

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SIGNATURE SOTHEBY'S
INTERNATIONAL REALTY, INC.,
EXECUTIVE PROPERTY
MAINTENANCE, INC.,
INTRACO CORPORATION, INC.,
CASITE INTRACO, LLC,
BAHASH & COMPANY, LLC, d/b/a
HILLSDALE JEWELERS,
WILLIAM A. SHORTT, D.D.S. &
THERESE F. SHORTT, D.D.S, P.C.,
d/b/a SHORTT DENTAL, and
MIDWEST CARWASH
ASSOCIATION,

Plaintiffs,

v.

GRETCHEN E. WHITMER, and
ROBERT GORDON,

Defendants.

Civil No. 20-00360

HON. PAUL L. MALONEY
MAG. PHILLIP J. GREEN

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

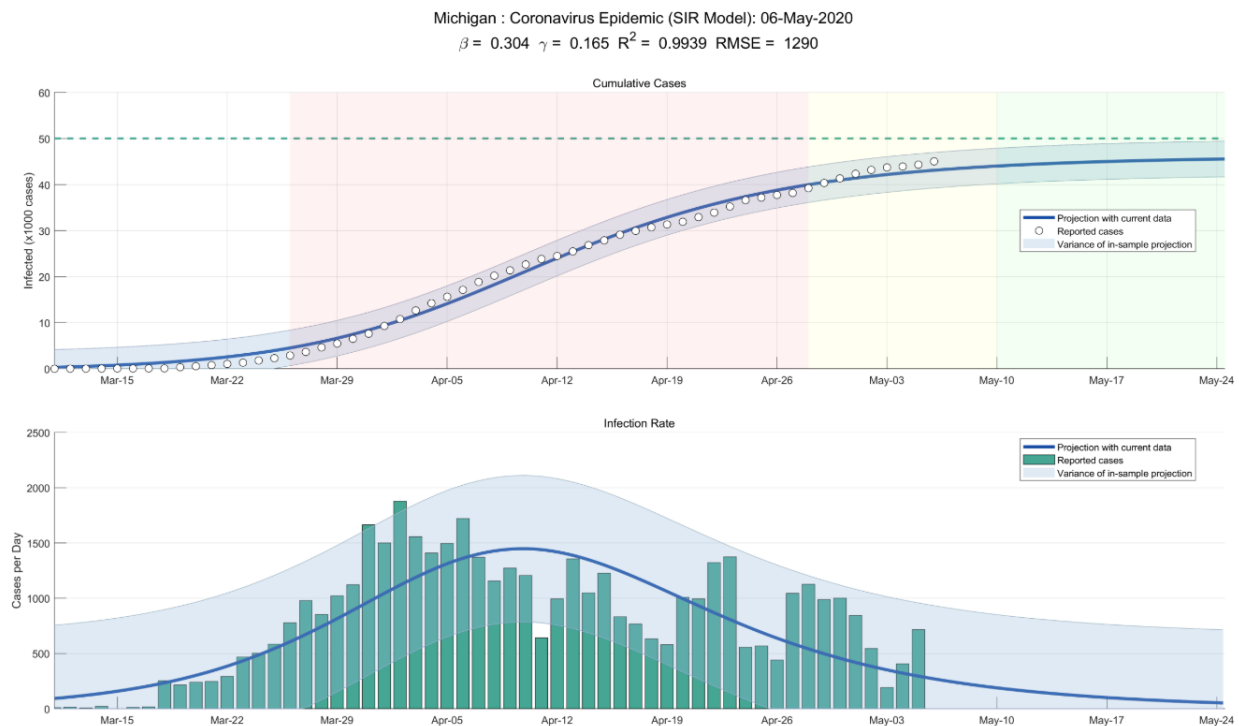
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Plaintiffs allege:

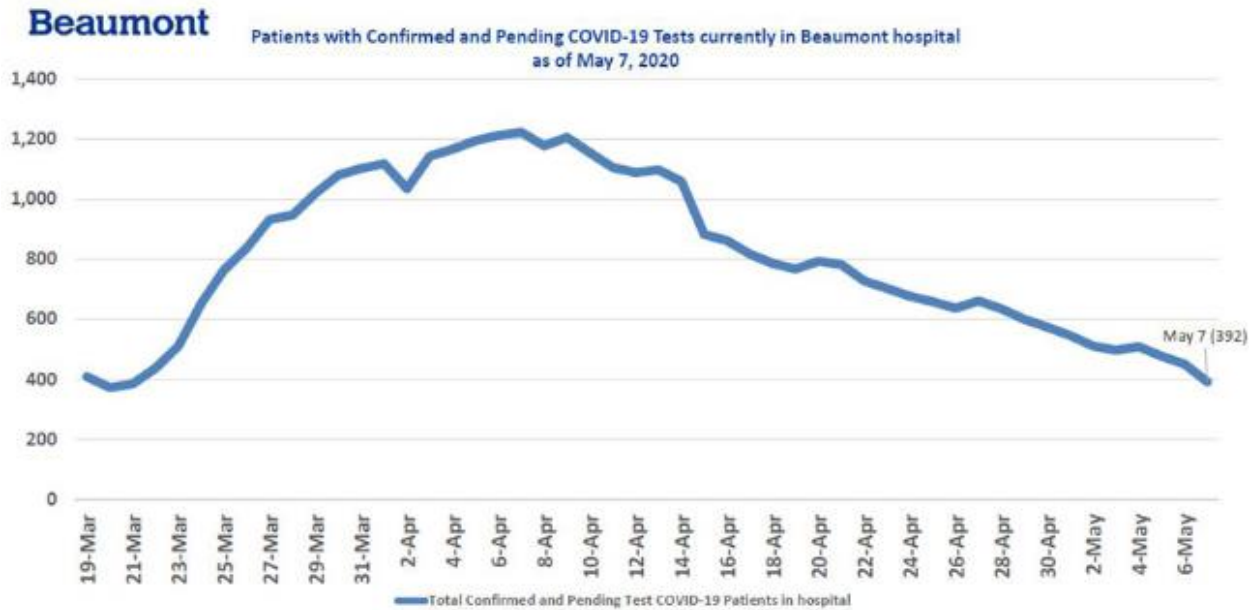
INTRODUCTION

1. Based on speculative modeling on the infectiousness and lethality of a new coronavirus, Governor Whitmer has issued executive orders that have shuttered civil society, placed 10 million people under house arrest, and taken jobs away from nearly 1.2 million people, all without due process of law. The Governor has not disclosed the data or methodology used to create the modeling that purportedly justifies this extreme action. At the same time, through Executive Order 2020-38, she has suspended certain provisions of the Freedom of Information Act through June 4, 2020, preventing any timely, independent assessment of whether the modeling used to justify locking down the entire State is reliable.

