

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

ORAL ARGUMENT REQUESTED

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

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QUESTIONS PRESENTED

- QUESTION NO. 1: Are Plaintiffs' claims concerning rescinded executive action moot?
- QUESTION NO. 2: Are Plaintiffs' claims concerning present and threatened executive action ripe?
- QUESTION NO. 3: Do Plaintiffs have standing to pursue the claims alleged in the First Amended Complaint?
- QUESTION NO. 4: If Plaintiffs' claims are ripe, not moot, and at least one of them has standing, does the First Amended Complaint state a claim upon which relief can be granted?

TIMELINE OF RELEVANT STATE ACTION

EO-4. On March 11, 2020, citing the Michigan Emergency Powers of the Governor Act (“**EPGA**”) and the Michigan Emergency Management Act (“**EMA**”), the Governor declared a “state of emergency” based upon two presumptive diagnoses of coronavirus disease (“**COVID-19**”), a respiratory illness caused by SARS-CoV-2, which stands for severe acute respiratory syndrome coronavirus two (the “**coronavirus**”).

EO-21. On March 23, 2020, the Governor prohibited all in-person work that she deemed “not necessary to sustain or protect life.”

EO-33. On April 1, 2020, the Governor expanded the emergency declaration to include a state of disaster under the EMA.

2020 SCR 24. On April 7, 2020, the Legislature voted to extend the emergency and disaster declarations under the EMA through April 30, 2020.

EO-42. On April 9, 2020, the Governor extended EO-21 through April 30, 2020, while imposing greater restrictions on the general public than before.

EO-59. On April 24, 2020, the Governor extended EO-42 through May 15, 2020, two weeks beyond the April 30th deadline approved by the Legislature. EO-59 loosened restrictions as part of a phased reopening of the economy.

2020 SB 858. On April 28, 2020, the Legislature passed a bill terminating the declared emergency and disaster while extending 28 executive orders through dates ending in May, June, July, and December 2020.

EO-66. On April 30, 2020, the Governor declared an end to the states of emergency and disaster under the EMA.

EO-67. On April 30, 2020, the Governor unilaterally extended the declared state of emergency under the EPGA.

EO-68. On April 30, 2020, the Governor declared a “new” emergency and a “new” disaster under the EMA, citing the same grounds as before.

EO-70. On April 30, 2020, the Governor replaced EO-59 with EO-70. She maintained the expiration date of May 15, 2020, while further loosening restrictions as part of a phased reopening of the economy.

2020 SJ 39. On May 4, 2020, the Governor vetoed Senate Bill 858 of 2020.

EO-77. On May 7, 2020, the Governor extended EO-70 through May 28, 2020, while further loosening restrictions as part of a phased reopening of the economy.

MI Safe Start Plan. Also on May 7, 2020, the Governor announced MI Safe Start: A Plan to Re-Engage Michigan's Economy.

EO-92. On May 18, 2020, the Governor replaced EO-77 with EO-92. She maintained the expiration date of May 28, 2020, while further loosening restrictions as part of a phased reopening of the economy.

EO-96. On May 20, 2020, the Governor replaced EO-92 with EO-96. She maintained the expiration date of May 28, 2020, while further loosening restrictions as part of a phased reopening of the economy.

EO-99. On May 22, 2020, the Governor unilaterally extended the declared states of emergency and disaster through June 19, 2020.

EO-100. On May 22, 2020, the Governor extended EO-96 through June 12, 2020.

EO-110. On June 1, 2020, the Governor extended EO-96 indefinitely—it has no expiration date—while further loosening restrictions as part of a phased re-opening of the economy. EO-110 did not contain a stay-home order, but it continued to keep certain parts of the economy closed.

EO-115. On June 5, 2020, the Governor partially modified EO-110. This latest EO likewise lacks an expiration date or a stay-home order, and it further loosens restrictions as part of a phased re-opening of the economy. Parts of the economy remain fully closed in 51 of Michigan's 83 counties, including the counties where Plaintiffs' businesses are located. Both EO-110 and EO-115 remain in effect.

EO-143. On July 1, 2020, the Governor closed indoor bar service across the Lower Peninsula, except for those counties in Region 6 (the Traverse City region) that are already in Stage 5 of the Governor's six-stage plan. None of Plaintiffs businesses are directly affected by this order, but it demonstrates the Governor's willingness to retighten restrictions.

Under Local Rule 7.2(c), Plaintiffs respectfully submit this Memorandum in opposition to the Government's Motion to Dismiss.

INTRODUCTION

The right to work ... is the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property ... To work means to eat. It also means to live.

– Justice William O. Douglas^{*}

Where there is no work, there is no dignity.

– Pope Francis[†]

The Fourteenth Amendment prohibits every state from depriving any person of life, liberty, or property without due process of law. Of course, you cannot be deprived of something unless you already have it. So then, logically, every person already “possesses life, liberty, and property to begin with, and ... he may be deprived of it subsequently, only when due process standards are met. In other words, ***freedom is the rule***, and ***government action is the exception***.” Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207 (2003) (“SANDEFUR”) (emphasis added).

This rule has been turned on its head. Commerce has been deemed “nonessential” unless Governor Whitmer and Director Gordon (jointly, the “**Government**”) say it is. For months, no one could leave their homes or put in an honest day's work without the Government's permission. Over 1.7 million hardworking Michiganders were forced onto the dole. Scores of business owners have been robbed of the fruits of their labor, their storefronts never to reopen. All of this over a virus with a projected survival rate better than 99%. A virus that has infected 0.6% of the state and claimed the lives of only 0.06%

^{*} *Barsky v. Board of Regents of Univ. of State of N.Y.*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

[†] Pope Francis, @Pontifex Tweet (Jun. 11, 2014, 1:11 a.m.), <https://twitter.com/Pontifex/status/608909299704709120>.

of the population. A disease that disproportionately manifests in seniors and has swept through nursing homes—accounting for 35% of all deaths in Michigan—because of “rational” Government policies guided by “experts.”

But, perhaps most audaciously, we are now told that these radical and unprecedented infringements on our freedoms, and the economic devastation they have wrought, are so perfectly consistent with our Constitution and so indisputably reasonable that *summary dismissal* is warranted. Judicial review cannot be had. At least not today, says the Government. Plaintiffs are somehow both too early and too late in raising their claims. The Court should reject this “catch me if you can” attitude toward this lawsuit. The evading-review doctrine prevents such gamesmanship.

In Argument I, Plaintiffs explain why the Court has jurisdiction to declare the Governor’s executive orders and the Director’s emergency orders and emergency rules (collectively, the “**Lockdown Orders**”) invalid, and to enjoin the Government from infringing on their constitutional rights through similar orders in the future. In Argument II, Plaintiffs explain why they have adequately pleaded claims upon which relief can be granted.¹ Finally, in Argument III, Plaintiffs respond to the putative amici’s brief.

The Court should hold that it has jurisdiction to reach Plaintiffs’ claims, and that the First Amended Complaint (“**Complaint**”) states claims upon which relief can be granted.

STATEMENT OF FACTS

Despite acknowledging that the Court’s review of the Government’s Motion is limited to the factual allegations in the Complaint, ECF 18, PageID.214, the Government offers several pages of “facts” without a single citation to the Complaint. The Court should reject the Government’s statement of facts as procedurally improper, and limit

¹ Plaintiffs concede that Counts II and III, which state claims for violations of the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment, should be dismissed, but not for the reasons advanced by the Government. See Argument II.D and II.E.

itself to (and accept as true) the factual allegations in the pleadings, as required under the applicable standard of review.

* * *

Although the coronavirus is highly contagious, it does not invariably result in COVID-19. ECF 8, ¶ 42, PageID.96. For those who do develop the disease, the mortality rate is low. *Ibid.* 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's population. *Ibid.* Even for the known fractional percent of those who have developed COVID-19, the State reports a 90.5% survival rate. *Ibid.* As a result, only 0.04% of the State's population has succumbed to the virus.² *Ibid.*

In all likelihood, the survival rate in Michigan is far higher. Recent antibody testing conducted in the State of New York 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. *Id.*, at ¶ 43, PageID.96. In New York, this new information has dropped the mortality rate to 0.5%—*i.e.*, a survival rate of 99.5%. *Ibid.* In Los Angeles, it dropped the mortality rate to 0.1–0.3%—*i.e.*, a survival rate of 99.7–99.9%. *Ibid.* 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.

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. *Id.*, at ¶ 44, PageID.96.

² Plaintiffs acknowledge that the data has changed in the two months since filing their Complaint. Because this is a motion to dismiss and the Court must accept the pleadings as true, Plaintiffs rely on the facts as pleaded. The current data is not, however, materially different. As of July 3, 2020, roughly 0.65% of the population reportedly has caught the virus, 0.06% have succumbed to it, and the official survival rate has increased to 90.9%. <https://bit.ly/MichCoronavirusDashboard>.

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. ECF 8, ¶ 45, PageID.97. WHO guidelines allow both to be used to code COVID-19 as a cause of death. *Ibid.* Stated differently, even when the coronavirus **is not identified** in the person, it can still be listed as a COVID-19 death. *Ibid.*

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. *Id.*, at ¶ 46, PageID.97.

