, farmers' markets, farm and produce stands, supermarkets, food banks, convenience stores, and other establishments engaged in the retail sale of canned food, dry goods, fresh fruits and vegetables, fresh meats, fish, and poultry, and any other household consumer products (such as cleaning and personal care products). This authorization includes stores that sell groceries and other non-grocery products, and products necessary to maintaining the

safety, sanitation, and essential operations of residences;

(3) Food cultivation, including farming, livestock, and fishing;

(4) Businesses that provide food, shelter, social services, and other necessities of life for economically disadvantaged or otherwise needy individuals. Hotels, motels and other housing providers;

(5) Newspapers, television, radio, and other media services;

(6) Gas stations;

(7) Auto-supply, auto-repair, related facilities, and towing companies;

(8) Banks and related financial institutions;

(9) Hardware and home improvement stores;

(10) Licensed contractors and other tradesmen, appliance repair personnel, exterminators, and other service providers who provide services that are necessary to maintain the safety, sanitation, and essential operation of residences and other structures;

(11) Businesses providing mailing and shipping services, including post office boxes;

(12) Laundromats, dry cleaners, and laundry service providers;

(13) Restaurants and other facilities that prepare and serve food, but subject to the limitations and requirements under Federal, State or Local Emergency Orders. Schools and other entities that typically provide free food services to students or members of the

public may continue to do so on the condition that the food is provided to students or members of the public on a pick-up and takeaway basis only. Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site;

(14) Businesses that supply office products needed for people to work from home;

(15) Businesses that sell medical equipment and supply providers. Also, businesses that supply other essential businesses with support and supplies necessary to operate, and which do not interact with general public;

(16) Businesses that ship or deliver groceries, food, goods, or services directly to residences;

(17) Airlines, taxis, and other private transportation providers providing transportation services via automobile, truck, bus, or train;

(18) Home-based care for seniors, adults, or children;

(19) Assisted living facilities, nursing homes, and adult day care centers, and senior residential facilities;

(20) Legal or accounting services and notaries public;

(21) . Landscape and pool care businesses, including residential landscape and pool care services, and maintenance of property, equipment and grounds of businesses, whether or not currently open to the public;

(22) Childcare facilities providing services that enable employees exempted in this Emergency Executive Order to work, as permitted. To the extent practical, childcare facilities shall operate under the following mandatory conditions:

a. Childcare. shall take place in stable groups of ten (10) or fewer people (inclusive of childcare providers for the group);

b. Children and childcare providers shall not change from one group to another; and

c. If more than one group of children is cared for at one facility, each group shall be in a separate room, and groups shall not mix or interact with each other;

(23) Businesses operating at an airport, government facility, or government office;

(24) Pet supply stores;

(25) Logistics providers, including warehouses, trucking, consolidators, fumigators, and handlers;

(26) Telecommunications providers, including sales of computer or telecommunications devices and the provision of home telecommunications, to include private security businesses;

(27) Providers of propane or natural gas;

(28) Construction sites, irrespective of the type of building;

(29) Architectural, engineering, and land surveying services;

(30) Factories, manufacturing facilities, bottling plants, or other industrial uses;

(31) Waste management services, including collection and disposal of waste; and

(32) Businesses interacting with customers solely through electronic or telephonic means;

(33) Businesses delivering products via mailing, shipping, or delivery service

(34) Office space and administrative support necessary to perform any of the above listed essential retail or commercial business activities; and

(35) In addition to essential businesses listed above, any individuals that are employed in or working to maintain continuity of operations of the federal critical infrastructure sectors as more particularly described at http://www.cisa.gov/identifying-critical-nfrastructure-during-covid-19. This link identifies a number of critical infrastructure sectors as vital to the United States including (1) healthcare and public benefits, (2) transportation systems and logistics, (3) communications, (4) water and wastewater, (5) food and agriculture, (6) nuclear reactors, hazardous materials and waste, other governmental facilities, operations and essential functions, (8) energy, (9) financial services, (10) commercial facilities, (11) emergency services, (12) defense industrial base, (13) critical manufacturing, (14) chemical, and (15) information technology. This exception only applies to individuals working in one of these critical

infrastructure sectors while or during the course of employment in and performing their work in that sector.

(c) This Order does not affect or limit the operations of Orange County, any municipality, the Orange County School District, any educational institution, whether public or private, or Federal office or facility, or any public utility, except that such entities shall endeavor to abide by the prohibitions or restrictions of any County, municipal, State or Federal Emergency Order, as applicable.

(d) This Order does not limit the number of persons who may be physically present performing services at any location where an essential business is being conducted or operated, except as expressly set forth herein or otherwise governed by a State or Federal Order or regulation. Employers and employees of such essential businesses are urged to practice social distancing, such as keeping at least six (6) feet apart and limiting group size to less than ten (10) people.

(e) This Order does not limit religious or funeral services at any location, but all persons leading, performing or attending religious or funeral services are urged to fully comply with all measures advised by the CDC, including limiting gatherings to not more than ten (10) people and practicing social distancing of at least six (6) feet between persons.

Section 3. Minimum Standards. The provisions of this Emergency Executive Order shall serve as minimum standards, and shall not modify any powers possessed by municipalities to impose

more stringent standards within their respective jurisdictions.

Section 4. Variances or Exceptions. Any variance or exception to any prohibitions set forth in Section 1 or Section 2 shall be valid only when stated in writing signed by me or under my authority.