2. The Governor's initial Executive Order was premised on the perceived need to "flatten the curve" so as to avoid overwhelming the State's hospitals and healthcare centers, not to eradicate the virus. Objective data and reporting shows that the curve was flattened during the first week of April 2020:



3. This data also tracks with publicly released hospital-level data. See, e.g., Beaumont Hosp. Chart:



4. Although the curve has been flattened, the Governor has nonetheless continued to issue stricter and unclear executive orders that unreasonably and unnecessarily interfere with constitutional rights under the rubric of an indefinite “emergency.”

5. Governor Whitmer’s executive orders are unprecedented. For the first time in our State’s history—indeed, in our nation’s history—the State government is mass quarantining millions of *healthy* people instead of the sick. As a free people, we have the unalienable right to pursue happiness, which includes the freedom to make our own choices about our safety and welfare without unconstitutional interference. In the face of the coronavirus, it means the freedom to choose whether to stay at home, or to keep calm and carry on with the things that make life worth living.

6. Plaintiffs are affected by the Governor’s orders. Under threat of criminal penalties, they have been forced to close or significantly restrict their businesses, depriving them of their liberty and property interests without due process. At the same time, without offering any justification, the Governor has allowed, and is still allowing,

other businesses deemed “critical” to stay open, even though: (a) “critical” businesses must adhere to guidance from the U.S. Centers for Disease Control and Prevention (“**CDC**”) on “social distancing”; and (b) Plaintiffs are fully capable of adhering to those same guidelines if allowed to reopen.

7. Although Michigan, like all States in the Union, is expressly guaranteed a republican form of government under Article IV, Section 4 of the U.S. Constitution, the Governor has unilaterally suspended civil liberties and decided that this state of affairs will continue even over the Legislature’s express objection.

8. Ours is a constitutional republic that empowers government to act within defined limits. Those limits apply at all times and under all circumstances. In war, in peace, and in pandemics. “No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism....” *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–122 (1866).

9. Plaintiffs seek a judicial declaration that the executive orders keeping people in their homes and away from their businesses—and all other orders, rules, and enforcement activity related to them—are unconstitutional under the Dormant Commerce Clause, the Privileges and Immunities Clause, the Privileges or Immunities Clause, the Due Process Clause, the Equal Protection Clause, and State law. Such a declaration, and a corresponding injunction, will yield a more rational, pragmatic response to the virus that saves lives, saves livelihoods, and preserves constitutional norms all at the same time.

10. In short, Plaintiffs bring this lawsuit to define the limits of a State’s police power. Whatever its limits, this legal term of art is not some shibboleth that unlocks absolute executive power and casts our Constitution to the wind. The issues raised in this Complaint are novel, and they will not be rendered moot if the executive order is lifted before the Court issues judgment. The issues presented are capable of repetition and are of such importance that they cannot evade judicial review.

PARTIES

11. Plaintiff Signature Sotheby's International Realty, Inc. ("**Sotheby's**"), is a Michigan limited liability company with its principal place of business at 415 South Old Woodward, Birmingham, Michigan 48009. It engages in foreign, interstate, and intrastate commerce. Sotheby's is a full-service residential brokerage that represents all price points and practices throughout the State of Michigan. Sotheby's normally has 282 real estate agents and 18 employees. Because of the Governor Whitmer's executive orders and Director Gordon's Emergency Order and Emergency Rule, none of its real estate agents were working, and it had to lay off six employees. Although EO 2020-70 released restrictions on EPM as of May 7, 2020, it still suffers substantial injuries from the remaining restrictions imposed under EO 2020-70 and EO 2020-77.

12. Plaintiff Executive Property Maintenance, Inc. ("**EPM**"), is a Michigan corporation with its principal place of business at 42245 East Ann Arbor Road, Suite 107, Plymouth, Michigan 48170. It engages in intrastate commerce, but depends on interstate commerce for the goods necessary to perform its intrastate services. EPM provides to commercial, municipal, and residential clients lawn, snow, and ice maintenance; fertilization; property maintenance; planting; softscape; hardscape; design and build; irrigation; and water-feature services. EPM is an ISO9001/SN9001 certified company and participates in the Safe Company Program through the National Association of Landscape Professionals. During its peak season, EPM employs up to 45 employees. Because of the Governor Whitmer's executive orders and Director Gordon's Emergency Order and Emergency Rule, all EPM employees were ordered to stop work. Although EO 2020-59 released restrictions on EPM, it still suffers substantial injuries from the restrictions placed on its vendors and customers.

13. Plaintiff Intraco Corporation, Inc. ("**Intraco**"), is a Michigan corporation with its principal place of business at 530 Stephenson Highway, Troy, Michigan 48083. It engages in foreign, interstate, and intrastate commerce. Intraco is a major diversified

exporter of architectural and automotive glass, automotive chemicals, and other goods. Its business model and success is based on maintaining personal face-to-face relationships with current and prospective customers in Michigan and elsewhere. Videoconferencing is not conducive to Intraco's operations. Intraco's revenue has decreased substantially because of the executive orders and agency orders and rules at issue. Although some of Intraco's employees in Michigan are performing limited functions at home, Intraco will soon face the harsh reality of laying off its staff if the executive orders and agency orders and rules at issue are not enjoined or rescinded.

14. Plaintiff Casite Intraco, LLC ("**Casite**"), is a Michigan limited liability company, and a wholly-owned subsidiary of Intraco, with its principal place of business at 530 Stephenson Highway, Troy, Michigan 48083. Casite engages in foreign, interstate, and intrastate commerce. It distributes engine oil, fuel additives, and other after-market products for automobiles. Like Intraco, Casite's business model and success is based on maintaining personal face-to-face relationships with current and prospective customers in Michigan and elsewhere. Casite contracts through two separate sales representatives, both of which are prohibited from calling on customers directly; videoconferencing is not conducive to Casite's operations. Casite's revenue has decreased substantially because of the executive orders and agency orders and rules at issue.

15. Plaintiff Bahash & Company, LLC, doing business as **Hillsdale Jewelers**, is a Michigan limited liability company with its principal place of business at 77 North Howell Street, Hillsdale, Michigan 49242. Hillsdale Jewelers engages in interstate and intrastate commerce. It is a storefront retailer of jewelry and offers jewelry-repair services. Hillsdale Jewelers has been forced to close because of the executive orders and agency orders and rules at issue. All three of its employees, including owner-employee Chris Bahash, are unemployed.