The CDC relies on three death codes: the U07.1 code and two codes for pneumonia, J12.0 and J18.9. *Id.*, at ¶ 47, PageID.97. 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. *Ibid.* This still artificially increases the number of COVID-19 deaths, although to a lesser extent. *Ibid.*

Michigan counts all deaths coded on a death certificate under U07.1 as COVID-19 deaths. *Id.*, at ¶ 48, PageID.97. But it also looks beyond death certificates and counts as COVID-19 deaths those people who were coded RA01.0 while living. *Ibid.* In other words, a person can be counted as a COVID-19 death **even when an attending physician or medical examiner concluded that the person died of something other than COVID-19**. *Ibid.*

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. *Id.*, at ¶ 49, PageID.97.

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. *Id.*, at ¶ 50, PageID.97. The State would still list the patient as having died from COVID-19, not

from heart disease. *Id.*, PageID.98.

This results in grossly distorted mortality rates and misleads the public about the threat that COVID-19 poses. ECF 8, ¶ 51, PageID.98. Simply put, the State appears to be intentionally inflating COVID-19 death statistics to justify an emergency. *Id.*, at ¶ 52, PageID.98

Yet, even when considering the inflated number of deaths caused by COVID-19, the number of deaths is not “unprecedented,” as routinely claimed. *Id.*, at ¶ 53, PageID.98. What is unprecedented is the Government’s response to it: it shuttered civil society and confined 10 million people to their homes. *Id.*, at ¶¶ 1, 6, 26–41, PageID.86–88, 93–96.

In 1918, in response to the Spanish Flu, Governor Albert Sleeper issued an order closing places of public amusement. *Id.*, at ¶ 54, PageID.98. Individual cities decided whether to close schools. *Ibid.* Work continued. *Ibid.* Governor Sleeper wisely balanced public health while preserving commerce. *Ibid.* The current executive orders fail to do so, overreaching to such extent that the State’s economy is spiraling toward a depression. *Ibid.*

In the 1940s and the early 1950s, annual summer polio epidemics killed thousands of children before a vaccine was found. *Id.*, at ¶ 55, PageID.98. Even under such dire circumstances, several Michigan governors of both parties, refrained from violating constitutional norms with excessive executive orders during those years. *Ibid.*

In the late 1960s, the Hong Kong Flu swept across the globe killing more than 1 million people. *Id.*, at ¶ 56, PageID.98. The CDC estimated that 100,000 people died in the U.S. *Ibid.* Michigan, like other states, was affected. *Ibid.* Governor George Romney did not place residents under house arrest or shutdown the economy then, either. *Ibid.*

Governor Whitmer repeatedly states that decisions must be made on data. *Id.*, at ¶ 57, PageID.98. Yet, despite data showing that the curve was flattened, the Governor ***tightened restrictions*** through an executive order that the *Wall Street Journal* described as the “most excessive” in the country. *Id.*, at ¶ 57, PageID.98–99.

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. ECF 8, ¶ 58, PageID.99. 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. *Ibid.* The Governor timed EO 2020-42 to prohibit families from gathering to celebrate Easter Sunday and Passover. *Ibid.*

Although a previous order allowed “critical infrastructure” workers—those described as critical by the U.S. Cybersecurity and Infrastructure Agency (“**CISA**”)—to perform in-person work in compliance with CDC guidance on “social distancing,” the Governor expressly, arbitrarily, and capriciously refused to adopt CISA’s updated definitions of “critical infrastructure workers,” in EOs 2020-42, 2020-59, 2020-70, and 2020-77. *Id.*, at ¶ 59, PageID.99. Other governors who issued similar executive orders adopted the updated federal definitions. *Ibid.* Governor Whitmer never explained why these new definitions were not, and could not have been, adopted in Michigan. *Ibid.* This is further evidence that the Governor unreasonably kept more Michiganders locked up in their homes than necessary. *Ibid.*

Taking the Governor at her word that she wanted to make decisions based on data, but lacking confidence in the Governor’s modeling because the underlying data and methodology was 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. *Id.*, at ¶ 60, PageID.99. They provided AEG’s report to the Governor on April 13, 2020. *Ibid.* The Governor has never responded. *Ibid.*

Consistent with the assessments in the AEG report, nearly 1.2 million residents reportedly filed for unemployment, the largest number of unemployment claims in the state’s history.³ *Id.*, at ¶ 62, PageID.100. Michigan is among the top five worst states for

³ The actual number who filed for unemployment is higher, but Plaintiffs are using the as-pleaded facts to comply with the Rule 12(b)(6) standard. See Note 2, *supra*.

unemployment. *Ibid.* See also ECF 8-1, PageID.126. According to 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. ECF 8, ¶ 62, PageID.100. For context, the national *peak* in the unemployment rate during the Great Depression of 1929 was 26%. *Ibid.*

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. *Id.*, at ¶ 63, PageID.100. If businesses can't operate, then they can't generate revenue. *Ibid.* And, if they can't generate revenue, then they have no way of paying into the unemployment fund. *Ibid.*

According to the U.S. Department of the Treasury, as of March 31, 2020, Michigan's unemployment trust fund balance was \$4.55 billion. *Id.*, at ¶ 64, PageID.100. State officials predicted that the fund will be drained in July. *Ibid.* One recent prediction is that the Michigan Unemployment Trust Fund will be drained within two months and incur a \$15 billion deficit. *Ibid.* Taxes on businesses may double to pay back the loans that the State would require to keep paying unemployment. *Ibid.* This will leave less money for businesses to rehire workers and prolong the economic crisis. *Ibid.*

Unemployment is not the only factor in play. ECF 8, ¶ 65, PageID.100. For those fortunate enough to remain employed, many were subject to furloughs, pay cuts, and mandatory sick leave. *Id.*, at ¶ 65, PageID.100–101.

Plaintiffs wanted 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. ECF 8, ¶ 66, PageID.101. The Government forbade them from doing so under pain of criminal punishment and civil fines, *ibid.*, even though they could safely operate by adhering to existing social distancing rules or reasonably equivalent and equally safe measures tailored to the unique nature of their in-person operations, *id.*, at ¶¶ 96–97, 106, 113, PageID.108–109, 112–113.

STANDARD OF REVIEW

Subject-matter jurisdiction. There are two ways to challenge a court’s subject-matter jurisdiction under Rule 12(b)(1): facial attacks and factual attacks. *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 816 (CA6 2017). The Government asserts a facial attack on the Court’s jurisdiction. A facial attack challenges the sufficiency of the pleading itself. When reviewing facial attacks, the court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the nonmoving party, just like they do under Rule 12(b)(6). *Ibid.* As the parties invoking subject-matter jurisdiction in this case, Plaintiffs bear the burden of proving that subject-matter jurisdiction exists. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).

Statement of a claim. When a defendant asserts that a plaintiff has failed to state a claim upon which relief can be granted, a court must satisfy itself that the complaint plausibly pleads that the defendant acted unlawfully and injured the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–679 (2009). In doing so, the court must construe the complaint in the light most favorable to plaintiffs, taking all well-pleaded allegations as true and drawing all reasonable inferences in the plaintiff’s favor.⁴ *In re Flint Water Cases*, — F.3d—; 2020 WL 2611546, at *12 (CA6 May 22, 2020). Defendants bear the burden of proving that the complaint fails to state a claim for relief. *Taylor v. City of Saginaw*, 922 F.3d 328, 331 (CA6 2019).

ARGUMENT

The Government asks the Court to dismiss this action, arguing that the claims are simultaneously unripe and moot, that MCA lacks standing to assert claims on behalf of its members, and that the complaint generally fails to state a claim upon which relief can be

⁴ The Government says that the Court “may” make reasonable inferences, citing caselaw from the Eleventh Circuit. ECF 18, PageID.383. Controlling authority **mandates** those reasonable inferences in the Sixth Circuit. See *Ohio Police & Fire Pension Fund v. Standard & Poor’s Fin. Servs., LLC*, 700 F.3d 829, 835 (CA6 2012) (“We *must* ... draw all reasonable inferences in favor of the plaintiff.” (emphasis added)).

granted. None of these arguments has merit.

Attacks on the Court’s subject-matter jurisdiction must be decided first; a Rule 12(b)(6) challenge becomes moot if the court lacks subject-matter jurisdiction. *Moir v. Greater Cleveland Reg’l Transit Auth.*, 895 F.2d 266, 269 (CA6 1990). Ripeness, mootness, and standing are threshold jurisdictional questions under Article III. *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 157 (CA6 1992) (ripeness); *United States v. Sanchez-Gomez*, —U.S.—; 138 S.Ct. 1532, 1537 (2018) (mootness); *Department of Commerce v. New York*, —U.S.—; 139 S.Ct. 2551, 2565 (2019) (standing). Plaintiffs therefore address these three issues first, before deconstructing the Government’s challenge under Rule 12(b)(6).

I. *Jurisdiction: Plaintiffs’ claims are neither moot nor unripe, and they have Article III standing to pursue their claims.*

A. *Mootness: Plaintiffs’ claims are capable of repetition yet evading review.*

Article III courts may adjudicate only live cases or controversies where a plaintiff claims to have suffered, or to be threatened with, an actual injury that is traceable to the defendant and can be redressed by judicial decree. *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). The Government argues that it mooted Plaintiffs’ claims by rescinding or modifying the executive orders at issue in the complaint. ECF 18, PageID.384–389. Anticipating the Government would continue its pattern of modifying executive orders to moot lawsuits challenging its exercise of power, Plaintiffs pleaded that the orders are capable of repetition yet evading review. ECF 8, ¶ 10, PageID.88. The Government does not address this doctrine in its brief.

