

Robert Alt
President & CEO
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
robert@buckeyeinstitute.org

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, Massachusetts 02109
(617) 227-0548
patrick@consovoymccarthy.com

David L. Rosenthal (D.C. Bar ID 1660535)
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
david@consovoymccarthy.com

Counsel for Respondent

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:

Dane Flannery Restaurant, LLC
t/a The Big Board

Holder of a
Retailer's Class CT License

at premises
421 H Street, N.E.
Washington, D.C. 20002

Case No.	22-CMP-00006
License No.	ABRA-087398
Order No.	2022-057

**MOTION FOR RECONSIDERATION
OF ORDER AFFIRMING SUMMARY SUSPENSION**

INTRODUCTION

Dane Flannery Restaurant LLC and Eric James Flannery, operator and owner of the Big Board restaurant, hereby seek reconsideration and clarification of the Alcoholic Beverage Control Board's order affirming the summary license suspension issued against Big Board (License No. ABRA-087398). Big Board raises three points for reconsideration:

- (1) the predicate emergency orders upon which the suspension is based are lifting, so the suspension should lift as well;
- (2) the emergency orders and suspension violate D.C.'s Home Rule Charter and the Constitution; and
- (3) Big Board assumes that it cannot appeal until the emergency orders lift under D.C. Code § 7-2308, but seeks clarity on a conflict between the Code and the ABC Board's order interpreting the Mayor's emergency orders.

ARGUMENT

I. Big Board's license suspension should lift with the Mayor's lifting of the predicate emergency orders.

The ABC Board's order affirming the suspension issued on February 14, 2022. The order was expressly premised on Big Board's alleged violation of the ABC Board's emergency regulations implementing the Mayor's emergency orders requiring businesses to impose masking on its customers and employees and to check the vaccination status of all customers. *See* 2/14/22 Order ¶¶1,18. And the ABC Board's order provided that the suspension would remain in effect "until all orders requiring the wearing of masks and the checking of vaccination status at on-premise establishments regulated by ABRA are no longer in effect and have been repealed, amended, or superseded." *Id.* at p. 9.

Critically, the Mayor announced on February 14—the same day the ABC Board issued its order affirming Big Board’s suspension—that the vaccination requirement was being lifted effective February 15, and that the mask requirement will be lifted on March 1. The bases for Big Board’s suspension thus have been or are about to be repealed. As a result, Big Board seeks immediate reinstatement of its license. *See* 2/14/22 Order at 9 (noting that upon repeal of the mask and vaccination requirements, “the Board will consider a motion by the Respondent to reopen the record and to modify the present Order, and upon receipt, the Board will consider returning the license[.]”).

II. The Mayor’s Successive Emergency Orders violate D.C.’s Home Rule Charter.

Reinstatement is appropriate for an additional reason: the suspension itself derives from executive orders that violate federal law governing the District of Columbia’s authority to issue emergency regulations. As the ABC Board acknowledged, the regulations it relied upon in suspending Big Board’s license were enacted to comply with the latest in a series of emergency executive orders issued by the Mayor covering a rolling two-year period. Order at 2-3. The repeated issuance of such orders runs afoul of D.C.’s Home Rule Charter and the Constitution, thus rendering the successive orders unlawful.

D.C.’s Home Rule Charter—which delegates Congress’s exclusive authority to legislate over the District pursuant Article I, Section 8—generally requires that legislation enacted by the D.C. Council be submitted to Congress for review during a 30-day period, during which Congress may take action to disapprove and invalidate legislation. *See* D.C. Code § 1–206.02(c)(1). There is an exception to this requirement for emergency legislation, but in such case that the legislation “shall be effective for a period of not to exceed 90 days.” D.C. Code § 1–204.12(1). The Mayor, in turn, has been authorized by the Council using emergency legislation to extend her own

emergency orders for months on end, which she has repeatedly done. *See* D.C. Code § 7–2306(c-1), (c-2).

By layering emergency order on top of emergency order, the Council and the Mayor have thwarted Congress’s reserved constitutional power under D.C. Code § 1–206.02(c)(1). In making a limited exemption for legislation that was only to be effective for 90 days, Congress never could have intended to authorize legislation by the D.C. executive to escape Congressional review for years on end. This renders the emergency orders upon which the ABC Board relied upon to enact its own emergency regulations *ultra vires*. As a result, the suspension itself is *ultra vires*, null and void.

Apart from these concerns, Big Board believes that the ABC Board’s order also infringes upon the First Amendment. In particular, the ABC Board noted “public comments” made by Big Board as a motivating factor for its investigation, and D.C. officials have given interviews indicating that Big Board was singled out for enforcement action in response to public statements made by its owner. *See* 137:30-138:00. Obviously, government enforcement authority cannot be selectively used in a manner that violates the First Amendment rights of the targeted persons.

III. Big Board seeks clarification concerning the appealability of the ABC Board’s order.

Finally, Big Board seeks clarity on an apparent conflict between D.C. Code § 7–2308 and the ABC Board’s order relying on the Mayor’s emergency orders (and the ABC Board’s implementing regulations) as the basis for Big Board’s suspension. The ABC Board’s order itself suggests that review of the suspension is immediately available under D.C.’s Administrative Procedures Act. *See* 2/14/22 Order at 10. *See also* Notice of Seventeenth Emergency Rulemaking, Alcoholic Beverage Regulation Administration Alcoholic Beverage Control Board, at 6 (Jan. 12, 2022) (noting that “[a] licensee aggrieved by a final summary action may file an appeal in

accordance with the procedures set forth in Subchapter I of Chapter 5 of Title 2.”). But “action taken pursuant to an emergency executive order issued by the Mayor”—which the ABC Board’s Order plainly is—is subject to D.C. Code. § 7-2308, which makes clear that such action is not subject to APA review “until after the expiration date of the emergency executive order.” *Id.* (quoting D.C. Code. § 7-2308). By the plain text, this provision suggests that Big Board may not appeal the Board’s order until the Mayor lifts the emergency orders. And indeed, the DCRA has informed Big Board that this provision prohibits immediate appeal of the suspension of its business license. Of course, the general rule is that a statute (D.C. Code. § 7-2308) trumps a contrary regulation. *In re D.K.*, 26 A.3d 731, 737 (D.C. 2011). Big Board thus seeks clarity on the immediate appealability of that order.

CONCLUSION

The ABC Board should grant reconsideration and immediately lift the summary license suspension issued against Big Board. Regardless, Big Board seeks a clarification on whether D.C. Code § 7–2308 precludes an immediate appeal of the ABC Board’s order.

Respectfully submitted,

/s/ David L. Rosenthal

Robert Alt
President & CEO
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
robert@buckeyeinstitute.org

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, Massachusetts 02109

(617) 227-0548
patrick@consovoymccarthy.com

David L. Rosenthal (D.C. Bar ID 1660535)
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
david@consovoymccarthy.com

February 24, 2022

Counsel for Respondent