16. Plaintiff William A. Shortt, D.D.S & Therese F. Shortt, D.D.S, P.C., doing business as **Shortt Dental**, is a Michigan professional corporation with its principal place

of business at 12756 Ten Mile Road, South Lyon, Michigan 48178, and a second location at 720 West Houghton Avenue, West Branch, Michigan 48661. Shortt Dental engages in intrastate commerce, but depends on interstate commerce for the goods necessary to perform intrastate services. Both of Shortt Dental's locations have been forced to close because of the executive orders and agency orders and rules at issue. Shortt Dental employs 2 dentists, 4 dental hygienists, 12 office assistants, and 4 front desk workers, most of whom are unemployed. Shortt Dental's revenue has decreased at least 75% due to the Lockdown Orders. The only service it provides is emergency care limited to patient complaints of acute pain.

17. Plaintiff Midwest Carwash Association, Inc. ("**MCA**"), is a Michigan corporation with its principal place of business at 120 North Washington Square, Suite 11A, Lansing, Michigan 48933. MCA is an association of carwashes located in Michigan, Wisconsin, Illinois, Indiana, and Ohio, that provides members with programs and services at discount rates and networking opportunities with other carwash operators, manufacturers, and suppliers. In 2019, MCA had 119 members, consisting of 71 carwash operators and 48 vendors. In 2020, due to the Lockdown Orders, MCA's membership reduced to 86 members, consisting of 51 operators and 35 vendors. On information and belief, all staffed carwashes have been shut down, even though each are able and uniquely qualified to operate exterior washes safely and without risk to the public. Exterior-only carwash operations can safely operate with limited staff to sanitize wash equipment, and can restrict payment to online or by an outside worker, wearing a safety mask.

18. Defendant Gretchen E. Whitmer is the Governor of the State of Michigan. Plaintiffs sue her in her official capacity only.

19. Defendant Robert Gordon is the Director of the Michigan Department of Health and Human Services. Plaintiffs sue him in his official capacity only.

JURISDICTION

20. This action arises under 42 U.S.C. § 1983 and challenges Governor Whitmer’s Executive Orders 2020-17, 2020-69, and 2020-77 (and their predecessors and future iterations of these orders) (the “**EOs**”) and Director Gordon’s Emergency Order and Emergency Rule (all collectively, the “**Lockdown Orders**”), which Plaintiffs believe violate the following clauses of the U.S. Constitution:

- (a) the Dormant Commerce Clause of Article I, Section 8 ;
- (b) the Privileges and Immunities Clause of Article IV, Section 1;
- (c) the Privileges or Immunities Clause of the Fourteenth Amendment;
- (d) the Due Process Clause of the Fourteenth Amendment; and
- (e) the Equal Protection Clause of the Fourteenth Amendment.

The Court therefore has federal-question jurisdiction under Article III of the U.S. Constitution and 28 U.S.C. § 1331.

21. Plaintiffs seek declaratory relief and a preliminary and permanent injunction against the Lockdown Orders and similarly crafted orders and rules issued in the future. Accordingly, they bring this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the All Writs Act, 28 U.S.C. § 1651.

VENUE

22. Governor Whitmer is a resident of, and the principal office of the Governor is located in, Lansing, Michigan.

23. Director Gordon’s principal office is located in Lansing, Michigan.

24. A substantial part of the events giving rise to the claims in this Complaint occurred in Lansing, Michigan.

25. The city of Lansing is the seat of government for the State of Michigan. Michigan Const. art. III, § 1 (1963). It is located within Ingham County, which is within the territorial jurisdiction of the Western District of Michigan. 28 U.S.C. § 102(b)(1). This Court is therefore a proper venue for this action under 28 U.S.C. § 1391(b)(1)–(2).

EXECUTIVE ACTION

Executive Orders

26. The Emergency Powers Act provides that a governor, “during times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the State, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, ... [may] proclaim a state of emergency and designate the area involved ... [and may] promulgate **reasonable** orders, rules, and regulations as he or she considers necessary to protect life or property or to bring the emergency situation within the affected area under control.” Mich. Comp. Laws § 10.31(1) (emphasis added).

Executive orders issued under this Act have the force of law.

27. The Emergency Management Act provides that a governor, upon the declaration of an emergency or a disaster, to compel evacuation, to control entry to, exit from, and the occupancy of premises within, the affected area, among other things. Mich. Comp. Laws § 30.405(1). Executive orders issued under this Act have the force of law.

28. On March 11, 2020, Governor Whitmer issued Executive Order 2020-04, which declared a “state of emergency” under both Acts based upon two presumptive diagnoses of coronavirus disease (“**COVID-19**”), a respiratory illness caused by virus named the severe acute respiratory syndrome coronavirus two (“**SARS-CoV-2**” or the “**coronavirus**”).

29. On March 22, 2020, the Governor issued Executive Order 2020-20 and cited both Acts. This order closed to the public a wide range of public accommodations, including all restaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverages for on-site consumption. A willful violation of EO 2020-20 is a misdemeanor for which a person can be imprisoned for up to 90 days and fined up to \$500. Mich. Comp. Laws §§ 10.33, 30.405(3), and 750.504; EO 2020-20(6).

30. On March 23, 2020, the Governor issued Executive Order 2020-21 and cited Acts. This order prohibits all in-person work that the Governor deems “not

necessary to sustain or protect life.” A willful violation of EO 2020-21 is a misdemeanor for which a person can be imprisoned for up to 90 days and fined up to \$500. Mich. Comp. Laws §§ 10.33, 30.405(3), and 750.504; EO 2020-20(6).

31. On April 9, 2020, the Governor issued Executive Order 2020-42 and cited both Acts. This order extends EO 2020-21 through April 30, 2020, while imposing even greater restrictions on the general public than before. A willful violation of EO 2020-42 is a misdemeanor for which a person can be imprisoned for up to 90 days and fined up to \$500. Mich. Comp. Laws §§ 10.33, 30.405(3), and 750.504; EO 2020-42(17).

32. On April 13, 2020, the Governor issued Executive Order 2020-43 and cited both Acts. This order extends EO 2020-20 through April 30, 2020. A willful violation of EO 2020-43 is a misdemeanor for which a person can be imprisoned for up to 90 days and fined up to \$500. Mich. Comp. Laws §§ 10.33, 30.405(3), and 750.504; EO 2020-42(7).