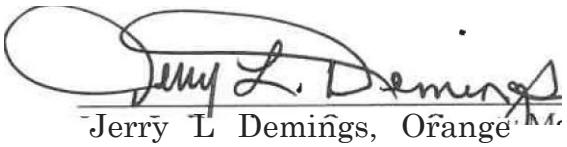
Section 5. Penalties. Anyone who violates this Emergency Executive Order shall upon conviction be punished according to law and shall be subject to a fine not exceeding the sum of Five Hundred Dollars ($500.00), or imprisonment in the County jail for a period not exceeding sixty (60) days, or by both such fine and imprisonment.

Section 6. Severability. Any provision of this Emergency Executive Order that conflicts with any Federal or State constitutional provision or law, including the State's preemption of the regulation of firearms and ammunition codified in Section 790.33, Florida Statutes, or conflicts with or is superseded by an Executive Order issued by the President of the United States or the Governor of Florida, shall be deemed inapplicable and deemed to be severed from this Emergency Executive Order, with the remainder of the Emergency Executive Order remaining intact and in full force and effect. Nothing in this Emergency Executive Order shall be interpreted as prohibiting retail or wholesale stores or vendors that currently sell sealed containers of alcoholic beverages for off-premises consumption from continuing such sales for off premises consumption.

Section 7. Effective Date; Expiration Date.

(a) This Emergency Executive Order shall become effective on March 26, 2020, at 11:00 p.m.

(b) This Emergency Executive Order shall expire on April 9, 2020, at 11:00 p.m.



Jerry L Demings, Orange County Mayor, as Director of Emergency Management

RECEIVED AND FILED in the Office of the Orange County Comptroller, as Clerk to the Board of County Commissioners, this 24th day of March, 2020, at 5:54 p.m.

By: /s/illegible
Comptroller

CERTIFICATE OF COMPLIANCE

No. 22-650

ORLANDO BAR GROUP LLC, a Florida limited liability company d/b/a THE BASEMENT, THE ATTIC, and THE TREEHOUSE; DENNIS L. HACKER, INC., a Florida for profit corporation d/b/a DIZZY D'S; THE BARLEY POP L.L.C., a Florida limited liability company d/b/a THE PARK DRIVE; JAX BEACH BAR INVESTMENTS LLC, a Florida limited liability company d/b/a THE TAVERN ON FIRST STREET and THE WRECK TIKI BAR; CHRIS VILLAGE LOUNGE, INC., a Florida for profit corporation d/b/a CHRIS' VILLAGE LOUNGE; and LAMP POST LOUNGE, INC., a Florida for profit corporation d/b/a KENNEDY'S LAMP POST TAVERN,

Petitioners,

v.

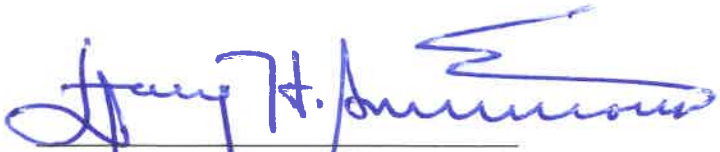
RON DESANTIS, in his official capacity as The Governor of the State of Florida; FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, an administrative agency of the State of Florida; and ORANGE COUNTY, FLORIDA, a subdivision of the State of Florida,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 3059 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 30, 2023.



David H. Simmons, Esq., B.C.S.
Counsel of Record
de Beaubien, Simmons, Knight, Mantzaris & Neal, LLP
332 North Magnolia Avenue
Orlando, Florida 32801
dsimmons@dsklawgroup.com
Telephone: 407-422-2454
Fax: 407-849-1845

CERTIFICATE OF SERVICE

No. 22-650

ORLANDO BAR GROUP LLC, a Florida limited liability company d/b/a THE BASEMENT, THE ATTIC, and THE TREEHOUSE; DENNIS L. HACKER, INC., a Florida for profit corporation d/b/a DIZZY D'S; THE BARLEY POP L.L.C., a Florida limited liability company d/b/a THE PARK DRIVE; JAX BEACH BAR INVESTMENTS LLC, a Florida limited liability company d/b/a THE TAVERN ON FIRST STREET and THE WRECK TIKI BAR; CHRIS VILLAGE LOUNGE, INC., a Florida for profit corporation d/b/a CHRIS' VILLAGE LOUNGE; and LAMP POST LOUNGE, INC., a Florida for profit corporation d/b/a KENNEDY'S LAMP POST TAVERN,

Petitioners,

v.

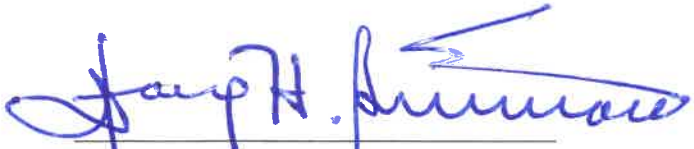
RON DESANTIS, in his official capacity as The Governor of the State of Florida; FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, an administrative agency of the State of Florida; and ORANGE COUNTY, FLORIDA, a subdivision of the State of Florida,

Respondents.

I HEREBY CERTIFY that on January 30, 2023, a true and correct copy of Petitioners' Petition for a Writ of Certiorari was provided via email transmission and via FedEx overnight delivery to: SCOTT MCHENRY, ESQ. (Scott.McHenry @ocfl.net); JOSEPH WHEALDON III, ESQ. (Joseph.Whealdon@ myfloridalicense.com); and RAYMOND TREADWELL, ESQ. (Ray.Treadwell@ eog.myflorida.com).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 30, 2023.



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