DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Matters	**COURT MINUTES**	**August 17, 2020**

A-20-817872-C MILLER S TAVERN LLC, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

August 17, 2020 **3:00 AM** **Minute Order**

HEARD BY: Earley, Kerry **COURTROOM:** RJC Courtroom 12D

COURT CLERK: Nylasia Packer

JOURNAL ENTRIES

THIS MATTER came before the Court for hearing on August 13, 2020 at 9:00 A.M. with Dennis Kennedy, Esq. of the law firm Bailey Kennedy appearing on behalf of Plaintiffs Millers Tavern, et al., and Craig Newby, Esq. of the State of Nevada appearing on behalf of Defendants State of Nevada, et al. on Plaintiff Millers Tavern, et al. s Motion for Temporary Restraining Order and Preliminary Injunction filed on July 21, 2020; Defendant State of Nevada, et al. s Opposition to Plaintiff s Motion for Temporary Restraining Order and Preliminary Injunction filed on August 4, 2020; Plaintiffs Reply in Support of Motion for Temporary Restraining Order and Preliminary Injunction filed on August 7, 2020; and Defendants Supplemental Authority filed on August 13, 2020.

THE COURT having reviewed the matter including all points and authorities, and exhibits, having heard argument of counsel, and for good cause appearing, the Court hereby DENIES Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction, based on the following:

I.
FACTS

Plaintiffs motion brought pursuant to NRCP 65 and NRS 33.010 requests this Court enter a preliminary injunction enjoining all defendants from continuing to enforce Sections 5 and 6 of the Governor s Declaration of Emergency Directive 27 (hereafter referred to as Directive 27). Sections 5 and 6 of Directive 27 are specifically directed toward bars and taverns doing business in Clark County and other counties in the identified red zone. Directive 27 rescinded certain sections of Directive 21 which included those related to bars and taverns.

Section 5 of Directive 27 closed bar tops and bar areas in Plaintiffs bar and tavern businesses that

served food. Section 6 of Directive 27 closed Plaintiffs bar and tavern businesses that were not licensed to serve food.

Plaintiffs argue that they own and operate bars and taverns in Clark County, Nevada that in addition to serving alcoholic beverages, many bars/taverns serve food and the vast majority of them (including all Plaintiffs) have restricted gaming licenses. Plaintiffs further argue that many bars and taverns cannot survive without the revenue and draw of customers created by gaming in their establishments because the overwhelming majority of gaming machines at bars and taverns are installed on bar tops or in the bar area.

Defendants allege Directive 27 was issued in response to numerous factors to address an increase in COVID-19 spread in Nevada in certain counties which were designated red zones. The reasons stated by Defendants for issuing Sections 5 and 6 were following recommendations of Federal experts, actions of other states that were designated red zones due to an increase in COVID-19 cases, and review of Nevada specific COVID-19 statistical data.

II.
POLITICAL QUESTION

Defendants argue that the constitutionality of Directive 27 is a non-justiciable political question.

THE COURT FINDS that what constitutes an emergency and how to address it by the State, as in the present case, are not pure policy choices that fall within the doctrine of non-justiciable political questions. Therefore, the constitutionality of Directive 27 is subject to judicial review.

THE COURT NOTES that contrary to Defendants argument, emergency directives are subject to the constitutional guarantees of substantive due process and equal protection. Therefore, the Court has the authority to review the constitutionality of Directive 27.

III.
JACOBSON STANDARD

Defendants have asserted that under Jacobson v. Mass., 197 U.S. 11 (1905), when reviewing an emergency public health measure, such as Directive 27, this Court must grant deference to a State s response to a public health crisis.

The Jacobson standard, which grants deference to the State in responding to a public health crisis such as COVID-19, applies only after the Court had addressed whether the State s authority is limited by the constitutional protections of substantive due process and equal protection.

Therefore, the Court must first address the issues of whether Sections 5 and 6 of Directive 27 violate

the equal protection clause of the U.S. and Nevada Constitutions and Plaintiffs substantive due process rights.