33. On April 24, 2020, the Governor issued Executive Order 2020-59 and cited both Acts. This Order extends EO 2020-42 through May 15, 2020. It purports to loosen some restrictions imposed under EO 2020-42 as part of a phased reopening of the economy. A willful violation of EO 2020-59 is a misdemeanor for which a person can be imprisoned for up to 90 days and fined up to \$500. Mich. Comp. Laws §§ 10.33, 30.405(3), and 750.504; EO 2020-59(20).

34. On April 30, 2020, the Governor issued Executive Order 2020-67 and cited the Emergency Powers Act. This order extends the original declaration of a state of emergency under the Act through May 28, 2020. Mich. Comp. Laws § 10.33; EO 2020-67(1).

35. The same day, the Governor issued Executive Orders 2020-66 and 2020-68 and cited the Emergency Management Act. EO 2020-66 declared an end to the state of emergency and the state of disaster declared under the Emergency Management Act because the Legislature declined to grant an extension of those declarations, as is its right under the Act. EO 2020-68 purports to declare a “new” state of emergency and a “new” state of disaster, citing the same public-health grounds as before.

36. The same day, the Governor also issued Executive Order 2020-69 and cited both Acts. This order effectively extends EO 2020-43, but under the authority of the “new” declared emergencies under EO 2020-67 and 2020-68. A willful violation of EO 2020-69 is a misdemeanor for which a person can be imprisoned for up to 90 days and fined up to \$500. Mich. Comp. Laws §§ 10.33, 30.405(3), and 750.504; EO 2020-69(7).

37. On May 1, 2020, the Governor issued Executive Order 2020-70 and cited both Acts. This order effectively extends EO 2020-59, while purporting to loosen some additional restrictions as part of a phased reopening of the economy. A willful violation of EO 2020-70 is a misdemeanor for which a person can be imprisoned for up to 90 days and fined up to \$500. Mich. Comp. Laws §§ 10.33, 30.405(3), and 750.504; EO 2020-70(20).

38. On May 7, 2020, the Governor issued Executive Order 2020-77 and cited both Acts. This order effectively extends EO 2020-70, while purporting to loosen some additional restrictions as part of a phased reopening of the economy. A willful violation of EO 2020-70 is a misdemeanor for which a person can be imprisoned for up to 90 days and fined up to \$500. Mich. Comp. Laws §§ 10.33, 30.405(3), and 750.504; EO 2020-70(20).

Action by MDHHS

39. On April 2, 2020, Director Gordon issued an Emergency Order under the Michigan Public Health Code. Mich. Comp. Laws § 333.2253(1). This order requires every person in Michigan to comply with EO 2020-20 and EO 2020-21, and authorizes police and prosecutors to enforce those EOs as incorporated through the Emergency Order. <https://perma.cc/K6ZH-HS6N>. This order also applies to EOs 2020-42, 2020-43, and 2020-59. A violation of an MDHHS order is a misdemeanor punishable by imprisonment for up to six months and a fine of \$200, or both. Mich. Comp. Laws § 333.2261. Thus, Director Gordon’s Emergency Order effectively doubles the period of incarceration authorized under the Governor’s executive orders.

40. At the same time, Director Gordon issued an Emergency Rule establishing a \$1,000 civil penalty for violations of Director Gordon's Emergency Order.

<https://perma.cc/8W5C-E98N>.

41. So, since April 2, 2020, any person who violates Governor Whitmer's EOs (and thereby automatically violates Director Gordon's Emergency Order and the Emergency Rule) can now be imprisoned for up to six months, assessed a penal fine of up to \$500, and assessed a civil fine of up to \$1,000.

GENERAL ALLEGATIONS

42. Although the coronavirus is highly contagious, it does not invariably result in COVID-19. For those who do develop COVID-19, the mortality rate is low. As of May 8, 2020, the State reported on its official coronavirus webpage 46,326 confirmed cases of COVID-19, which is roughly 0.46% of the State population. Even for the known fractional percent of those who have developed COVID-19, the State reports a 90.5% survival rate. As a result, only 0.04% of the State's population has succumbed to the virus.

43. In all likelihood, the survival rate in Michigan is far higher. Recent antibody testing conducted in New York State and a study in Los Angeles suggest that millions more have been infected with the coronavirus than previously known, and that the supermajority of those previously infected were either asymptomatic or experienced mild reactions to it. In New York, this new information has dropped the mortality rate to 0.5%—*i.e.*, a survival rate of 99.5%. In Los Angeles, it dropped the mortality rate to 0.1–0.3%—*i.e.*, a survival rate of 99.7–99.9%. There is no reason to believe that Michigan is exempt from this good news. As more Michiganders are tested, increases in positive tests will yield a higher survival rate.

44. Moreover, the method of counting COVID-19 deaths is designed to artificially inflate the statistics that justify the alleged emergency and that are supposedly driving the Lockdown Orders at issue.

45. The World Health Organization (“**WHO**”) has created two emergency COVID-19 death codes: (1) “U07.1, COVID-19, virus identified”; and (2) “U07.2, COVID-19, virus not identified,” which is used when laboratory confirmation is inconclusive or not available. WHO guidelines allow both to be used to code COVID-19 as a cause of death. <https://perma.cc/SP9D-XXU2>. Stated differently, even when the coronavirus *is not identified* in the person, it can still be listed as a COVID-19 death.

46. The WHO has also rolled out an ICD-11 code for living patients: (1) RA01.0, which is used for a laboratory-confirmed case of COVID-19; and (2) RA01.1, which is used for suspected or probable cases. <https://perma.cc/SP9D-XXU2>.

47. The CDC relies on three death codes: the U07.1 code and two codes for pneumonia, J12.0 and J18.9. While this appears more reasonable than the WHO guidance, the CDC still allows physicians to use the U07.1 code for laboratory-confirmed cases or when the death was *presumed* to have been caused by COVID-19. <https://perma.cc/E7CR-CBLY> (See “Understanding the Numbers, How It Works”). This still artificially increases the number of COVID-19 deaths, although to a lesser extent.

48. The State counts all deaths coded on a death certificate under U07.1 as COVID-19 deaths. But, on information and belief, it also looks beyond death certificates and counts as COVID-19 deaths where a person was coded RA01.0 and RA01.1. In other words, a person can be counted as a COVID-19 death *even when it was never confirmed that they had the coronavirus and an attending physician or medical examiner concluded that the person died of something other than COVID-19*.

49. For example, a patient with heart disease can be diagnosed as having contracted coronavirus, die of a heart attack because of the heart disease, *and the physician could code the cause of death as heart disease*, but the State would still list the patient as having died from COVID-19.

50. Take another example: the same patient, instead of dying of a heart attack in the hospital, recovers and is discharged, but dies at home from another heart attack.

