

STATE OF INDIANA)
) SS:
COUNTY OF WELLS) CAUSE NO. _____

YERGY'S STATE ROAD BBQ, LLC,)
)
 Plaintiff,)

v.)

WELLS COUNTY HEALTH)
DEPARTMENT; and)
ERIC HOLCOMB, in his official)
capacity as GOVERNOR of the State)
of Indiana; and STATE OF INDIANA,)
)
 Defendants.)

**VERIFIED PETITION FOR JUDICIAL REVIEW & COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

COMES NOW, Petitioner Yergy's State Road BBQ, LLC, by counsel, and for its *Verified Petition for Judicial Review & Complaint for Declaratory and Injunctive Relief* ("Petition") states as follows:

I. The Parties

1. This action is brought, in part, pursuant to Indiana Code § 4-21.5-5-1 *et seq.* governing judicial review of an order, determination, and/or action of an agency.
2. The name of the petitioner in this action is Yergy's State Road BBQ, LLC ("Yergy").
3. Yergy's mailing address is 14145 South Main Street, Bluffton, Indiana 46714.
4. Yergy is a limited liability company organized under the laws of the State of Indiana with a principal place of business in Wells County, Indiana.
5. The name of the agency whose action is at issue is Wells County Health

Department (“WCHD”), named as a Defendant in this Cause.

6. Upon information and belief, WCHD’s mailing address is 223 W. Washington Street, Bluffton, Indiana 46714.
7. WCHD is a health department agency that purports to provide public health services within Wells County, Indiana.
8. Defendant Eric Holcomb (“the Governor”) is the current Governor of the State of Indiana and is named herein as a Defendant solely in his official capacity as Governor.
9. Defendant State of Indiana is a body politic.
10. Venue is proper in Wells County.
11. This Court has personal and subject matter jurisdiction.
12. Yergy has met all conditions precedent to the bringing of this action, including the exhaustion of any applicable administrative remedies available to it.
13. This Petition is timely filed.

II. General Allegations Common to All Counts

14. Yergy incorporates the foregoing allegations as though fully set forth herein.
15. Yergy operates a very popular restaurant located in Wells County, Indiana and also a food truck and catering business that routinely conducts business in Wells County, Indiana.
16. Yergy’s restaurant offers a year-round indoor dining experience and a seasonal outdoor dining experience.
17. On or about August 28, 2020, Yergy received a certain *Order to Abate Emergency*

Order to Close and Terminate Violative Operations issued by the Food Environmental Health Specialist of the Wells County Health Department and the Health Officer of the Wells County Health Department (“WCHD Order”).

18. A true and accurate copy of the WCHD Order is attached hereto as Exhibit “1.”
19. Yergy is aggrieved and adversely affected by the WCHD Order, as the WCHD Order demands, among other things, that Yergy “IMMEDIATELY CLOSE AND TERMINATE VIOLATIVE OPERATIONS in any further producing, handling, preparing, manufacturing packing, storing, selling, distributing or transporting of food whether for providing in-dining services or catering at or from the YERGY’S BBQ, located at 1415 South Main Street, Bluffton, Indiana 46714.”
20. In other words, the WCHD Order prohibits the operation of Yergy’s restaurant business insofar as indoor dining services are concerned, though it is unclear from the WCHD Order whether it prohibits the operation of Yergy’s food truck business or any outdoor dining service as the phrase “whether for providing in-dining services or catering at or from” is unclear.
21. The WCHD Order relies on Indiana Code § 16-19-3-11 and several Executive Orders issued by the Governor to support the basis for its issuance.
22. Further, the WCHD Order is further predicated on unverified allegations that Yergy’s “continues to provide food handling services (producing, processing, handling, preparing, manufacturing, packing, storing, selling, distributing, or transporting of food) whether for providing in-dining services or catering in violation of the employee and staff face-covering requirements as well as

in violation of capacity limits (in-person or on-premises dining is limited to up to 75% of seating capacity in any segregated or separate dining area of the facility[.]” (emphasis in original).

23. Not only does the WCHD Order suggest that Yergy’s must shut down at least a substantial portion of its restaurant business, placing Yergy in dire financial straits with the likely result of having to file bankruptcy due to lost profits and having to throw out substantial food product, but also it deprives numerous residents of, and visitors to, Wells County from enjoying one of the best dining experiences in all of Indiana.
24. The WCHD Order, if enforced against Yergy’s, will result in permanent closure of Yergy’s business at a time when numerous Indiana small businesses like Yergy are being jeopardized by restrictions that drive down sales or otherwise compel permanent closure.
25. Further, the WCHD Order threatens the employment of numerous Yergy employees, which would only serve add to the myriad of unemployment claims that Hoosiers have been forced to file during 2020.
26. Yergy’s legal remedies are inadequate thereby causing it irreparable harm.
27. Yergy has a reasonable likelihood of success on the merits in this matter.
28. Yergy’s ongoing and threatened injury outweighs any purported harm that any of the Defendants would suffer should the Court grant injunctive relief in Yergy’s favor in this matter.
29. The public interest would not be disserved by granting injunctive relief sought by

Yergy in this matter.

