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**IN THE CAMBRIDGE MUNICIPAL COURT,  
GURNSEY COUNTY, OHIO**

CAMBRIDGE MUNICIPAL COURT  
CAMBRIDGE, OHIO

2020 JUN 11 A 8:28

LAURIE ENDLY  
CLERK OF COURT

**STATE OF OHIO,**

**Plaintiff,**

**v.**

**VICKI BREARLEY**

**Defendant.**

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:  
: **Case No. 20-CRB-0391**  
: (Related Case No. 20-CRB-0392)  
:  
: **JUDGE JOHN M. NICHOLSON**  
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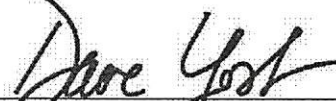
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**MOTION AND MEMORANDUM SEEKING LEAVE TO DISMISS COMPLAINT  
(CRIMINAL RULE 48)**

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Now comes the State of Ohio, by and through the Attorney General acting as Special Prosecutor pursuant to appointment by the Cambridge City Attorney, and respectfully requests leave of this honorable Court to file a dismissal in the instant case pursuant to Criminal Rule 48 and the interests of justice, for reasons more fully set out in the accompanying memorandum in support.

Respectfully submitted,

  
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Lead Trial Counsel

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**MEMORANDUM IN SUPPORT**

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At noon on April 22, 1889, the United States opened the area that would become the state of Oklahoma to settlers, who were able to claim 160 acres of ground. A large number of would-be settlers lined up at the border, waiting for the cavalry to fire cannons signaling the arrival of the noon start of a rush for land.

A small number of people did not comply with the start time and sneaked in under the cover of night to get a head start. These "Sooners" gave the State and its desultory university football team their nicknames.

It does not appear that the Sooners were criminally charged, but they were subject to the law: some 5,000 claims were subject to lengthy legal contests.

This case involves a "sooner" in Ohio who opened a restaurant before the government-set starting time, and is criminally charged for violating the time term of a public health order.

For the reasons set out below, the State of Ohio believes that the interests of justice require dismissal of this case.

**I. FACTUAL BACKGROUND**

The facts in this case are not in dispute. Vicki and Dwight Brearley ("the Brearleys") own and operate the National Road Diner located at 3394 Glenn Highway, Cambridge, Ohio. The National Road Diner is a family-friendly "sit down" restaurant offering food and drinks for in-person dining and carry-out. It is not a chain. It is a small business run by a single family.

On March 15, 2020, the Ohio Department of Health, through its Director Amy Acton, M.D., issued an Order Limiting Sale of Food and Beverages, Liquor, Beer and Wine to Carry-out and Delivery Only ("the March 15 Order"). Effective nine o'clock that evening, businesses

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located in the State of Ohio were prohibited from allowing customers to consume beverages on site.

That complete prohibition against on-site consumption of food and beverages remained in effect until May 15, 2020, when businesses with outdoor seating areas were allowed to offer on-premises consumption of food and drinks, so long as certain other requirements were met.<sup>1</sup> Indoor dining was allowed to resume May 21.<sup>2</sup>

The Brearleys initially followed the closure order. But by early May, Dwight and Vicki Brearley decided they could not abide by the restrictions anymore. They reopened the National Road Diner for in-person service in spite of the Director's Order. The National Road Diner's return to in-person dining and the Brearleys' defiance of the Director's Order was proudly promoted on social media. The Brearleys decided to open the doors, take a stand and see what the State would do. They wouldn't have to wait long.

Things came to a head on May 6, 2020. The Brearleys again permitted one or more individuals to purchase and consume meals at tables located within the National Road Diner. They did this after being warned that indoor dining was not allowed.

Finally, seeing no other avenue to get Dwight and Vicki Brearley's attention, Guemsey County Health Commissioner Dr. Edward Colby filed criminal complaints charging each with a single count of violating an order of the Director of the Department of Health under RC 3701.352, a misdemeanor of the second degree.

## II. REMEDIES AVAILABLE TO THE DIRECTOR OF HEALTH

RC 3701.352 provides that no person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this

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<sup>1</sup> See Director of Health's Dine Safe Ohio Order issued May 14, 2020, which is attached as Exhibit A.

<sup>2</sup> Id.

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chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event. This includes orders issued pursuant to RC 3701.13, which gives the director of health the authority to “make special orders...for preventing the spread of contagious or infectious diseases.” The Director’s March 15 Order was issued pursuant to RC 3701.13. Thus, violating the March 15 Order can give rise to criminal charges such as the ones at issue here.