A case falls within this special category of disputes and remains a live controversy if: (1) the challenged action is too short in duration to be fully litigated before it ends; and (2) the plaintiff reasonably expects to be subject to the same action again. *Turner v. Rogers*, 564 U.S. 431, 439–40 (2011). The party asserting mootness—here, the Government—bears the “formidable burden” of persuading a court that “it is absolutely

clear” that the challenged action cannot reasonably be expected to recur. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 67, 189 (2000).⁵ The Government must also show that “interim relief and events have completely and *irrevocably* eradicated the effects of the [challenged action].” *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 530–31 (CA6 2001) (emphasis added). The Government has not met this heavy burden.

1. The challenged actions were too short in duration to be fully litigated.

The Supreme Court has ruled that challenged actions lasting 12 months are too short to permit full litigation. *Turner*, 564 U.S., at 440 (holding that a 12-month jail term was capable of repetition yet evading review, citing in support *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978), which held that an 18-month period was too short, and *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514–516 (1911), which held that a two-year period was too short). The executive orders at issue in our case were in force for mere days. The shortest were EO-92 and EO-96, tied for two days. The longest was EO-21, which lasted 21 days. It is impossible to fully litigate a case in such time. Indeed, the court rules give a defendant a minimum of 21 days just to answer the complaint or file a motion to dismiss. Fed. Rule Civ. Proc. 12(a)(1)(A)(i).

2. Plaintiffs reasonably expect to be subject to the same action again.

The executive orders assert the Governor has the power to issue lockdown orders under the Emergency Powers of the Governor Act upon the declaration of an emergency in her sole discretion. See also MCL 10.31(1). The Governor has extended the declared emergency three times. EO-4; EO-67; EO-99; EO-127. The extension orders declare that

⁵ *Friends of the Earth* involved the application of a different doctrine: the doctrine of voluntary cessation. Plaintiffs do not rely on that doctrine, but the decision is instructive on which party carries the burden in as much as both the evading-review doctrine and the voluntary-cessation doctrine share this element.

a state of emergency will continue until “the threats posed by COVID-19 to life and the public health, safety, and welfare of th[e] state have been *neutralized*.” EO-67, at 3, ¶ 2; EO-99, at 4, ¶ 1; EO-127, at 3-4, ¶ 5. When used in connection with biology and medicine, the word “neutralized” means “to render a virus non-infective.”⁶ In other words, the Governor has thrice stated her intent to continue the state of emergency until a vaccine is available.⁷

Since declaring an emergency, the Governor has exercised broad executive powers over the Legislature’s objection. ECF 8, ¶ 7, PageID.88; 2020 SB 0858; *House of Reps. & Senate v. Governor*, No. 20-79-MZ (Mich. Ct. Cl.). Given how power has been autocratically exercised during the asserted emergency, Plaintiffs can reasonably expect that the Government will keep suppressing civil liberties and closing businesses. There have been 12 orders closing “noncritical” businesses and forbidding in-person work. EO-9; EO-20; EO-21; EO-42; EO-43; EO-59; EO-69; EO-70; EO-77; EO-92; EO-96; EO-100; EO-110; EO-115. In those orders, the Governor reserves the right to “maintain, strengthen, or relax the restrictions” that she has imposed at any time. EO-21(13); EO-42(16); EO-59(19); EO-70(19); EO-77(19); EO-92(19); EO-96(21); EO-100(3); EO-110(18); EO-115(14).

The Governor has also adopted a plan for reopening the economy in six phases. See MI Safe Start Plan (May 7, 2020), <https://perma.cc/ED25-4YM2>. Under Phases 1 and 2, residents are ordered to stay at home, and only those portions of the economy that the Governor unilaterally deems to be “critical infrastructure” can continue to operate. *Id.*, at 2. Under Phase 3, residents are still required to stay at home, but select “noncritical”

⁶ “Neutralize, v.,” Sense 6a, Biology & Medicine. Oxford English Dictionary (3d ed., Jun. 2020), www.oed.com/view/Entry/126463.

⁷ See also Livengood, *Pfizer’s Michigan team works to produce COVID-19 vaccine by fall*, A18, Crain’s Det. Bus. (May 11, 2020) (“‘We can’t resume normal life until we have a vaccine,’ Michigan Gov. Gretchen Whitmer said last week.”) Plaintiffs do not offer this quotation to go beyond the four-corners of the Complaint. Instead, it is offered only to show that Plaintiffs are not twisting words to manufacture an unreasonable inference.

industries may resume operations under strict, unilaterally imposed regulations. *Ibid.* For the eight weeks between March 23rd and May 18th, every Michigander was in Phase 1–3. Although the Governor relaxed restrictions in the Upper Peninsula and part of the northern Lower Peninsula after eight weeks, over 90% of Michiganders remained in Phases 1–3 for a full 10 weeks. This despite the virus peaking during Week 3, with hospitalizations steadily decreasing thereafter.⁸ ECF 8, ¶¶ 2–3, PageID.86–87; ECF 8-1 at 14, PageID.153. Indeed, the Governor **strengthened** the lockdown orders after the peak to keep people apart over Easter and Passover. ECF 8, ¶¶ 31, 57–58, PageID.94, 98–99. When the Governor disregards “facts and data” in this manner, Plaintiffs can reasonably expect that she will do so again until a vaccine is produced and we reach Phase 6 of her plan.⁹

In addition, the Governor’s plan states “[i]t is also possible to move backwards if risk increases and if we stop adhering to safe practices.” The Court can take judicial notice that there have been mass protests in Grand Rapids, Lansing, and Kalamazoo, where people marched without regard to social distancing rules. Fed. Rule Evid. 201(b)(1), (d). The Governor herself recently marched shoulder to shoulder with

⁸ Before May 18th, the entire state was subject to the lockdown orders. On May 18th, the Governor divided the state into eight regions and started loosening restrictions in the Upper Peninsula and in the northern part of the Lower Peninsula. EO-92(2), (8)(a)(19). These two regions represent just 7.5% of the state’s population—92.5% of the state remained under more restrictive terms. See U.S. Bureau of the Census and Mich. Dept. of Mgmt. & Budget, Office of State Demographer, Michigan Population by County 1990–2019 (May 27, 2020), <https://perma.cc/FWL8-5WLW>.

⁹ We will not reach Phase 6 until there is “sufficient community immunity” or a vaccine. See MI Safe Start Plan at 2 (May 7, 2020), <https://perma.cc/ED25-4YM2>. By forcing people to remain in their homes and forcing businesses to shutter for nearly three months, the Governor has prevented society from naturally reaching herd immunity. There is as yet no vaccine for SARS-CoV-2, and the record for the fastest vaccine—against the mumps—is four years. Because it is unlikely that a vaccine for SARS-CoV-2 will be available in the near future, it is reasonable to infer that the Governor will keep issuing executive orders for the foreseeable future.

protestors in Highland Park. Whitmer, Official Facebook Post (Jun. 4, 2020), <https://perma.cc/QY3E-N37S>; Fed. Rule Evid. 201(b)(2), (d). Based on such representations, Plaintiffs can reasonably anticipate spikes in infections because of the protests and riots.¹⁰ Based on the MI Safe Start plan, they can also reasonably expect that the Governor will return us to some level of lockdown.

In its brief, the Government says that “[t]he notion that [it] will again put into place the same restrictions is speculative, and the notion that identical conditions will exist in this dynamic situation in the future is conjecture premised on an impossibility.” ECF 18, PageID.388. One hopes the Government isn’t trying to gaslight the Court. Days earlier, the Governor told Congress that stricter stay-home measures would be considered if a second wave occurred:

As my state moves to reopen its industries and economy, we are cautious to remain ever vigilant against this virus ... [A] second wave is a real possibility come the fall and winter ... Beyond the health implications, the economic pain associated with a second wave of Covid-19 would be tremendous ***should stricter stay home measures need to be considered again to contain the virus.***

Whitmer, Written Testimony, p. 10, Hearing on “On the Front Line: How Governors are Battling the COVID-19 Pandemic,” Subcommittee on Oversight and Investigations, Comm. on Energy and Commerce, U.S. House of Representatives, 114th Cong., 2d Sess. (Jun. 2, 2020) (emphasis added), <https://perma.cc/3HUV-7P4U>.¹¹ The Governor’s congressional testimony is consistent with her oft-repeated warning that we “don’t want

¹⁰ Indeed, the press has been reporting increases in cases nationwide for the last few weeks, especially among young adults in their 20s and 30s. Although many of these reports attribute the increases to reopening businesses around Memorial Day, common sense says that weeks of mass protests by young people across the country are the primary cause of the uptick in cases among young people.

¹¹ The Court can take judicial notice of the Governor’s testimony because it can be accurately and readily determined from the official records of the U.S. House of Representatives, a source whose accuracy cannot reasonably be questioned. Fed. Rule Evid. 201(b)(2).

to be in the same posture” in the fall if a second wave of the virus appears. For example, at a June 1st press conference addressing the virus, flooding, protests, and riots, the Governor said: “No one wants to move backwards, but, if we see a spiking coming, we may have to.” Whitmer, Press Conf., Mich. State Police Facebook Live Video, 16:38 (Jun. 1, 2020), <https://bit.ly/WhitmerPressConference06012020>.