30. On September 11, 2020, Yergy's filed its *Petition for Review of Order to Abate and Emergency Order to Close and Terminate Violative Operations and Petition to Stay Effectiveness of Same* with WCHD, challenging the WCHD Order.

31. A true and accurate copy of the above-described petition is attached hereto as Exhibit "2."

32. On November 10, 2020, a hearing on the foregoing petition was held before a panel consisting of William Horan; Dr. Steven Bales, DVM; and Marcia Meyer, LPN (collectively "the Hearing Officer").

33. At the November 10, 2020 hearing, no evidence was presented that even attempted to establish that Yergy was in violation of any applicable capacity limits despite the allegations related to that issue in the WCHD Order.

34. On November 17, 2020, the Hearing Officer issued the *Findings of Fact, Conclusions of Law, and Order* ("Hearing Officer's Order").

35. A true and accurate copy of the Hearing Officer's Order is attached hereto as Exhibit "3."

36. The Hearing Officer's Order asserts conclusions of law and "finds for [WCHD] and modifies the August 28, 2020, [WCHD Order] issued to Yergy's by the Food Environmental Health Specialist of the Wells County Health Department and the Health Officer of the Wells County Health Department to Yergy's to remove all language regarding the alleged violation with respect to the 75% capacity limitation in the third and fifth paragraph and confirms the remainder of the

[WCHD] Order.”

37. In this Petition, Yergy seeks judicial review of the WCHD Order and the Hearing Officer’s Order, except for the portion that vacated the aspects of the WCHD Order geared toward capacity issues.

38. Additionally, Yergy challenges each of the Executive Orders issued by the Governor discussed below because they do not comply with the requirements of the United States Constitution and the Indiana Constitution, the direct consequence of which is unjust injury to Yergy’s fundamental civil rights, liberty interests, and property rights.

39. The United States Constitution is the fundamental framework of America’s system of government. By and through the United States Constitution, the People:

- A. recognized their own authority to govern themselves;
- B. created a government that keeps that authority in the hands of the people;
- C. delegated their authority and separated the powers of government into three branches: the legislative branch, which makes the laws; the executive branch, which executes the laws; and the judicial branch, which interprets the laws;
- D. set up a system of checks and balances that ensures no one branch has too much power;
- E. divided power between the states and the federal government;
- F. described the purposes and duties of the government;
- G. defined the scope and limit of governmental power; and
- H. recognized and enumerated many rights and freedoms of the people.

40. The United States Constitution was, as its preamble recites, ordained and established by the people of the United States.

41. The United States Constitution emanated from the people and was not the act of sovereign and independent states.

42. The United States Constitution was made by, and for the protection of, the people of the United States.

43. The United States Constitution and the laws of the United States are the supreme law of the land and states may not enact laws or regulations which are contrary to federal law.

44. Any section of the Indiana Constitution which is contrary to the United States Constitution is null and void.

45. The Preamble of the Indiana Constitution states:

TO THE END, that justice be established, public order maintained, and liberty perpetuated; *WE*, the *People* of the *State of Indiana*, grateful to *ALMIGHTY GOD* for the free exercise of the right to choose our own form of government, do ordain this *Constitution*.

46. The People of Indiana apparently saw the wisdom in the architecture and substance of the United States Constitution because in most respects they echoed it, as – by and through their Indiana Constitution – the People:

- A. recognized their own authority to govern themselves;
- B. created a government that keeps that authority in the hands of the people;
- C. delegated their authority and separated the powers of state government into three branches: the legislative

branch, which makes the laws; the executive branch, which executes the laws; and the judicial branch, which interprets laws;

- D. set up a system of checks and balances that ensures no one branch has too much power;
- E. described the purposes and duties of the state government;
- F. defined the scope and limit of government power; and
- G. recognized and enumerated many rights and freedoms of the people.

47. Specifically, Article 3, Section 1 of the Indiana Constitution provides:

The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

48. The spine of Indiana's constitutional system is the limitation on governmental power and seeks to preserve of those limits established by the founders of the United States and the founders of the State of Indiana. As stated in the recent 2019 Indiana Supreme Court Opinion of *Horner v. Curry*:

As James Madison explained in *The Federal No. 47*, the principal reason for separating governmental power was to protect liberty and avoid tyranny. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

...