IV.
STANDARD OF REVIEW

NRCP 65 and NRS 33.010 grant this Court the authority to enjoin Defendants if the Plaintiffs can show a likelihood of success on the merits and a reasonable probability that Defendants conduct, if allowed to continue, will cause irreparable harm. Clark Cnty. Sch. Dist. v. Buchanan, 112 Nev. 1146, 1150 (1996). The District Court may also weigh the public interest and relative hardships of the parties in deciding whether to grant a preliminary injunction. Id.

In order to prove a likelihood of success on the merits, Plaintiffs must demonstrate both the existence of a claim against Defendants, and a likelihood of prevailing on that claim. State Farm Mut. Auto. Ins. Co. v. Jafbros Inc., 109 Nev. 926, 928 (1993).

Here, Plaintiffs claims are based on both equal protection and substantive due process. A substantive due process claim is based on whether state action interferes with a fundamental right, while an equal protection claim involves whether state action discriminates against a suspect class.

Although Plaintiffs bar and tavern businesses contribute to both the economic welfare of the community and substantial employment of the members of the community, economic rights, such as alleged by Plaintiffs, are not recognized as fundamental constitutional rights. In addition, Plaintiffs are not a suspect class. Therefore, the court applies a rational basis standard of review, which has been determined by the Nevada Supreme Court to be minimum scrutiny, i.e., is rationally related to a legitimate governmental purpose. Arata v. Faubion, 123 Nev. 153, 159, 161 P.3d 244, 248 (2007)

THE COURT FINDS that Directive 27 is subject to rational basis review for both Plaintiffs substantive due process and equal protection claims, as Directive 27 does not involve a fundamental right and Plaintiffs are not a suspect class.

V.
LIKELIHOOD OF SUCCESS ON THE MERITS

In the present case, the Defendants have advanced various reasons for issuing Directive 27 which were based on expert federal opinions, action of other states in designated red zones due to an increase in COVID-19 cases, as well as review of Nevada specific statistical data.

Specifically, Governor Sisolak referred to various sources for singling out bars and taverns to support Directive 27 which included:

COVID can easily spread when people are congregating for long periods of time, like inside a bar.

In [other] states where we have seen significant spikes such as Arizona, Texas, and Florida, they ve all taken actions to rollback bars.

Recently, Dr. Fauci, the U.S. top infectious disease expert, advised that congregating in bars poses a significant risk and is one [of] the most dangerous things people could do...

Additionally, I m concerned because based on our inspection, thus far, fewer than half of the bars that OSHA inspectors have visited have been found to be in compliance.

The Supreme Court of the United States in Heller v. Doe by Doe, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993), explained its constitutional jurisprudence and long-standing legal principles that this court is required follow in both a substantive due process and equal protection analysis. Rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 2100 2101, 124 L.Ed.2d 211 (1993). See also, e.g., Dandridge v. Williams, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). Nor does it authorize the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976) (per curiam). For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. See, e.g., Beach Communications, supra, 508 U.S., at 314 315, 113 S.Ct., at 2096; Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 462, 108 S.Ct. 2481, 2489, 101 L.Ed.2d 399 (1988); Hodel v. Indiana, 452 U.S. 314, 331 332, 101 S.Ct. 2376, 2386 2387, 69 L.Ed.2d 40 (1981); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976) (per curiam). Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. See, e.g., Nordlinger v. Hahn, 505 U.S. 1, 11, 112 S.Ct. 2326, 2331 2332, 120 L.Ed.2d 1 (1992); Dukes, supra, 427 U.S., at 303, 96 S.Ct., at 2516. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Nordlinger, supra, 505 U.S., at 15, 112 S.Ct., at 2334. See also, e.g., United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528, 79 S.Ct. 437, 441, 3 L.Ed.2d 480 (1959). Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Beach Communications, supra, 508 U.S., at 313, 113 S.Ct., at 2101. See also, e.g., Nordlinger, supra, 505 U.S., at 11, 112 S.Ct., at 2334; Sullivan v. Stroop, 496 U.S. 478, 485, 110 S.Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); Fritz, supra, 449 U.S., at 174 179, 101 S.Ct., at 459 461; Vance v. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979); Dandridge v. Williams, supra, 397 U.S., at 484 485, 90 S.Ct., at 1161 1162.