The Governor has also repeatedly characterized her power as a “dial,” which she can use to turn civil liberties up and down at will. As noted earlier, the Governor must show that “interim relief and events have completely and **irrevocably** eradicated the effects of the [challenged action].” *Cleveland Branch*, 263 F.3d, at 530–31 (emphasis added). If she can turn her dial at will until the emergency is “neutralized,” then the relaxed posture now prevailing can be turned back up at any time. See, e.g., EO-143 (closing bars). By definition, the Governor has given **revocable** interim relief, and the standard requires the relief to be **irrevocable**.

Moreover, Plaintiffs are not required to show that the Governor **would** take identical action. Under *Turner*, 564 U.S., at 439–40, Plaintiffs need only **reasonably expect** the same type of action to occur again. See also, e.g., *Northeastern Fla. Chap. of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (“*City of Mesquite* [v. *Aladdin’s Castle, Inc.*, 455 U.S. 283 (1982),] does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot ... [It is sufficient that] it disadvantages them in the same fundamental way.” (emphasis in original)). Here, any future lockdown order that directly closes businesses or indirectly closes them by preventing in-person work would disadvantage Plaintiffs in the same fundamental way.

Finally, Plaintiffs take issue with the Government’s suggestion that the Governor has not lifted or modified her executive orders to avoid judicial review. ECF 18, PageID.387. They contend she has done exactly that. After being sued in *Belanger* for criminalizing pro-life protests, the Governor “clarified” the then-prevailing executive

order with an FAQ that authorized “expressive activities” protected by the First Amendment. *Belanger v. Whitmer*, No. 1:20-cv-00291 (WD Mich.) (Neff, J.), PageID.119. After being sued in *Beemer* and *Michigan Nursery* for infringing on religious liberty, the right to bear arms, the right to intrastate travel, the right to work, and the use of motorized watercraft, the Governor modified her executive order to moot the need for injunctive relief.¹² She now argues that the *Beemer* claims are moot.¹³ After being sued in *Mitchell* for infringing on free speech, the right to medical care, and other liberty and property interests, the Governor modified her orders and now argues that those claims are moot.¹⁴ After being sued in *Midwest Institute of Health* for infringing on the right to medical care, the Governor yet again modified her orders to permit medical care and now argues that those claims are moot.¹⁵ And, after Plaintiffs filed an amicus brief in the Michigan Court of Claims showing that it was unreasonable to keep rural counties locked down after months of low infection rates, low or no deaths, and in some counties no cases, the Governor began implementing a regional approach to lockdowns.¹⁶ Ian Fleming’s version of the Moscow rules rings true: “Once is happenstance. Twice is coincidence. The

¹² Compare *Beemer v. Whitmer*, No. 1:20-cv-00323 (WD Mich.) (Maloney, J.), PageID.1 (Compl., **Apr. 15**, 2020) with EO-59 (**Apr. 24**, 2020) and *Beemer*, PageID.390–391 (Stip. Order re: Inj. Mot., **Apr. 27**, 2020).

Compare also *Michigan Nursery & Landscape Assn v. Whitmer*, No. 1:20-cv-00331 (WD Mich. Maloney, J.), PageID.1 (Compl., **Apr. 17**, 2020) with EO-59 (**Apr. 24**, 2020) and *Michigan Nursey*, Page.116 (Notice of Withdrawal of Motion as Moot, **Apr. 24**, 2020).

¹³ The parties agreed that the *Michigan Nursery* plaintiffs would dismiss their claims without prejudice before the Government’s deadline to respond to the complaint.

¹⁴ Compare *Mitchell v. Whitmer*, No. 1:20-cv-00384 (WD Mich.) (Maloney, J.), PageID.75 (First Am. Compl., **May 11**, 2020), with EO-96(19) (**May 21**, 2020) and *Mitchell*, PageID.161–162 (Gov.’s Mot. to Dismiss, **Jun. 5**, 2020).

¹⁵ Compare *Midwest Institute of Health, PLLC v. Whitmer*, No. 1:20-cv-00414 (WD Mich.) (Maloney, J.), PageID.1 (Compl., **May 12**, 2020) with EO-96(19) (**May 21**, 2020) and *Midwest Institute*, PageID.1795–1800 (Pls.’ Reply re: Mootness, **May 26**, 2020).

¹⁶ Compare Exhibit 1, Pls.’ Amicus Br., *House of Reps. & Senate v. Governor*, 20-79-MZ (Mich. Ct. Cl. **May 14**, 2020), with EO-92(2), (8)(a)(19) (**May 18**, 2020).

third time, it's enemy action." Fleming, *Goldfinger*, Chap. 14 (Cape ed. 1959). The count now stands at six.

Litigation is not dodgeball. For as long as the Governor claims the power to shutter the economy and confine residents to their homes in the name of public health, Plaintiffs will have a concrete stake in the outcome of this litigation. Their claims are not moot.

B. *Pre-Enforcement Standing*: Plaintiffs have pre-enforcement standing to challenge the Governor's executive actions because they would have conducted business but for the lockdown orders and a credible threat of prosecution if they violated the orders.

To establish Article III standing, a plaintiff bears the burden of showing: (1) an injury in fact; (2) a sufficient causal connection between the injury and the challenged conduct; and (3) the likelihood that a favorable decision will redress the injury. *Driehaus*, 573 U.S., at 157–158. Although a plaintiff must demonstrate standing separately for each form of relief sought, *Friends of the Earth*, 528 U.S., at 185, the Governor contends only that Plaintiffs have suffered no injury in fact. ECF 18, PageID.389–390

Before turning to the required analysis, Plaintiffs note that the Government's position is at odds with the argument it advanced in the Michigan Court of Claims. There, it argued that the Legislature lacks standing to challenge her position. Exhibit 2, Opp'n, Immediate Decl. J. 11–19, *House of Reps.*, No. 20-79-MZ (Mich. Ct. Cl. May 12, 2020). When pressed on this point at oral argument, the Assistant Solicitor General argued that the only people with standing to contest the executive orders are those affected by them:

The Court: You said they [the Legislature] didn't have the authority to do that [standing to sue]. So okay, the only person, the only entity then, that can come in and say to the Governor, we know you've got good faith, but we think you're wrong, this is not, in fact, an emergen[cy] condition or it is not a crisis situation *would have to be a private citizen, wouldn't it?*

Mr. Allen: I think that—that—that would be the case, Your Honor.

Exhibit 3, Motion Hrg. Tr. 34:16–24, *House of Reps.*, No. 20-79-MZ (May 15, 2020). Now the Government is arguing in every pending case that those affected by the Lockdown Orders do not have standing.¹⁷ Apparently, no one has standing to challenge the Government.

1. *Injury in Fact:* With all reasonable inferences drawn in Plaintiffs’ favor, the pleadings allege that Plaintiffs would have engaged in normal business operations but for the credible threat of prosecution under the Lockdown Orders.

In the pre-enforcement context, a plaintiff satisfies the injury-in-fact requirement where he has “[1] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and [2] there exists a credible threat of prosecution thereunder.” *McKay v. Federspiel*, 823 F.3d 862, 867 (CA6 2016). A threat of future enforcement may be “credible” when the same conduct has drawn enforcement actions or threats of enforcement in the past. *Schickel v. Dilger*, 925 F.3d 858, 865 (CA6 2019).

On the intent-to-engage element, the Government argues that Plaintiffs have not satisfied this element because they have not expressly alleged that they intended to engage in business during the lockdown. ECF 18, PageID.390. Of course, Plaintiffs are entitled all reasonable inferences at this stage of the proceedings. *Wayside Church*, 847 F.3d, at 816. Plaintiffs pleaded that, “[u]nder 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.” ECF 8, ¶ 6, PageID.87. And, in their prayers for relief, Plaintiffs repeatedly request a permanent injunction against such action in the

¹⁷ Governor’s Mot. Dismiss, *Beemer v. Whitmer*, No. 1:20-cv-00323 (WD Mich.) (Maloney, J.), PageID.666–670; Governor’s Mot. Dismiss, *Mitchell v. Whitmer*, No. 1:20-cv-00384 (WD Mich.) (Maloney, J.), PageID.166–168 (discussed under the rubric of ripeness); Governor’s Mot. Dismiss, *Midwest Institute of Health, PLLC v. Whitmer*, No. 1:20-cv-00414 (WD Mich.) (Maloney, J.), PageID.1800–1801.

future. *Id.*, at ¶¶ 9, 75, 80, 86, 100, 110, 117, 125 and Prayer for Relief ¶¶ 1–2, PageID.88, 103, 105–106, 111–115. It can be reasonably inferred from the word “forced” that Plaintiffs would have continued to operate their businesses but for the Lockdown Orders. It can also be reasonably inferred from the requested injunction that they wish to resume their operations and never have the Government shut them down again. From these inferences, Plaintiffs satisfy the burden of pleading their intent to engage in business during the lockdowns but for the challenged orders. Of course, should the Court disagree, this is a point easily remedied by amending the pleadings. An outright dismissal on this basis is unnecessary and unwarranted.