Madison's concerns are reflected in our own Indiana Constitution, which divides state government into "three separate departments": "the Legislative, the Executive including the Administrative, and the Judicial". Ind.

Const. art. 3, § 1. No official within one department “shall exercise any of the functions of another, except” – and this is a key qualification – “as in this Constitution expressly provided.” *Id.* In other words, the only permissible deviation from strictly separate governmental powers arises when the Constitution itself permits it.

125 N.E.3d 584, 612 (Ind. 2019).

49. By this, Indiana goes beyond merely establishing separation but *requires* separation and with great rigor.

50. This “Distribution of Powers Clause” must be strictly construed in order to preclude a commingling of three essentially different powers in the same hands. *Rush v. Carter*, 468 N.E.2d 236, 238 (Ind. Ct. App. 1984).

51. The power to enact and alter laws is conferred specifically on the legislative branch by the Indiana Constitution, and any attempt by the legislature to entrust its functions to another branch of government is unconstitutional.

52. Indiana’s Emergency Management and Disaster Law is codified at Indiana Code § 10-14-3 *et. seq.* (“the Emergency Disaster Law”).

53. Indiana Code § 10-14-3-11(b) (2003) of the Emergency Disaster Law empowers the Governor to, among other things, “[m]ake, amend, and rescind the necessary orders, rules, and regulations to carry out this chapter.”

54. During 2020, the Governor issued the following Executive Orders, which purport to be predicated on authority granted by the Emergency Disaster Law: Executive Order 20-04, Executive Order 20-10, Executive Order 20-14, Executive Order 20-18, Executive Order 20-22, Executive Order 20-32, Executive Order 20-41, and Executive Order 20-42 (collectively “the Executive Orders”).

COUNT I – Judicial Review

55. Yergy incorporates the foregoing allegations as though fully set forth herein.

56. The Hearing Officer's Order is in error for the following reasons:

- A. The determinations of WCHD are arbitrary, capricious, an abuse of discretion, and not in accordance with law;
- B. The determinations of WCHD are contrary to Yergy's constitutional rights, powers, privileges, and immunities;
- C. The determinations of WCHD are in excess of statutory jurisdiction, authority, and limitation, and short of statutory right;
- D. The determinations of WCHD are without observance of procedure required by law; and
- E. The determinations of WCHD are unsupported by substantial evidence.

57. Indiana Code § 16-19-3-11 provides "[t]he state department may issue an order condemning or abating conditions causative of disease[.]"

58. It is irrational, arbitrary and capricious to determine, with or without evidence, that the lack of face coverings worn by healthy Yergy employees is a condition causative of disease when, among other things, Yergy's customers are not required by applicable law, ordinance or rule to wear face coverings at all times when present in Yergy's restaurant.

59. There is no evidence, let alone substantial evidence, that the lack of face coverings worn by healthy Yergy employees is a condition causative of disease or any other evidence of a condition created by Yergy that is causative of disease.

60. There is no rational basis for requiring Yergy's healthy employees to wear a face

covering when working for Yergy.

61. The WCHD Order was issued in defiance of Indiana Code § 16-19-3-11 and should have been declared unenforceable and set aside in its entirety by the Hearing Officer.

WHEREFORE, Yergy prays the Court grant this Petition, review the WCHD Order and the Hearing Officer's Order, reverse the Hearing Officer's Order, order the Hearing Officer to vacate the WCHD Order, enjoin the WCHD from enforcing any aspect of the WCHD Order, and enter all other relief deemed just and proper in the premises.

COUNT II – Action for Declaratory and Injunctive Relief for Violation of Distribution of Powers Clauses

62. Yergy incorporates the foregoing allegations as though fully set forth herein.

63. Yergy challenges the Emergency Disaster Law as unconstitutional as applied in this matter in violation of the United States Constitution and the Indiana Constitution.

64. The Emergency Disaster Law is not a valid source of legal authority for the Executive Orders.

65. The Emergency Disaster Law's grant of authority is unconstitutional and violates the separation of powers required by the Indiana Constitution and its non-delegation doctrine.

66. The Emergency Disaster Law is not accompanied by sufficient standards to guide the Governor in the exercise of his statutory authority in order to be valid.

67. The Emergency Disaster Law is unconstitutional because it delegates the power

to make law to the Governor.

68. Moreover, “[c]rimes shall be defined and punishment therefor fixed by statutes of this state and not otherwise.” Indiana Code § 1-1-2-2.

69. Whether granted the authority to do so by the Indiana General Assembly or not – the Governor’s Executive Orders identified in the WCHD Order are actions outside of the constitutional limitations of Article 3, Section 1 of the Indiana Constitution and the framework established by the United States Constitution and are being utilized via the WCHD Order to effectively punish Yergy.