The criminal charge is not, however, the only remedy available to State and local officials faced with addressing violations of these orders. Another statute authorizes enforcement through a civil action brought in the name of the director of health seeking injunctive relief under RC 3701.57.

It is the State’s belief that criminal sanctions should be reserved for the most egregious conduct. In the eyes of the undersigned, the Brearleys’ acts simply don’t rise to that level.

The General Assembly, having set out two independent mechanisms for enforcing public health orders, gave no further guidance as to which mechanism should be used in a given case. But the legislature did not provide two remedies by accident. The alternative remedies are a recognition that each violation should be considered on its own and in light of the conduct alleged and the risk created. The choice is a classic exercise of prosecutorial discretion.

### III. THE IMPORTANCE OF PROSECUTORIAL DISCRETION

A prosecutor has the responsibility of a minister of justice, and not simply that of an advocate. *Rule of Professional Conduct 3.8, comment 1*. To serve as a minister of justice in this case we must examine the underlying purpose of the health order this criminal charge seeks to enforce.

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The concluding paragraph of the Order states that its purpose is "to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population..."

The terms of the March 15 Order itself lay out a substantial number of health and safety requirements to achieve that end, including social distancing and sanitizing practices. It includes lengthy checklists for employees, guests and physical spaces. The Defendant in this case is not charged with violating any of them. The single operative fact underlying the criminal complaint is that the Defendant opened two weeks prior to the effective date of the Order permitting it. The Defendant complied with every other substantive health and safety requirement.

It is indisputable that the State is substantially justified in setting a boundary for when an Order becomes effective. By staging concatenative effective dates, the State is able to draw rough correlations on the risks of certain behaviors and a subsequent increase in COVID-19 cases.

But the effective date of the Order, as applied in this case, has a much less direct impact on the actual risk of "widespread exposure." The effective date does not have the impact of requiring regularly sanitized surfaces or masks; the effective date has no viral load.

The question here goes to *whether the use of a criminal prosecution is just* in procuring compliance with the Order. I conclude that it does not.

A prosecutor ought to look at other factors as well in the exercise of discretion. Here, the Defendant has a long history as an upstanding citizen and business person with no prior criminal record. The conduct complained of has no chance of being replicated, because the sole term of the Order that was violated has expired, and was set to expire at the time of the violation.

Deterrence of similar conduct by others is a classic justification for criminal prosecution. Other persons may choose to ignore an effective date of an order. However, the preferred manner of enforcement under these circumstances is the other alternative provided by the General Assembly: to seek civil enforcement. Civil enforcement provides a similar deterrent value, and more immediate effect.

If May 21 was truly the issue, a temporary restraining order could have been obtained almost immediately, and compliance with it could have been secured through the court's contempt powers. It is noteworthy that the Director of Health did not request a civil action.

Using criminal process in these circumstances simply takes too long if the goal is compliance for public health rather than punishment. The jury trial in this case is not set until August 27, 2020. Even assuming a jury would convict the Defendant of the violation, a conviction would do nothing to avert infection risk.

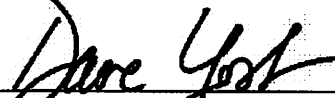
Criminal prosecution would be appropriate where the health and safety guidelines were willfully ignored. This is not that case.

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CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests this Court grant leave to dismiss this case with prejudice pursuant to Ohio Criminal Rule 48.

Respectfully submitted,



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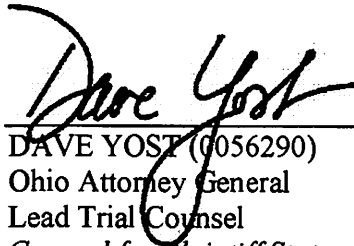
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon counsel for Vicki Brearley by the following methods this 10<sup>th</sup> day of June, 2020:

Michael H. Stahl and William Stephenson via ordinary mail to Stahl & Stephenson, 316 N. Michigan, Suite 600, Toledo, Ohio 43604;

Carla J. Cannon, Esq. via ordinary mail to Carla Cannon Law, 79 S. State St., Suite D4, Westerville, Ohio 43081; and,

Maurice A. Thompson via ordinary mail to 1851 Center for Constitutional Law, 122 E. Main Street, Columbus, Ohio 43215.



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