The State would still list the patient as having died from COVID-19, not from heart disease.

51. This results in grossly distorted mortality rates and misleads the public about the threat that COVID-19 poses. For example, as of May 8, 2020, the CDC lists 2,529 deaths in Michigan, while Michigan's official coronavirus webpage lists nearly double the number of deaths: 4,393.

52. Simply put, the State appears to be intentionally inflating COVID-19 death statistics to justify an emergency.

53. Yet, even when considering the inflated number of deaths caused by COVID-19, the number of deaths is not "unprecedented," as routinely claimed. What is unprecedented is Governor Whitmer's response to it.

54. In 1918, in response to the Spanish Flu, Governor Albert Sleeper issued an order closing places of public amusement. Individual cities decided whether to close schools. Work continued. Governor Sleeper wisely balanced public health while preserving commerce. The current executive orders fail to do so, overreaching to such extent that the State's economy is spiraling toward a depression.

55. In the 1940s and the early 1950s, annual summer polio epidemics killed thousands of children before a vaccine was found. Even under such dire circumstances, several Michigan governors of both parties, including Governor G. Mennen Williams, refrained from violating constitutional norms with excessive executive orders during those years.

56. In the late 1960s, the Hong Kong Flu swept across the globe killing more than 1 million people. The CDC estimated that 100,000 people died in the U.S. Michigan, like other States, was affected. Governor George Romney did not place residents under house arrest or shutdown the economy then, either.

57. Governor Whitmer repeatedly states that decisions must be made on data. Yet, despite the positive State-specific data, the Governor ***tightened restrictions*** through an

executive order that the *Wall Street Journal* described as the “most excessive” in the country.

58. Among other enhancements, the new order imposed harsher restrictions on the ability to travel and banned people from visiting their families, working, and purchasing a variety of everyday items at stores. The new order was announced at 3:00 p.m. on April 9th, and became effective at 12:01 a.m. on April 10th—*i.e.*, on less than 12 hours’ notice. The Governor timed EO 2020-42 to prohibit families from gathering to celebrate Easter Sunday and Passover.

59. Although her previous order allowed “critical infrastructure workers” to perform in-person work—defined as those workers described as critical by the director of the U.S. Cybersecurity and Infrastructure Agency (“**CISA**”) in guidance issued March 19th—in compliance with CDC guidance on “social distancing,” Governor Whitmer has expressly, arbitrarily, and capriciously refused to adopt CISA’s updated definition of “critical infrastructure workers,” in EOs 2020-42, 2020-59, 2020-70, and 2020-77. Other governors who have issued similar executive orders have adopted the updated federal definitions. Governor Whitmer has never explained why these new definitions have not been, and cannot be, adopted in Michigan. This is further evidence that the Governor is unreasonably keeping more Michiganders locked up in their homes than necessary.

60. Taking Governor Whitmer at her word that she wants to make decisions based on data, and lacking confidence in the Governor’s modeling because the underlying data and methodology is unavailable to the public, Sotheby’s, Intraco, and others hired Anderson Economic Group (“**AEG**”) to analyze the infection curve and the economic effects of her EOs, and they provided AEG’s report to the Governor on April 13, 2020. The Governor has not responded. At a press conference on April 27, 2020, the Governor confirmed that she had not read AEG’s report in the two weeks since it was delivered. The Governor has still not responded as of the date of this First Amended Complaint.

61. An economic depression is predictable following the shutdown of civil society caused by the Lockdown Orders. Businesses around Michigan are permanently closing because they cannot pay employees and vendors. More will be forced to permanently close the longer that the Lockdown Orders and any similarly drafted successor orders are in place.

62. Consistent with the assessments in the AEG report, nearly 1.2 million Michiganders have reportedly filed for unemployment, the largest number of unemployment claims in the State's history. Michigan is among the top five worst states for unemployment. Exhibit 1, AEG Report. According to Jeff Donofrio, Director of the Michigan Department of Labor and Economic Opportunity, this means more than 25% of Michigan's workforce filed for unemployment in the span of four weeks because of the Lockdown Orders. For context, the national *peak* in the unemployment rate during the Great Depression of 1929 was 26%.

63. Employers fund unemployment benefits. Mich. Comp. Laws § 421.13. The Governor has not explained how the unemployment system can keep paying benefits if employers can't operate their businesses. If businesses can't operate, then they can't generate revenue. And, if they can't generate revenue, then they have no way of paying into the unemployment fund.

64. According to the U.S. Department of the Treasury, as of March 31, 2020, Michigan's unemployment trust fund balance was \$4.55 billion. State officials predict that the fund will be drained in July. <https://perma.cc/R54P-GTMU>. One recent prediction is that the Michigan Unemployment Trust Fund will be drained within two months and incur a \$15 billion deficit. Taxes on businesses may double to pay back the loans that the State would require to keep paying unemployment. This will leave less money for businesses to rehire workers and prolong the economic devastation.

65. Unemployment is not the only factor in play. For those fortunate enough to remain employed during this time, many of them are subject to furloughs, pay cuts, and

mandatory sick leave. According to a recent study by the Anderson Economic Group, nearly 1.5 million Michiganders will lose significant income because of the coronavirus and the Governor's orders by the end of April. Exhibit 1, AEG Report.

66. All Plaintiffs want to fully reopen their business, to help their current and former employees (whom they hope to rehire) put food on their tables, keep roofs over their heads, and clothes on their backs. Governor Whitmer and Director Gordon forbid them from doing so under pain of criminal punishment and civil fines. Plaintiffs should not be forced to choose between risking criminal prosecution and economic sanctions on the one hand, or exercising their constitutional rights on the other.

67. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

68. Plaintiffs incorporate all of the foregoing paragraphs into each of the following causes of action.

COUNT I
DECLARATORY JUDGMENT
DORMANT COMMERCE CLAUSE

69. There is an actual and present controversy between the parties.

70. The Commerce Clause of the U.S. Constitution grants Congress the power "[t]o regulate commerce with foreign Nations, among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

71. In its dormant state, often called the Dormant Commerce Clause, the Commerce Clause precludes States from enacting legislation that discriminates against or impermissibly burdens interstate commerce. State laws that facially discriminate against

interstate commerce are invalid *per se* under the Commerce Clause. This is true also of State laws that are facially neutral, if they impermissibly burden interstate commerce in practice. *West Lynn Creamery v. Healy*, 512 U.S. 186, 194–195 (1994).

72. Although the Dormant Commerce Clause is usually invoked to challenge protectionist laws that favor in-state businesses over out-of-state businesses, the Clause has a broader function: to guarantee for all citizens the right to access and participate in interstate commerce. Just as no State can prevent out-of-staters from engaging in commerce with its residents, no State may prevent its residents from participating in commerce with those located in another State.