On the threat-of-prosecution element, the Government argues that Plaintiffs “face no credible threat of prosecution for violating the restrictions because the restrictions they challenge no longer exist.” ECF 18, PageID.390. Implicitly, then, it concedes that Plaintiffs faced a credible threat of prosecution when the restrictions were in place. Indeed, one need only look to the pending criminal prosecution against Karl Manke, the Owosso barber who faces two misdemeanor charges for operating his barbershop during the lockdown, Exhibit 4, Register of Actions, *Michigan v. Manke*, No. 20-ST0337-SM (Shiawassee Dist. Ct.) (May 4, 2020), and the threatened prosecution of Paul Glantz and Emagine Theatres for announcing a protest film festival, *Emagine Theatres v. Whitmer*, No. 1:20-cv-00570, ECF 1-1, PageID.21.¹⁸

Although standing requirements persist throughout the life of a lawsuit, *Wittman v. Personhuballah*, —U.S.—; 136 S.Ct. 1732, 1736 (2016), the Government conflates standing with mootness, a distinct jurisdictional doctrine. The threat of prosecution is not the injury; the injury was the forced shutdown or curtailment of normal business

¹⁸ A court can take judicial notice of entries on its own docket and entries on another court’s docket, as long as it does not treat disputable facts contained within docketed filings as true. *Privett v. Pellegrin*, 798 F.2d 470 (Table), 1986 WL 17206, at *1 (CA6 Jun. 27, 1986) (own records); *In re Omnicare, Inc. Secs. Litig.*, 769 F.3d 455, 468 (CA6 2014) (other courts); Fed. Rule Evid. 201(b)(2).

operations. The threat need merely exist at the time of the injury to make it a concrete injury. Once those two things occurred in tandem, Plaintiffs sustained a permanent injury.

Plaintiffs satisfy both elements of the pre-enforcement standing test, and they therefore satisfy the injury-in-fact requirement.

2. Causation: Plaintiffs have pleaded a causal connection between the Lockdown Orders and their injuries.

The Government does not dispute that the pleadings satisfy the causality requirement. ECF 18, PageID.389–390 (challenging only the injury-in-fact requirement). Nor can it. Plaintiffs allege that the Lockdown Orders forced them to shut down or radically limited normal business operations: “Plaintiffs are affected by the Governor’s orders. Under threat of criminal penalties, they have been forced to close or significantly restrict their businesses ... At the same time, without offering any justification, the Governor has allowed, and is still allowing, other businesses deemed ‘critical’ to stay open.” ECF 8, ¶ 6, PageID.87–88

To satisfy the *Iqbal* plausibility standard, Plaintiffs individually pleaded how the Governor’s orders affected their businesses on a claim-by-claim basis, satisfying the causality factor. Sotheby’s real estate agents were unable to work, and the company had to lay off six employees. *Id.*, at ¶¶ 11, 73(a), 78(a), 84(a), 92(a), 98(a), 105–108, 112–115, PageID.89, 102, 104–105, 107, 109, 108–114. EPM was unable to perform landscaping or maintenance work. *Id.*, at ¶ 12, 92(b), 98(b), 105–108, 112–115, R.8, PageID.89, 108–114. Intraco and Casite’s businesses rely on live, face-to-face relationships with current and prospective customers; the executive orders prevented them from engaging in those activities, resulting in 20–30% lost revenue. *Id.*, at ¶¶ 13–14, 73(b)–(c), 78(b)–(c), 84(b)–(c), 92(c)–(d), 98(c)–(d), 105–108, 112–115, PageID.89–90, 102–106, 108–114. Hillsdale Jewelers was forced to close, resulting in a 99% drop in revenue and leaving all of its employees—including its owner—unemployed. *Id.*, at ¶¶ 15, 73(d), 78(d), 84(d), 92(e),

98(e), 105–108, 112–115, PageID.90, 103–104, 106, 108–114. Shortt Dental had to close two office locations, leaving most employees unemployed and causing a 75% decrease in revenue. *Id.*, at ¶¶ 16, 92(f), 105–108, 112–115, R.8, PageID.90–91, 108–114. MCA lost members, and its members lost revenue. *Id.*, at ¶¶ 17, 73(e), 78(e), 84(f), 92(g), 98(g), 105–108, 112–115, PageID.91, 103–106, 108–114.

3. Redressability: Declaratory and injunctive relief can redress Plaintiffs’ injuries.

In Count I, Plaintiffs who engage in interstate commerce seek a declaration that the Lockdown Orders unconstitutionally interfered with interstate commerce, and an injunction that prevents the Government from denying them access to our national market. If the Court grants this relief, it will ensure that the Government cannot again indiscriminately shutter entire sectors of the economy statewide.

In Counts II–VII, Plaintiffs seek a declaration that the Lockdown Orders unconstitutionally infringed on their liberty and property interests, and a permanent injunction against such infringements in the future. If the Court grants this relief, it would vindicate their civil rights, which is “the very purpose of § 1983.” *Hall v. Hall*, 738 F.2d 718, 721 (CA6 1982).

Plaintiffs seek relief that would redress their injuries and would prevent future injuries, satisfying the redressability requirement. All three standing factors are adequately pleaded.

C. Ripeness: Plaintiffs’ claims are constitutionally and prudentially ripe.

The ripeness doctrine avoids “premature adjudication of legal questions” and prevents courts from “entangling themselves in abstract debates that may turn out differently in different settings.” *Warshak v. United States*, 532 F.3d 521, 525 (CA6 2008). This doctrine has both constitutional and prudential roots.

A case is constitutionally ripe if a plaintiff satisfies the injury-in-fact and redressability requirements for standing. *Duke Power Co. v. Carolina Env. Study Gp., Inc.*,

438 U.S. 59, 81–82 (1978).

A case is prudentially ripe if the court would be in “no better position” later than it is now to decide the case. *Id.*, at 82. To ascertain if that is so, courts look to the hardship it would cause the parties if the court declined to exercise jurisdiction, and the fitness of the record for review. *Kiser v. Reitz*, 765 F.3d, 601, 607 n.2 (CA6 2014). The “fitness” factor assesses whether the legal analysis would benefit from a concrete factual context and whether the government’s legal position is subject to change before enforcement. *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (CA6 2003).

Prudential ripeness is, however, in tension with the “unflagging” duty of federal courts to hear and decide cases within their jurisdiction. *Driehaus*, 573 U.S., at 167; *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–126 (2014). Since *Driehaus*, the Sixth Circuit exercises jurisdiction when constitutional requirements are met; it has dismissed cases as prudentially unripe sparingly, if ever. *United States v. De Leon*, —F. Appx.—; 2020 WL 1877688, at *3 (CA6 Apr. 15, 2020); *Saleh v. Barr*, 801 F. Appx. 384, 390 (CA6 2020); *Miller v. City of Wickliffe*, 852 F.3d 497, 503 n.2 (CA6 2017); *Kiser*, 765 F.3d, at 606–607.

Plaintiffs seek two forms of relief: (1) a declaration that the business-closure orders violated their constitutional rights; and (2) an injunction prohibiting such lockdowns in the future. ECF 8, Prayer for Relief ¶¶ 1–2, PageID.114–115. The Government argues that Plaintiffs’ claims are unripe for declaratory relief. ECF 18, PageID.390–392. Plaintiffs disagree. There is nothing abstract about the Lockdown Orders and the effect they had on Plaintiffs. The Government shut down the vast majority of businesses in the state, Plaintiffs are among those who were affected, and they seek a declaratory ruling that the Lockdown Orders were unconstitutional. Plaintiffs satisfy the injury-in-fact and redressability requirements for standing. See Arguments I.B(1) and I.B(3), *supra*. Their request for declaratory relief is therefore constitutionally ripe.

It seems, then, that the Government’s ripeness challenge targets Plaintiffs’ request for prospective injunctive relief. The Government says it is premature to enjoin future shutdowns because it might never shut down businesses again. ECF 18, PageID.390–392. This misses the point: the Government has ordered businesses closed over a dozen times, and ***it reserves the right to do so again***. Plaintiffs aim to prove that arbitrarily classifying and shutting down entire industries as nonessential, as a means of suppressing a communicable disease with a low mortality rate, violates the dormant Commerce Clause and fundamental rights. Such action cannot pass strict scrutiny review (or even review for reasonableness). Alternatively, Plaintiffs argue that procedural due process requires, at a minimum, post-deprivation procedures that would allow them to reopen their businesses if they can operate as safely as the “essential” businesses. If they succeed, injunctive relief would ensure that the Government knows in advance that it is forbidden from reinjuring Plaintiffs in exactly the same way—*i.e.*, that its “dial” doesn’t turn that far.

The Government doesn’t explain how the Court would be in a better position to decide these questions in the future. Plaintiffs conceive of no scenario where future factual development would better concretize the record for judicial review. At the same time, forcing Plaintiffs to endure another round of business closures in the future would unacceptably harm their liberty and property interests. Given the concrete facts pleaded in the Complaint, the Government’s refusal to forswear business-closure orders, and the weighty public interests at stake—interests that affect nearly 10 million people and more than 850,000 businesses—this case is prudentially ripe as well.