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. Beach Communications, supra, 508 U.S., at 315, 113 S.Ct. at 2098. See also, e.g., Vance v. Bradley, supra, 440 U.S., at 111, 99 S.Ct., at 949;

Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 812, 96 S.Ct. 2488, 2499, 49 L.Ed.2d 220 (1976); Locomotive Firemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129, 139, 89 S.Ct. 323, 328, 21 L.Ed.2d 289 (1968). A statute is presumed constitutional, see supra, at 2642, and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973) (internal quotation marks omitted), whether or not the basis has a foundation in the record.
[ ]
Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. Dandridge v. Williams, supra, 397 U.S., at 485, 90 S.Ct., at 1161, quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911).

Heller v. Doe by Doe, 509 U.S. 312, 319 21, 113 S. Ct. 2637, 2642 43, 125 L. Ed. 2d 257 (1993).

Moreover, in order to succeed on the merits of its substantive due process claim, when no fundamental right is at issue, Plaintiffs must establish a due process violation by proving that the challenged state action was clearly arbitrary and unreasonable, bearing no substantial relation to the public health, safety, morals, or general welfare. Patel v. Penman, 130 F.3d 868 (9th Cir. 1996). In other words, [i]f the statute does not abridge a fundamental right, it is reviewed under the rational basis test and will be upheld so long as it bears a rational relationship to a legitimate state interest. State v. Eighth Jud. Dist. Ct., 129 Nev. 492, 503 (2013).

THE COURT FINDS that Plaintiffs have not demonstrated a likelihood of success on the merits based upon the above facts and legal criteria, since Sections 5 and 6 of Directive do not violate the equal protection clause or Plaintiffs substantive due process rights.

VI.
EVENTS SUBSEQUENT TO THE ISSUANCE OF DIRECTIVE 27

In addition, Plaintiffs assert that the Court must also review subsequent public statements made by Governor Sisolak after the issuance of Directive 27 regarding the ongoing nature of the COVID-19 pandemic and the State s response.

Since this action was filed, Governor Sisolak has made various statements in outlining a new approach to implement a long-term response plan. He commented that the State was reviewing ways to contain the spread of COVID-19 due to infected people returning to work and from large family gatherings. He stated at a news conference on July 27, 2020, that in hindsight closing all bars was not the fairest way to do it. He also stated the State was going to look at daily data, including how many people follow the rules by wearing masks and practicing social distancing, with enforcement based on punishing violators, through utilizing a zip code analysis in partnership with municipalities for

mitigation enforcement, including business license suspension. Further, he stated as part of his new long term strategy to mitigate the transmission of COVID-19 that the State would target specific businesses that may be experiencing outbreaks versus industries as a whole.

Although a rational basis review allows a court to consider any reasonably conceivable state of facts that could provide a rational basis for the classification, there is no legal authority that allows a court to review events subsequent to the enactment of the challenged state action. See also Flamingo Paradise Gaming, LLC. v. Chanos, 125 Nev. 502, 520 (2009) (holding that the court is not limited, when analyzing a rational basis review, to the reasons enunciated for enacting a statute; if any rational basis exists, then a statute does not violate equal protection).

THE COURT FINDS that under a rational basis standard of review, the Court may conceive of additional facts (if needed) to determine whether there was a rational basis for the Directive at the time of enactment, but the law does not provide support for identifying new facts which occurred subsequent to the issuance of Directive 27 to determine that there was not a rational basis.

THE COURT FURTHER FINDS that Plaintiffs reliance on Qwest Corp. v. Iowa State Bd. of Tax Review, 829 N.W.2d 550 (2013) is inapposite, as the facts required to apply the rational basis test involved whether a statute no longer rationally related to a legitimate government purpose when considering changes in the underlying circumstances.

THE COURT FURTHER FINDS that Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 195 L. Ed. (2016), is not applicable here since that case applies a strict scrutiny analysis to a race-based classification, and does not support the Plaintiffs allegation that this Court must consider subsequent non-state action statements when determining whether there is a rational basis for Directive 27.

THEREFORE, THE COURT hereby DENIES Plaintiffs Millers Tavern, LLC, et al s Motion for Temporary Restraining Order and Preliminary Injunction.

Counsel for Defendants shall prepare the order in accordance with this Minute Order pursuant to EDCR 7.21, and in compliance with Administrative Order 20-17, with counsel for Defendants to approve as to form and content.

CLERK'S NOTE: This minute order was distributed via e-mail. (8-17-20 np)