73. Plaintiffs contend that The Lockdown Orders impermissibly restricted and still impermissibly restrict them from exercising the right to engage in interstate commerce:

(a) *Sotheby's*. Approximately 15–20% of Sotheby's annual business involves customers who buy and sell homes in Michigan while located outside of Michigan. Before May 7, 2020, the Lockdown Orders wholly prevented Sotheby's from seeking work and clients located outside of Michigan, even though: (1) real estate was specifically identified by CISA as a critical business; and (2) other States with comparable or more serious coronavirus and COVID-19 statistics allowed real estate operations to continue.

(b) *Intraco*. The Lockdown Orders have prevented and still prevent Intraco from using its offices to conduct the face-to-face meetings that are necessary to establish new relationships and maintain existing relationships with vendors and customers located inside and outside of Michigan. Intraco has suffered a 20% drop in revenue and has lost business opportunities because of the Lockdown Orders.

(c) *Casite*. The Lockdown Orders have prevented and still prevent Casite from using its offices to conduct the face-to-face meetings that are necessary to establish new relationships and maintain existing relationships with vendors and customers located inside and outside of Michigan. Casite has suffered a 30% drop in revenue and has lost

business opportunities because of the Lockdown Orders.

(d) *Hillsdale Jewelers*. The Lockdown Orders have prevented and continue to prevent Hillsdale Jewelers from importing precious metals and stones to create custom jewelry, from engaging in retail jewelry purchases and sales, and from performing jewelry-repair services. Hillsdale Jewelers has suffered a 99% drop in revenue because of the Lockdown Orders.

(e) *Midwest Carwash Association*. The MCA includes members from Michigan, Wisconsin, Illinois, Indiana, and Ohio. The Lockdown Orders have caused a significant membership reduction. In 2019, the MCA had 119 members throughout the Midwest and Michigan. But since the execution of the Lockdown Orders, the MCA lost over 30 members, including carwash operators and vendors. Other States, including Ohio, have enacted different and much less restrictive measures to allow exterior service carwash members to operate.

74. Governor Whitmer and Director Gordon acted under color of State law in an official capacity and within the scope of their official duties when issuing the Lockdown Orders.

75. Plaintiffs seek a declaration that the Lockdown Orders violate the Dormant Commerce Clause, and an injunction against further infringements of their rights under this Clause as described in the Prayer for Relief.

COUNT II
PRIVILEGES AND IMMUNITIES CLAUSE
42 U.S.C. § 1983

76. The Privileges and Immunities Clause of Article IV of the U.S. Constitution provides that “[t]he citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” U.S. Const. art. IV, § 2, cl. 1.

77. The Privileges and Immunities Clause protects a citizen’s right to pursue a livelihood in a State other than the State in which he is a resident. *Baldwin v. Fish &*

Game Comm'n of Montana, 436 U.S. 371 (1978).

78. The Lockdown Orders have impermissibly restricted and still impermissibly restrict Plaintiffs from exercising these rights:

(a) *Sotheby's*. Before May 7, 2020, the Lockdown Orders wholly prevented Sotheby's from seeking work and clients located outside of Michigan, even though: (1) real estate was specifically identified by CISA as a critical business; and (2) other States with comparable or more serious coronavirus and COVID-19 statistics allowed real estate operations to continue.

(b) *Intraco*. The Lockdown Orders have prevented, and continue to prevent, Intraco from nurturing existing and establishing new client relationships with vendors and customers out of state. Travel for in-person meetings, essential to Intraco's business model but deemed "noncritical" by the Governor, has been and remains prohibited under the Lockdown Orders.

(c) *Casite*. The Lockdown Orders have prevented, and continue to prevent, Casite from nurturing existing and establishing new client relationships with vendors and customers out of state. Travel for in-person meetings, essential to Casite's business model but deemed "noncritical" by the Governor, have been and remain prohibited under the Lockdown Orders.

(d) *Hillsdale Jewelers*. The Lockdown Orders have prevented, and continue to prevent, Hillsdale Jewelers from engaging in commerce with customers who travel to its storefront from locations outside the state.

(e) *Midwest Carwash Association*. The MCA includes members from Michigan, Wisconsin, Illinois, Indiana, and Ohio. The Lockdown Orders have caused a significant membership reduction. In 2019, the MCA had 119 members throughout the Midwest and Michigan. But since the execution of the Lockdown Orders, the MCA lost over 30 members, including carwash operators and vendors. Other States, including Ohio, have enacted different and much less restrictive measures to allow exterior service carwash

members to operate. The Lockdown Orders have prevented carwash operators to operate and to purchase necessary goods and equipment across State lines, whereas other carwash operators in less-restrictive States are able to continue in transacting business.

79. Governor Whitmer and Director Gordon acted under color of State law in an official capacity and within the scope of their official duties when issuing the Lockdown Orders.

80. Plaintiffs seek a declaration that the Lockdown Orders violate the Privileges and Immunities Clause, and an injunction against further infringements of their rights under this Clause as described in the Prayer for Relief.

COUNT III
PRIVILEGES OR IMMUNITIES CLAUSE
42 U.S.C. § 1983

81. The Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution provides that “[n]o State [can] make or enforce any law [that] abridge[s] the privileges or immunities of citizens of the United States.” U.S. Const. am. XIV, § 1.

82. The right to travel between States is a privilege of federal citizenship.

83. The right to engage in interstate commerce is also a privilege of federal citizenship.

84. The Lockdown Orders impermissibly restricted and still impermissibly restrict them from exercising these rights:

(a) *Sotheby’s*. Before May 7, 2020, the Lockdown Orders wholly prevented Sotheby’s from seeking work and clients located outside of Michigan, even though: (1) real estate was specifically identified by CISA as a critical business; and (2) other States with comparable or more serious coronavirus and COVID-19 statistics allowed real estate operations to continue.

(b) *Intraco*. The Lockdown Orders have prevented, and continue to prevent, Intraco from nurturing, existing, and establishing new client relationships with vendors

and customers out of state. Travel for in-person meetings, essential to Intraco's business model but deemed "noncritical" by the Governor, has been and remains prohibited under the Lockdown Orders.

(c) *Casite*. The Lockdown Orders have prevented, and continue to prevent, Casite from nurturing, existing, and establishing new client relationships with vendors and customers out of state. Travel for in-person meetings, essential to Casite's business model but deemed "noncritical" by the Governor, have been and remain prohibited under the Lockdown Orders.