D. *Organizational Standing: MCA has standing to pursue its own claims and claims on behalf of its members.*

An organization has Article III standing to assert its own claims and claims on behalf of its members. *MX Gp., Inc. v. City of Covington*, 293 F.3d 326, 332–333 (CA6 2002). When an organization asserts claims on its own behalf, it must satisfy the same constitutional standing rules that apply to all other plaintiffs: an injury in fact that is

traceable to the defendant's action and is redressable. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). A voluntary association can also have standing to sue on behalf of its members when “[1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth*, 528 U.S., at 181.

MCA asserts claims for itself and on behalf of its members. The facts pleaded, together with all reasonable inferences drawn in its favor, establish direct and organizational standing.

MCA has adequately pleaded direct standing. It lost 33 members—28% of its membership—an injury-in-fact that is actual and concrete. ECF 8, PageID.91. MCA specifically alleges that it lost those members “due to the Lockdown Orders,” thereby tracing the injury to the Government's actions. *Ibid.* The Government questions how many of these members were based in Michigan, suggesting that some loss may be attributable to other states where MCA has members. ECF 18, PageID.393. But, under the applicable standard of review, the Court must assume the pleaded facts are true, and MCA has pleaded: (1) that it has lost 28% of its members due to the Lockdown Orders; and (2) that it lost more than “25% of its members *from Michigan* in 2019.” Compare ECF 8, ¶ 17, PageID.91 (pleading that, due to the Governor's executive orders, MCA's membership declined from 119 members to 86 members, which is a decline of 28%), with ¶ 98(g), PageID.110 (pleading that “MCA lost over 25% of its members from Michigan in 2019) (emphasis added). Moreover, MCA pleads that “[o]ther States, including Ohio, have enacted different and much less restrictive measures to allow exterior service carwash members to operate.” ECF 8, ¶¶ 73(e), 78(e), and 84(f), PageID.103–106. From this, it can be reasonably inferred that MCA lost most of its members from Michigan. Finally, MCA's claims are redressable. By forbidding carwash operations, the Lockdown Orders deprived members of revenue, and cash-strapped businesses cut costs to avoid

losses. Membership in a voluntary organization is an easy cost to cut. An injunction precluding indiscriminate statewide closures of businesses would avoid artificial losses that lead to lost membership.

MCA has also pleaded organizational standing on behalf of its members. Like the named business Plaintiffs, MCA's individual members would have standing to sue over the lockdown orders. The interests are germane to the organization's purpose: promoting the operation of carwashes. Finally neither the claims nor relief requested requires the participation of individual members in this litigation. "If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). "Indeed, in all cases in which [the Court] expressly recognized standing in associations to represent their members, the relief sought has been of this kind." *Ibid*. MCA seeks declaratory and injunctive relief, thereby satisfying this requirement, as well.

Accordingly, MCA has direct and organizational standing to pursue the claims and relief sought in the Complaint on behalf of itself and its members.

II. *Stating a Claim: The Complaint states a claim upon which relief can be granted.*

After attacking the Court's jurisdiction, the Government argues the merits without acknowledging that this is a motion to dismiss under Rule 12(b)(6). The Court's objective is to determine whether Plaintiffs state a claim, not whether they are likely to prevail. *Iqbal*, 556 U.S., at 678 (holding that "[t]he plausibility standard is not akin to a 'probability requirement'..."). Of course, Plaintiffs are confident in their claims; they would not have filed this lawsuit otherwise.

For the Government to prevail, it must prove that *Jacobson* bars Plaintiffs claims. This it cannot do because *Jacobson* does no such thing. *Jacobson* accepted that public-

health regulations fall within the states' historical police powers, and accepted the commonwealth's asserted public-health interest in combatting smallpox. Even so, the Court repeatedly noted that there are limits to how far a state can go in the name of public health.

Although *Jacobson*'s core holding remains sound—states retain their police power to act in the interest of public health—Plaintiffs contend that modern due process and equal protection jurisprudence has overtaken *Jacobson*'s standard of review. Today, courts must apply strict scrutiny where a public-health regulation infringes upon a fundamental right. They must apply intermediate scrutiny when a public-health regulation treats people differently based on a protected classification and in certain First Amendment contexts. Only when strict or intermediate scrutiny do not apply may courts then apply *Jacobson*'s reasonableness standard.

A. *Governing Standard: Plaintiffs' claims are subject to strict-scrutiny review to the extent they assert infringements upon fundamental rights or class distinctions that are subject to heightened review.*

The Government leans heavily on *Jacobson*, arguing that its deferential standard is the “starting point” in the Sixth Circuit for analyzing COVID-19 restrictions that touch upon constitutional rights. ECF 18, PageID.397. Not so, at least when fundamental rights are at issue.

The Government cites a number of decisions from outside the Sixth Circuit for its proposition that *Jacobson* controls, even when fundamental rights are at issue. *Id.*, at PageID.397. None of those cases is controlling. It is a maxim of law that district courts are bound to apply the published decisions of the circuit in which they sit. The Sixth Circuit has ruled that modern strict scrutiny applies when fundamental rights are at issue. *Roberts v. Neace*, 958 F.3d 409 (CA6 2020); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, —F.3d—, No. 20-1581; 2020 WL 3468281 (CA6 Jun. 24, 2020) (“*LIFFT*”) (applying rational basis by stipulation of the parties, but noting that

fundamental rights are subject to higher scrutiny).

The Government repeatedly cites Chief Justice Roberts’s recent opinion concurring the Supreme Court’s denial of a preliminary injunction to churches impacted by an executive order by the governor of California capping attendance at church services. ECF 18, PageID.373–374, 398–399, 404, 419 (citing and quoting *South Bay United Pentecostal Church v. Newsom*, 509 U.S.—; 140 S.Ct. 1613 (2020) (Roberts, C.J., concurring)). The Government glosses over some key facts that warrant mention here.

First, this was not a merits decision. The *South Bay* plaintiffs asked the Supreme Court for a preliminary injunction that had been denied by the lower courts. The Chief Justice noted that such relief is granted “sparingly and only in the more critical and exigent circumstances,” *even when* “the legal rights at issue are indisputably clear.” *South Bay*, 140 S.Ct., at 1613. In our case, Plaintiffs are not seeking a preliminary injunction. Before the Court is a routine motion to dismiss for failure to state a claim. The standard of review is far lower than the one at issue in *South Bay*.

Second, although the Chief Justice relied on *Jacobson*, he did so for the general proposition that elected officials have broad authority to respond to public-health crises, while acknowledging that their decisions are subject to judicial review. *Ibid.* He then concluded that the plaintiffs, who had the burden of persuasion, could not show it was “indisputably clear” that they were entitled to emergency, interlocutory injunctive relief in light of rapidly changing facts. *Id.*, at 1614. In our case, the Government bears the burden of demonstrating that the pleadings fail to state a claim, *Bangura v. Hansen*, 434 F.3d 487, 498 (CA6 2006), and the Government’s burden is very high under *Iqbal*, inasmuch as Plaintiffs need only plead a *plausible* claim for relief.

Third, although the Chief Justice’s views are owed respect, none of the other justices joined in his concurring opinion. Indeed, four other justices dissented; they would have applied strict scrutiny. *South Bay*, 140 S.Ct., at 1614–1615 (Kavanaugh, J., dissenting). The other four justices gave no reason for denying the application. Under

such circumstances, the Chief Justice’s opinion is one vote among nine. His views do not displace *Roberts* as binding authority in this Circuit, which holds that strict scrutiny applies.

Plaintiffs assert that the Lockdown Orders have infringed upon their fundamental rights: the right to engage in interstate commerce, “which is not a gift of the state,” *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807–808 (1976); the right to engage in interstate travel, *United States v. Guest*, 383 U.S. 745, 757–760 (1966); and the right of individuals to contract and engage in the common occupations of life, and to “enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.” *Board of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (cleaned up). See ECF 8, ¶¶ 73, 78, 82–84, 102–105, PageID.102–103, 105–106, 111. Accordingly, these claims are subject to strict scrutiny.

B. Otherwise *Jacobson* applies, but it does not bar Plaintiffs’ claims.

To the extent one or more of their asserted interests cannot be classified as a fundamental right, such claims are subject to review under *Jacobson*. The Government reads *Jacobson* as a *de facto* bar to relief, overstating the holding as affirming a “sweeping, invasive measure” as a proper exercise of police power in response to a public health crisis. ECF 18, PageID.395. The Government is wrong on several levels.

First, the Supreme Court acknowledged—no fewer than four times in *Jacobson*—that public-health regulations are subject to judicial review:

- “A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.
- “[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or

might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

- “[I]f a statute purporting to have been enacted to protect the public health ... has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.
- “[W]e deem it appropriate, in order to prevent misapprehension as to our views...that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.”

Jacobson v. Massachusetts, 197 U.S. 11, 25, 28, 31, 38 (1905). Plainly, then, *Jacobson* does not foreclose constitutional challenges to public-health regulations.

Second, *Jacobson* dealt with a state **legislature**’s express authorization for local boards of health to inoculate residents. The Court held that it was “for the legislative department to determine” the appropriate responses to contagion in community:

[T]he legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government.

Id., at 35. Here, the Michigan Legislature has passed no law expressly authorizing the Governor to confine people to their homes under pain of imprisonment to combat contagion, much less on the dubious theory that everyone **might** be a carrier of the coronavirus. Indeed, the Legislature has established a procedure in the Public Health

Code that balances resident’s interests in due process against the state’s interest in protecting public health.