70. Via the WCHD Order, Yergy has been threatened with fines that have not been fixed by statute.

71. The Governor cannot impose restrictions on Yergy that have not otherwise been imposed upon Yergy by an act of the Indiana General Assembly or otherwise in accordance with the United States and Indiana Constitutions.

72. Pursuant to the requirements of the rule of law and separation of powers, especially now that the early “emergency” stages of the pandemic have passed and availability of vaccinations imminent, the Governor must have the legislated support of the Indiana General Assembly in order to make law and impose criminal or quasi-criminal penalties against Yergy.

73. Because the Executive Orders are void *ab initio* and the WCHD Order is predicated on the void Executive Orders, the WCHD Order must be declared unenforceable and set aside in addition to the aspects of Executive Order upon which the WCHD Order relies.

WHEREFORE, Yergy prays the Court grant this Petition, declare that the aspects of the Emergency Orders upon which the WCHD is predicated are unconstitutional, reverse the Hearing Officer's Order, order the Hearing Officer to vacate the WCHD Order, enjoin the WCHD from enforcing any aspect of the WCHD Order, and enter all other relief deemed just and proper in the premises.

COUNT III – Action for Declaratory Judgment and Injunctive Relief for Violation of the Emergency Disaster Law

74. Yergy incorporates the foregoing allegations as though fully set forth herein..

75. Assuming *arguendo* that the Emergency Disaster Law is found to be valid, the Executive Orders, and in turn the WCHD Order, nevertheless impose restrictions outside the scope of the Emergency Disaster Law.

76. The Emergency Disaster Law does not provide any specific authority to the Governor to enact a mask mandate, for example.

77. Moreover, there has been no evidence presented showing that Wells County, Indiana is under imminent threat of widespread or severe damage, injury, or loss of life or property from the operation of Yergy's business if healthy Yergy employees do not wear face coverings. No one is forced to consume food product prepared by Yergy or otherwise visit Yergy's business or be served by a Yergy employee that is not wearing a face covering.

78. By issuing such a mask mandate on Yergy and its employees, with penalties attaching if violated, the Governor's intended mandate has the effect of a law which goes beyond the scope of his limited "emergency" authority under the Emergency Disaster Law.

79. The Executive Orders, and in turn the WCHD Order, are the product of arbitrary, unscientific value judgments that unfairly devastate Yergy's business and pursuits while sparing the business and pursuits of others.
80. There is no rational basis for the harshly disproportionate restrictions placed on Yergy, especially because it has not been established as fact that asymptomatic individuals can even spread coronavirus and also because there is an increased risk of infection with cloth masks due to moisture retention, reuse, and poor filtration.
81. The Emergency Disaster Law only sanctions "emergency" powers exercised by the Governor for imminent and fleeting disaster events when the Indiana General Assembly does not have the time and ability to act within the imminent and fleeting timeframe.
82. The Executive Orders, issued over the course of numerous months, run counter to the authority set forth in the Emergency Disaster Law, as the Governor has had ample opportunity to call the Indiana General Assembly into a special session.
83. Black's Law Dictionary defines an emergency as "(a) sudden unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity." Black's Law Dictionary 654 (3rd Ed. 1933).
84. The conditions that are the basis of the Executive Orders has long passed the point of requiring sudden or unexpected occasion for action, or a sudden unexpected happening.

85. Once the opportunity arises to call the Indiana General Assembly into a special session, the opportunity to exercise power under the Emergency Disaster Law expires.

86. Pursuant to Article 4, Section 9 of the Indiana Constitution, if in the opinion of the Governor the public welfare requires it, he may call a special session of the General Assembly.

87. Thus the Governor has a remedy in a situation where the need for immediate action has passed and thus the situation is no longer an emergency.

88. Even if the Indiana General Assembly acts, government generally may not uproot liberty on a hope that it can hide society from pathogens; individuals – and not government – should decide if the risk of walking out their front door is worth the potential reward.

89. Because the WCHD is based on improper Executive Orders – issued outside the narrow scope of the Emergency Disaster Law – the WCHD Order is without legitimate legal footing and should be declared unenforceable and set aside.

WHEREFORE, Yergy prays the Court grant this Petition, declare that the aspects of the Emergency Orders upon which the WCHD is predicated are invalid attempted exercises of the Emergency Disaster Law, reverse the Hearing Officer's Order, order the Hearing Officer to vacate the WCHD Order, enjoin the WCHD from enforcing any aspect of the WCHD Order, and enter all other relief deemed just and proper in the premises.

Verification

I affirm, under the penalties for perjury, that the foregoing factual representations are true and accurate to the best of my knowledge and belief.



Adia Yergler, Member of Yergy's State Road BBQ, LLC

Respectfully submitted (but not verified):

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