(d) *Hillsdale Jewelers*. The Lockdown Orders have prevented, and continue to prevent, Hillsdale Jewelers from engaging in commerce with customers who travel to its storefront from locations outside the state.

(f) *Midwest Carwash Association*. The MCA includes members from Michigan, Wisconsin, Illinois, Indiana, and Ohio. The Lockdown Orders have caused a significant membership reduction. In 2019, the MCA had 119 members throughout the Midwest and Michigan. But since the execution of the Lockdown Orders, the MCA lost over 30 members, including carwash operators and vendors. Other States, including Ohio, have enacted different and much less restrictive measures to allow exterior service carwash members to operate. The Lockdown Orders have prevented car wash operators to operate and to purchase necessary goods and equipment across State lines, whereas other carwash operators in less-restrictive States are able to continue in transacting business.

85. Governor Whitmer and Director Gordon acted under color of State law in an official capacity and within the scope of their official duties when issuing the Lockdown Orders.

86. Plaintiffs seek a declaration that the Lockdown Orders violate the Privileges or Immunities Clause, and an injunction against further infringements of their rights under this Clause as described in the Prayer for Relief.

COUNT IV
PROCEDURAL DUE PROCESS
42 U.S.C. § 1983

87. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State can “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1, cl. 3.

88. The procedural component of the Due Process Clause prohibits government from depriving Plaintiffs of liberty and property interests without providing any process before or after the deprivations occurred.

89. To establish a procedural due process claim under 42 U.S.C. § 1983, a plaintiff must show that (1) it had a life, liberty, or property interest protected by the Due Process Clause; (2) it was deprived of this protected interest; and (3) the state did not afford it adequate procedural rights. See *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 904 (CA6 2014).

90. Plaintiffs have a protected liberty interest in the right to live without arbitrary governmental interference with their liberty and property interests. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1988).

91. Liberty “denotes not merely freedom from bodily restraint **but also the right of the individual to contract, to engage in any of the common occupations of life**, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, **and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.**” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (emphases added).

92. Plaintiffs had and have protected liberty and property interests, which Defendants infringed through the Lockdown Orders:

(a) *Sotheby’s*. Until May 7, 2020, Sotheby’s was denied the right to intrastate travel and the right to engage in commerce, to-wit: facilitating the sale of homes.

(b) *EPM*. EPM has been denied the right to intrastate travel and the right to engage in commerce, to-wit: selling its services to maintain the value of real property.

(c) *Intraco*. Intraco has been, and is being, denied the right to interstate travel, the right to intrastate travel, and the right to engage in commerce, to-wit: growing and maintaining its distributorship business.

(d) *Casite*. Casite has been, and is being, denied the right to interstate travel, the right to intrastate travel, and the right to engage in commerce, to-wit: growing and maintaining its distributorship business.

(e) *Hillsdale Jewelers*. Hillsdale Jewelers has been, and is being, denied the right to engage in commerce, to-wit: buying, selling, and repairing jewelry.

(f) *Shortt Dental*. Shortt Dental has been, and is being, denied the right to engage in commerce, to-wit: selling dental services.

(g) *Midwest Carwash Association*. MCA's members have been, and are being, denied the right to engage in commerce, to-wit: selling carwash services.

93. Neither Governor Whitmer nor Director Gordon provided any procedural due process before issuing the Lockdown Orders. Nor do the Lockdown Orders provide any mechanism for post-deprivation review.

94. Governor Whitmer and Director Gordon acted under color of State law in an official capacity and within the scope of their official duties when issuing the Lockdown Orders.

95. As a direct and proximate cause of the failure to provide any pre- or post-deprivation process, Plaintiffs suffered prejudice under threat of criminal and civil sanctions.

96. These orders and rules acknowledge that so-called "critical" businesses can safely operate by adhering to "social distancing" rules delineated in the Lockdown Orders, and that so-called "noncritical" businesses can safely operate by adhering to these same rules plus addition, arbitrary "enhanced social distancing" rules that apply only to the "noncritical" businesses allowed to resume operations.

97. Plaintiffs can operate consistent with social distancing rules.

98. By failing to provide any pre- or post-deprivation review of the orders and rules shuttering their businesses, Plaintiffs have suffered and are suffering substantial losses of liberty and property:

(a) *Sotheby's*. Sotheby's has lost roughly \$1 million in revenue over the four weeks since the Lockdown Orders went into effect. April 2020 business has dropped 67% compared to one year ago. Pending sales for May 2020 are down 92% compared to one year ago. Approximately 20% of pending deals have been lost. Sotheby's will continue to experience financial losses in the second quarter of 2020 and beyond because of the Lockdown Orders.

(b) *EPM*. EPM has experienced lost and delayed contracts. Customers have been and still are withholding landscape deposits out of fear that EPM will permanently shutter its operations. Customers on installment plans have been and still are withholding installment payments; they do not want to pay invoices if EPM can't provide the services they're paying for. Other existing and potential customers have been and still are unwilling to enter into new service contracts for 2020, citing the Governor's executive orders. The lost revenue from the multi-week delay in starting spring projects has created financial hardship in paying bills, making payroll, and meeting other fiscal demands. EPM will continue to experience financial losses because of the Lockdown Orders.

(c) *Intraco*. Intraco has lost over 20% of expected revenues for the first quarter of 2020 as compared to last year. It has also lost business opportunities and expectancies because of the restrictions imposed under the Lockdown Orders. Intraco also owns the building at the site of its principal place of business. Intraco will continue to experience financial losses in the second quarter of 2020 and beyond because of the Lockdown Orders.

(d) *Casite*. Casite has lost over 30% of expected revenues for the first quarter of 2020 as compared to last year. It has also lost business opportunities and expectancies

because of the restrictions imposed under the Lockdown Orders. Casite will continue to experience financial losses in the second quarter of 2020 and beyond because of the Lockdown Orders.

(e) *Hillsdale Jewelers*. Hillsdale Jewelers was experiencing year-over-year growth in the first quarter of 2020 before the Lockdown Orders first went into effect. Because of the Lockdown Orders, it ended the first quarter of 2020 with no growth and has lost 99% of expected revenues since closing. Even if the Lockdown Orders are enjoined or rescinded in the coming weeks, Hillsdale Jewelers will experience a nearly 50% drop in revenue (or more) for the second quarter of 2020. It has therefore suffered, and will continue to suffer, financial losses in the second quarter of 2020 and beyond because of the Lockdown Orders.