The Department of Health and Human Services (“**MDHHS**”) or a local health officer must issue a written warning notice to the suspected carrier and can order the person to undergo medical tests to verify that they are a carrier. MCL 333.5203(1). Critically, “[a] warning notice shall be individual and specific ***and shall not be issued to a class of persons.***” MCL 333.5203(2) (emphasis added). The warning notice must inform the suspected carrier that he has a right to a hearing to contest his designation as a carrier. MCL 333.5203(3). The executive orders are not warning notices, are impermissibly aimed at a class of persons (all Michiganders) instead of an individual, and provide no procedural due process as required under the Public Health Code.

The Code applies even during emergencies. MCL 333.50207(1). “To protect the public health ***in an emergency,***” an MDHHS or local health officer can obtain *ex parte* a temporary detention order to facilitate observation, examination, testing, diagnosis, and treatment. *Ibid.* (emphasis added) A detention cannot last longer than 72 hours, excluding weekends and legal holidays, without a court hearing to determine whether it should continue. MCL 333.50207(3). The executive orders forcibly detained 10 million people for 70 days without a hearing.

Here, Michigan’s Public Health Code is the point of comparison to *Jacobson*, not the Governor’s executive orders. The Public Health Code is Michigan’s equivalent to the Massachusetts law authorizing compulsory vaccinations in *Jacobson*. Of course, that is not the statute that the Governor has proceeded under. Instead, she has disregarded that law and implemented her own policy—over the Legislature’s objection at that. The Governor is not on the same footing as Massachusetts was in *Jacobson*.¹⁹

¹⁹ The Government may argue here, as it did recently in *Imagine Theatres*, that the EPGA gives the Governor equivalent power. Under *Pennhurst*, the Court cannot reach the state-law question (unless the Government wants to waive Eleventh Amendment immunity). But, even if *Pennhurst* were not a bar, the Lockdown Orders exceeded the

Third, the executive orders are not remotely similar to the state action at issue in *Jacobson*. There is no comparison between: (i) a one-time inoculation of the residents of a single town to treat a historical scourge; and (ii) shuttering the economy and placing 10 million people under *de facto* house arrest. The first is reasonable, the latter is not.

Fourth, *Jacobson* involved a “dangerous” disease. *Jacobson*, 197 U.S., at 34. The city of Cambridge suffered a smallpox epidemic. Smallpox killed 30–80% of its victims on average, depending on the strain of the virus, the person’s sex, and pregnancy status.²⁰ And, of course, the judiciary could take judicial notice of how deadly smallpox was; it was a well-known disease that had ravaged the world for centuries. As the Government has repeatedly noted, the strain of coronavirus that can cause COVID-19 is novel. Proof of dangerousness is necessary in this case. It cannot be declared by executive fiat.

The Government says “Plaintiffs cannot dispute the gravity of the pandemic in Michigan,” ECF 18, PageID.399, but the fact is they do. Plaintiffs challenge the prevailing narrative, alleging that public officials have overstated the risk posed by the coronavirus and COVID-19.

Plaintiffs question the existence of an epidemic throughout Michigan, noting that only 0.46% of the State’s population was reportedly positive for the disease at the time of filing, and that only 0.04% of Michiganders had succumbed to the virus. ECF 8, ¶ 42,

Governor’s powers under those acts. See Exhibit 1, Pls.’ Amicus Br. *House of Reps. & Senate v. Governor*, 20-79-MZ (Mich. Ct. Cl. May 14, 2020). In any event, *Jacobson* did not deal with some general power to act during an emergency. It involved specific legislative approval to act in the very manner in question. This still makes the point of comparison the Public Health Code, not a general emergency law stretched to fit a situation it was never designed for.

²⁰ U.S. Centers for Disease Control & Prevention, *What is Smallpox?*, <https://perma.cc/9YPP-EFF2> (noting a 30% fatality rate); Lane, *Remaining Questions About Clinical Variola Major*, *Emerging Infectious Diseases* 17(4): 676–680 (Apr. 2011), <https://perma.cc/P7PR-HP7G> (noting “the case-fatality rate for early hemorrhagic smallpox approached 100%,” with a 70% fatality rate for unvaccinated women, and unborn children dying nearly 80% of the time).

PageID.96. Plaintiffs also question the way in which the State is counting COVID-19 deaths, alleging that the State has chosen a method to “artificially inflate the statistics” to justify the claimed emergency and drive the lockdown orders. *Id.*, at ¶ 44, PageID.96.

To satisfy *Iqbal*’s plausibility requirement, the Complaint explains how deaths are coded and supplies the definition of those codes, showing how ***presumed*** cases are treated as ***actual*** cases. *Id.*, at ¶¶ 45–48, PageID.97. For a disease that mimics many symptoms of influenza and the common cold, and entered the population during the annual flu season, treating presumed cases as actual cases will skew numbers higher. Plaintiffs also allege that the State looks beyond death certificates and counts as confirmed COVID-19 deaths those who died of natural causes, including when an attending physician or a medical examiner concluded that the person died of something other than COVID-19. *Id.*, at ¶ 48, PageID.97. Plaintiffs give concrete examples of how this occurs. *Id.*, at ¶¶ 48–52, PageID.97–98. Removing inflated death counts, Plaintiffs allege, would show that the true mortality rate in Michigan is far less than the advertised rate of 9.5%. Specifically, when factoring in other data, they allege that the mortality rate is likely 0.1–0.5%, based on medical studies conducted in New York and California, two other states deemed “hard hit” by the coronavirus in the press. *Id.*, at ¶ 43, PageID.97. The Government does not address any of these allegations. However, a motion to dismiss requires the Court to accept these well-pleaded facts as true.

Plaintiffs also plead historical reference points to plausibly allege that the lockdown orders are unprecedented, shutting down civil society in a way that has never been done in Michigan’s history. They noted that Governor Sleeper balanced public health while preserving commerce during the Spanish Flu pandemic of 1918. *Id.*, at ¶ 54, PageID.98. Governors from both political parties refrained from the kind of lockdown imposed by Governor Whitmer during the annual summer polio epidemics of the 1940s and 1950s. *Id.*, at ¶ 55, PageID.98. Governor Romney never placed residents “under house arrest or shutdown the economy” when the Hong Kong Flu swept across the globe

in the 1960s, killing more than 1 million worldwide and 100,000 in the United States. *Id.*, at ¶ 56, PageID.98.

There are also pre-twentieth century examples of epidemics in this country. For instance, in September 1789, mere months after George Washington gave his first inaugural address and James Madison introduced the Bill of Rights to the House of Representatives, our new nation experienced its first epidemic. Influenza spread from New York City, our first capitol, to Philadelphia, the birthplace of our great nation. Hinsdale, *Epidemics of Influenza in 1647, 1789–90 and 1807: As Recorded by Noah Webster, Benjamin Rush, and Daniel Drake* 723–728 (1919), <http://hdl.handle.net/2027/spo.7850flu.0016.587>. The afflicted suffered from headaches, difficulty breathing, bloody coughs, loss of taste, loss of voice, nausea, vomiting, diarrhea, and acute pains in their limbs. *Id.*, at 723–725. The illness “proved fatal (with few exceptions) only to old people, and to people who had been previously debilitated by consumptive habits.” *Id.*, at 726. (“Consumption” is an old-fashioned term referring to tuberculosis.) This at-risk population generally succumbed to pneumonia. *Id.*, at 725. The epidemic lasted six weeks, spreading “from New York and Philadelphia in all directions, and in the course of a few months, pervaded every state in the union.” *Id.*, at 726. Yet the nation did not shut down. Although “[n]o profession or occupation escaped” the virus, commerce continued. *Id.*, at 725. “Many thousand people had the disease ... ***but transacted business as usual out of doors***” in the marketplaces. *Id.*, at 725–726 (emphasis added).

Plaintiffs also allege that the Government tightened restrictions after receiving independent evidence that the rate of infection had flattened. ECF 8, ¶ 60, PageID.99; ECF 8-1, PageID.117–139. The new restrictions resulted in the “most excessive” lockdown in the country. ECF 8, ¶ 57, PageID.98–99. Among other things, the Government criminalized family gatherings over Easter and Passover, and refused to revise its definitions of “critical infrastructure,” leaving businesses and employees closed who could meet CDC safety guidelines. *Id.*, at ¶¶ 58–59, PageID.99. As a result,

unemployment soared to levels not seen since the Great Depression. *Id.*, at ¶ 62, PageID.100. More than 25% of Michigan’s workforce is unemployed. *Ibid.* Michigan’s unemployment fund is inadequate to meet the demand for unemployment assistance. *Id.*, at ¶¶ 63–64, PageID.100. And the State is now projecting a \$3.6 billion budget shortfall. Senate Fiscal Agency, Michigan’s Economic Outlook & Budget Review: FY 2019–20, FY 2020–21, and FY 2021–22, at 2 (May 14, 2020), <https://perma.cc/9SMM-68FZ>.²¹

These facts are not exhaustive. They are illustrative and designed only to pass *Iqbal* muster. Discovery will yield additional facts about what the Government knew and when. For example—and for the sake of clarity, these examples are also not exhaustive—Plaintiffs anticipate that discovery will show that rural counties with low population density were at a lower risk of transmission. The basic reproductive number, R_0 , is the expected number of cases directly generated by one infected person. If R_0 is less than 1.0, then the contagion generally will not spread in the community. Plaintiffs anticipate that discovery will establish that the majority of the state never experienced or came close to $R_0=1.0$.

