

**CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT,
DIVISION ONE**

Midway Venture LLC v. County of San Diego

Midway Venture · No. D078375 · Decided February 8, 2021

SUMMARY

The California Court of Appeal modified its published opinion in an appeal involving COVID-19 restrictions on San Diego County adult entertainment businesses and restaurants, denied rehearing, and stated that the modification did not change the judgment. The underlying opinion reversed a preliminary injunction that broadly prohibited enforcement of COVID-19-related public health restrictions against restaurants and adult entertainment businesses. The court concluded that the injunction was procedurally overbroad, unsupported by the claims before the trial court, and impermissibly vague.

CASE DETAILS

COURT	California Court of Appeal, Fourth Appellate District, Division One
WRITING FOR THE COURT	Per curiam; Guerrero, J.; Haller, Acting P. J.; Irion, J.
JURISDICTION	California
DECIDED	February 8, 2021
DOCKET	D078375
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from an order granting a preliminary injunction against enforcement of COVID-19 public health restrictions on live adult entertainment and restaurant operations.
STANDARD OF REVIEW	A preliminary injunction is generally reviewed for abuse of discretion; underlying factual findings are reviewed for substantial evidence and pure legal issues de novo. Constitutional and statutory interpretation is independently reviewed.
PRECEDENTIAL VALUE	Published and certified for publication
PARTIES	County of San Diego, Gavin Newsom, as Governor, California Department of Public Health v. Midway Venture LLC, Peter Balov, F-12 Entertainment Group Inc., Rich Buonantony

TOPICS

injunctions procedural due process first amendment free speech appellate procedure

PRACTICE AREAS

constitutional law civil rights civil procedure appellate procedure First Amendment
preliminary injunctions municipal law health law

QUESTIONS PRESENTED

1. Whether the superior court violated procedural due process by enjoining restaurant restrictions that were not challenged in the pleadings or litigated by the parties.
2. Whether the plaintiffs established a likelihood of prevailing on their First Amendment challenge to COVID-19 restrictions on live entertainment at restaurant establishments.
3. Whether the Regional Stay at Home Order implicated the First Amendment when applied to businesses offering restaurant service.
4. Whether the Blueprint for a Safer Economy and related restaurant guidance were valid content-neutral restrictions on expressive conduct under *United States v. O'Brien*.
5. Whether the preliminary injunction was impermissibly vague.
6. Whether the preliminary injunction should be reversed because the plaintiffs failed to show any possibility of prevailing on the merits.

HOLDINGS

1. A court may not enjoin enforcement of restaurant restrictions when those restrictions were not part of the plaintiffs' claims, requested relief, or the parties' litigation because the affected defendants lacked notice and an opportunity to be heard.
2. The Regional Stay at Home Order did not implicate the First Amendment when applied to the plaintiffs' businesses because it was a generally applicable public-health regulation directed at restaurant operations and public gatherings, not at expressive activity.
3. Because the Regional Stay at Home Order did not implicate the First Amendment, its restaurant restrictions were subject to rational basis review.
4. The Blueprint for a Safer Economy and updated restaurant guidance were valid content-neutral restrictions on expressive conduct under the *O'Brien* test.
5. The preliminary injunction was invalid because its authorization of enforcement of protocols that were no greater than essential to controlling COVID-19 was unreasonably vague.

KEY QUOTATIONS

“It is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he was given proper notice and an opportunity to defend.” (22-23)

“A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff will ultimately prevail on the merits of the claim.” (43)

“An injunction must be narrowly drawn to give the party enjoined reasonable notice of what conduct is prohibited.” (44)

FACTUAL BACKGROUND

The plaintiffs operated businesses offering live nude adult entertainment and restaurant service in San Diego County. After pandemic restrictions limited live entertainment, the businesses reopened under proposed safety protocols, received cease-and-desist letters, and ceased adult performances. They challenged the restrictions as violating the First Amendment and related constitutional rights. The superior court issued an expansive injunction covering not only live entertainment at the plaintiffs' establishments but also restaurant restrictions throughout the county.

PROCEDURAL HISTORY

The adult entertainment businesses sued state and county officials under the First Amendment, equal protection, due process, 42 U.S.C. § 1983, and California mandamus law after receiving cease-and-desist letters concerning live entertainment. The superior court issued a temporary restraining order and then a preliminary injunction prohibiting enforcement of restrictions against the plaintiffs' live entertainment and against all San Diego County restaurants, subject to protocols deemed essential to controlling COVID-19. The State and County parties appealed, and the Court of Appeal reversed with directions to deny the preliminary injunction.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The superior court must enter an order denying the adult entertainment businesses' request for a preliminary injunction pending trial. The businesses may seek to amend their claims to address restaurant restrictions. The State and County parties are entitled to costs on appeal.

CASES CITED

- Butt v. State of California (1992) 4 Cal.4th 668, 677-678
- Jamison v. Dept. of Transportation (2016) 4 Cal.App.5th 356, 362
- Smith v. Adventist Health System/West (2010) 182 Cal.App.4th 729, 739
- Cal. Ass'n of Dispensing Opticians v. Pearle Vision Ctr. (1983) 143 Cal.App.3d 419, 426
- Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd. (1994) 23 Cal.App.4th 1459, 1471
- O'Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1464
- Shoemaker v. County of Los Angeles (1995) 37 Cal.App.4th 618, 625-626
- In re Marriage of Lippel (1990) 51 Cal.3d 1160, 1166

- Carr v. Kamins (2007) 151 Cal.App.4th 929, 936
- Spector v. Superior Court of San Mateo County (1961) 55 Cal.2d 839, 843
- In re Wilford J. (2005) 131 Cal.App.4th 742, 746
- Moore v. California Minerals Products Corp. (1953) 115 Cal.App.2d 834, 837
- Bricker v. Superior Court (2005) 133 Cal.App.4th 634, 639
- People v. Uber Technologies, Inc. (2020) 56 Cal.App.5th 266, 317
- City of Redlands v. County of San Bernardino (2002) 96 Cal.App.4th 398, 405, 415
- Krantz v. City of San Diego (2006) 136 Cal.App.4th 1126, 1132, 1137-1138
- City of Erie v. Pap's A.M. (2000) 529 U.S. 277, 289, 296, 301-302
- Dream Palace v. County of Maricopa (9th Cir. 2004) 384 F.3d 990, 998
- Arcara v. Cloud Books, Inc. (1986) 478 U.S. 697, 706-707
- Clark v. Community for Creative Non-Violence (1984) 468 U.S. 288, 293 fn. 5, 298 fn. 8, 299
- Roberts v. Neace (6th Cir. 2020) 958 F.3d 409, 413
- Reed v. Town of Gilbert (2015) 576 U.S. 155, 156
- Roman Catholic Diocese v. Cuomo (2020) 141 S.Ct. 63, 66, 68
- Agudath Israel of America v. Cuomo (2d Cir. 2020) 983 F.3d 620, 2020 WL 7691715, at *6-*7
- F.C.C. v. Beach Communications, Inc. (1993) 508 U.S. 307, 313-314
- Aiuto v. City & County of San Francisco (2012) 201 Cal.App.4th 1347, 1361
- Halverson v. Skagit County (9th Cir. 1994) 42 F.3d 1257, 1261
- Dariano v. Morgan Hill Unified School Dist. (9th Cir. 2014) 767 F.3d 764, 780
- Thompson v. 10,000 RV Sales, Inc. (2005) 130 Cal.App.4th 950, 979
- In re Marriage of Hartmann (2010) 185 Cal.App.4th 1247, 1250