(f) *Shortt Dental*. Shortt Dental has suffered an over 75% loss in revenue due to the Lockdown Orders. Its two offices have been closed, save for select emergencies from patients complaining of acute pain. Critical and necessary oral cancer examinations and other necessary examinations are suspended, including necessary diagnoses of cancers and other life-threatening ailments and illnesses. Because dentists regularly combat airborne disease, they are uniquely qualified and able to safely operate their dental offices, much safer than grocery stores and the other businesses and services that have been deemed “essential.” Indeed, during HIV and Hepatitis C epidemics, dentists were required by law to see such infected patients. As part and parcel of the profession, dentists have been implementing the most stringent anti-viral protocols in healthcare.

(g) *Midwest Carwash Association*. MCA lost over 25% of its members from Michigan in 2019. Of its remaining members, all are closed and have suffered substantial losses of revenue.

99. The prejudice each Plaintiff has suffered would not have occurred but for Defendants’ deprivations of their liberty and property interests.

100. Plaintiffs seek a declaration that the Lockdown Orders violate the procedural component of the Due Process Clause, and an injunction against further infringements of their rights under this Clause as described in the Prayer for Relief.

COUNT V
SUBSTANTIVE DUE PROCESS
42 U.S.C. § 1983

101. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State can “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1, cl. 3.

102. The substantive component of the Due Process Clause prohibits government from taking action that “shocks the conscience” or “interferes with rights implicit in the concept of ordered liberty.” *United States v. Salerno*, 481 U.S. 739, 746 (1987) (cleaned up).

103. Plaintiffs have a protected liberty interest in the right to live without arbitrary governmental interference with their liberty and property interests. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1988).

104. Liberty “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (emphases added).

105. The Lockdown Orders shock the conscience and interfered, and continue to interfere, with Plaintiffs’ deeply-rooted liberty and property rights, including the to work, right to contract, and right to engage in commerce, for all of the reasons described in the General Allegations and in each of the Counts of this Complaint, which are incorporated into this Paragraph by reference.

106. Each Plaintiff could and can conduct business in full compliance with all of the rules imposed on businesses allowed to operate under the Lockdown Orders, or reasonably equivalent and equally safe measures tailored to the unique nature of the in-person operations. Thus, the Lockdown Orders are not narrowly tailored to achieve a compelling governmental interest.

107. Nor is there any rational basis to deprive Plaintiffs of their liberty and property interests in performing services for willing customers when they can do so safely and in the same (or reasonably safe equivalent) manner as other businesses allowed to operate.

108. In the alternative, the Lockdown Orders are not reasonably related to a legitimate governmental interest.

109. Governor Whitmer and Director Gordon acted under color of State law in an official capacity and within the scope of their official duties when issuing the Lockdown Orders.

110. Plaintiffs seek a declaration that the Lockdown Orders violate the substantive component of the Due Process Clause, and an injunction against further infringements of their rights under this Clause as described in the Prayer for Relief.

COUNT VI
EQUAL PROTECTION
42 U.S.C. § 1983

111. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State can “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1, cl. 4.

112. The Lockdown Orders deprive Plaintiffs of the equal protection of the law because they allow some businesses to operate but not Plaintiffs’ businesses, even though they are similarly situated. See *e.g.*, *Grocers Dairy Co. v. McIntyre*, 377 Mich. 71, 75

(1966) (“The Constitution guarantees to citizens the general right to engage in any business which does not harm the public.”)

113. Each Plaintiff could and can conduct business in full compliance with all of the rules imposed on businesses allowed to operate under the Lockdown Orders, or reasonably equivalent and equally safe measures tailored to the unique nature of the in-person operations. Thus, the Lockdown Orders are not narrowly tailored to achieve a compelling governmental interest.

114. Nor is there any rational basis to deprive Plaintiffs of their liberty and property interests in performing services for willing customers when they can do so safely and in the same (or reasonably safe equivalent) manner as other businesses allowed to operate.

115. In the alternative, the Lockdown Orders are not reasonably related to a legitimate governmental interest.

116. Governor Whitmer and Director Gordon acted under color of State law in an official capacity and within the scope of their official duties when issuing the Lockdown Orders.

117. Plaintiffs seek a declaration that the Lockdown Orders violate the Equal Protection Clause, and an injunction against further infringements of their rights under this Clause as described in the Prayer for Relief.

COUNT VII
DECLARATORY JUDGMENT
VOID FOR VAGUENESS

118. There is an actual and present controversy between the parties.

119. Plaintiffs contend that the Lockdown Orders are unconstitutionally vague under the void-for-vagueness doctrine under the U.S. and Michigan constitutions.

120. The void-for-vagueness doctrine requires penal laws to define criminal conduct with sufficient precision that ordinary people can understand what conduct is

prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983). This doctrine flows from the Due Process Clause. *Michigan Dep’t of State Compliance & Rules Div. v. Michigan Educ. Ass’n*, 251 Mich. App. 110, 116 (2002); U.S. Const., am. XIV.

121. The Lockdown Orders purport to carry the force of law and (with the exception of Director Gordon’s Emergency Rule) makes any willful violation of their terms a misdemeanor punishable by imprisonment or a fine. It is therefore subject to the void-for-vagueness doctrine.

122. EO 2020-77 allows certain businesses to continue operations if they fall within certain “sectors” of the economy, but it does not identify any criteria by which a business owner can safely determine whether his or her business falls within that sector. Incongruities are evident within the order.

123. The very fact that the Governor needs a webpage to answer “frequently asked questions” about the scope of the order shows that it’s vague. Michiganders are smart people. If “ordinary people” could understand the Lockdown Order, then there would be no need for **125+ FAQs** on these orders on the State’s coronavirus webpage.

124. On information and belief, Governor Whitmer and Director Gordon deny these contentions.

125. Plaintiffs seek a judicial declaration that the Lockdown Orders are void for vagueness, and an injunction against enforcement or adoption of these and similar orders and rules in the future as described in the Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask the Court to grant them the following relief:

1. A declaratory judgment that the Lockdown Orders violate Plaintiffs’ constitutional rights as set forth in this Complaint and/or are void for vagueness;

2. Enjoin Governor Whitmer and Director Gordon from enforcing the Lockdown Orders and from issuing any future orders or rules similar to the invalid ones described in this action;

3. Award Plaintiffs their reasonable attorneys' fees, costs, and expenses under 42 U.S.C. § 1988 and any other applicable law; and

4. Any other such further relief to which Plaintiffs may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

JURY DEMAND

Under the Seventh Amendment to the U.S Constitution and Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs demand trial by jury on all issues so triable.

Respectfully submitted,

BUTZEL LONG, P.C.

DANIEL J. MCCARTHY P59457

Dated: May 11, 2020

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