Plaintiffs also anticipate that discovery will prove that the Government has erroneously claimed credit for saving 3,500 lives based on modeling that was “highly preliminary and uncertain” and could not be used “for prediction of specific numbers.” See, e.g., Eisenberg, *et al.*, Michigan COVID-19 Modeling Dashboard, Current Forecasts and Social Distancing Tabs (Apr. 25, 2020), <https://perma.cc/P7X7-GQF7>.²²

²¹ The Court can judicially notice this public document. Fed. Rule Evid. 201(b)(2).

²² Epidemiologists who have sought leave to participate as amici cited this dashboard. The dashboard itself says that it is “highly preliminary and uncertain” and could not be used “for prediction of specific numbers.” This didn’t stop the Governor from asserting that “without the Stay Home, Stay Safe order, the median estimate is that we would have had 32,000 more cases today, **and at least 3,480 more deaths.**” Whitmer Press Conf. 11:20–11:37 (May 13, 2020) (emphasis added), https://www.youtube.com/watch?v=z2pX0iw_UNI. Neither the corresponding graphic nor her comments acknowledged the “highly preliminary and uncertain” nature of the information. Nor did the Governor tell Michiganders that the data she cited said it could not be used to predict specific numbers.

Discovery is further expected to show that: (1) seniors are the class most susceptible to developing COVID-19 if they contract the coronavirus; (2) seniors make up less than 20% of the state's population; (3) most people in the prime working age of 18–64 are likely to develop only mild-to-moderate symptoms—only a small minority are likely to develop severe or critical symptoms requiring hospitalization; and (4) the Governor and her advisors knew this when they locked down the entire state (ostensibly to save lives) while putting COVID-19 patients in senior nursing homes where the virus spread to the most vulnerable. Indeed, nearly 2,000 deaths in Michigan can be traced to the Governor's nursing home policy, which represents a third of all deaths statewide. Wilkinson, *et al.*, *More than 1,900 coronavirus deaths in Michigan nursing homes*, Bridge Magazine (Jun. 15, 2020), <https://perma.cc/7DR2-BCDU>. In other words, discovery will show that the Government needlessly locked down the State, and needlessly infringed on Plaintiffs' rights in the process, while channeling the virus to those most likely to die from it.

Given what is pleaded in the Complaint—independent of (but buttressed by) public developments that have come to light since then—Plaintiffs plausibly challenge whether coronavirus is a dangerous disease; whether it is truly epidemic statewide; whether the lockdown was arbitrary, oppressive, and so far beyond what was reasonably required for public safety; and whether it constituted a plain, palpable invasion of constitutional rights.

These factual disputes are key to, and incorporated by reference into, each of Plaintiffs' claims. ECF 8, ¶ 68, PageID.101. With this context in mind, Plaintiffs now analyze each count in the Complaint.

C. The Dormant Commerce Clause

The Government's challenge to the dormant Commerce Clause claim disregards the standard of review. It argues that the burden on interstate commerce was “miniscule” and that “Plaintiffs offer nothing to show that the [challenged restrictions] were somehow ‘clearly excessive’ in comparison to [their asserted benefits].” ECF 18, PageID.406–407.

But, at the pleading stage, Plaintiffs need only plead a plausible claim, not prove their case. The Complaint satisfies that low threshold.

The Government insists that its actions were necessary to stop the spread of a highly contagious and deadly disease. *Id.*, at PageID.407. But, as shown in the Statement of Facts and Argument II.B, *supra*, Plaintiffs factually dispute that assertion. As the United States noted in its Statement of Interest, “the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack.” ECF 14, PageID.185 (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality op.)).

Before assessing the sufficiency of the claim, it is worth recalling the first principles that animate the Commerce Clause. Those principles provide valuable context for assessing Plaintiffs’ claim.

“[T]he right to engage in interstate commerce is not a gift of the state....” *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). “What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.” *Id.*, at 538 (citation omitted). “Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce **by the certainty** that he will have free access to every market in the nation.” *Id.*, at 539 (emphasis added). “The material success that has come [from our] federal free trade unit has been the most impressive in the history of commerce, [and] the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions.” *Id.*, at 539.

Sotheby’s pleads that the challenged executive orders prevented realtors from seeking work and clients located outside of Michigan. ECF 8, ¶ 73(a), PageID.102. This plainly burdens interstate commerce. Cf. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 249 (1911) (observing that “prohibit[ing] interstate commerce is more than to indirectly affect it,” when invalidating a law that forbade the export of natural gas from one state to

another). Other states affected by the coronavirus did not shut down realtors, and those that did reopened far earlier than Michigan. ECF 8, ¶ 73(a), PageID.102. The federal government classified the real estate sector as critical infrastructure, from which it can be inferred that federal authorities believed that the ability to buy and sell real estate remained essential despite the public health concerns. *Id.*, at ¶¶ 59, 73(a), PageID.99, 102. This sufficiently pleads that the Government’s actions were excessive. Whether the burden on interstate commerce was “miniscule,” or whether the restrictions were “clearly excessive” are fact-based defenses that cannot be decided at the pleading stage.

Intraco is a diversified exporter of architectural and automotive glass, chemicals, and other goods, in both interstate and foreign commerce. *Id.*, at ¶ 13, PageID.89–90. Its subsidiary, Casite, distributes engine oil, fuel additives, and other after-market products for automobiles. *Id.*, at ¶ 14, PageID.90. Both these companies were unable to meaningfully operate because their business models hinge upon maintaining personal face-to-face relationships with current and prospective customers outside of Michigan, both in the United States and abroad. *Id.*, at ¶¶ 13–14, 73(b)–(c), PageID.90, 102–103. The Lockdown Orders caused a 20–30% drop in revenue. *Ibid.* As with Sotheby’s, whether such burdens on interstate and foreign commerce were “miniscule,” or whether the restrictions were “clearly excessive” are fact-based defenses that cannot be decided at the pleading stage.

The analysis is much the same for Hillsdale Jewelers. It has alleged a 99% drop in revenue because of the Lockdown Orders, alleging that those orders prevented it from importing precious metals and stones to create custom jewelry. *Id.*, at ¶ 73(d), PageID.103. This adequately pleads a burden on interstate commerce. Whether the burden is clearly excessive in relation to the putative local benefits is a fact-based defense that it not yet before the Court.

Finally, MCA is an interstate organization that claims the Lockdown Orders caused a significant reduction in membership, including carwash operators and vendors.

Carwashes can service vehicles driven into Michigan from all of the country. Again, whether such burdens on interstate commerce are “clearly excessive” is beyond the scope of the Government’s pleadings-based challenge.

D. Privileges and Immunities Clause

In Count II, Plaintiffs assert a claim predicated upon the Privileges and Immunities Clause under Article IV of the Constitution. The Government challenges this claim, arguing that a plaintiff cannot assert claims under this clause against his home state. Although Plaintiffs disagree—the clause protects a citizen’s right to leave his own state, *United States v. Wheeler*, 254 U.S. 281, 297–299 (1920), such claims can only be brought against his home state, and each Plaintiff claims that its home state has infringed on that right—Plaintiffs nonetheless concede that Count II must be dismissed. While researching the Government’s arguments, counsel discovered *South Macomb Disposal Authority v. Washington Twp.*, 790 F.2d 500, 503–504 (CA6 1986), where the Sixth Circuit held that a corporation “can never assert the denial of privileges and immunities under Section 1983” because they are not “citizens” within the meaning of the Constitution. *Ibid.* Although *South Macomb* addressed a claim predicated upon the Privileges or Immunities Clause under the Fourteenth Amendment, its reasoning applies here with equal force because the Supreme Court has held that corporations are not citizens for purposes of the Privileges and Immunities Clause under Article IV, either. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868). Accordingly, the Court must dismiss Count II.

E. Privileges or Immunities Clause

In Count III, Plaintiffs assert a claim predicated upon the Privileges or Immunities Clause under the Fourteenth Amendment. The Government does not acknowledge that this clause protects the privileges and immunities of national citizenship, which are different from those interests protected under Article IV. For example, it protects as rights of national citizenship the right to interstate travel, *Griffin v. Breckenridge*, 403

U.S. 88, 105–106 (1971), and the right to engage in interstate commerce, *Dennis v. Higgins*, 498 U.S. 439, 448 (1991). Nonetheless, as with Count II, Plaintiffs concede that Count III must also be dismissed because, as corporate persons, they are not citizens of the United States for Fourteenth Amendment purposes. *South Macomb*, 790 F.2d, at 503–504 (citing *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 514 (1939)).

F. Substantive Due Process

Although they may not be citizens, corporations are “clearly” persons within the meaning of the Due Process Clause. *South Macomb*, 790 F.2d, at 503. Substantive due process is “the doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed.” *Range v. Douglas*, 763 F.3d 573, 588 (CA6 2014). “It protects a narrow class of interests, including those enumerated in the Constitution, those so rooted in the traditions of the people as to be ranked fundamental, and the interest in freedom from government actions that ‘shock the conscience.’” *Ibid.* “It also protects the right to be free from ‘arbitrary and capricious’ governmental actions, which is another formulation of the right to be free from conscience-shocking actions.” *Ibid.*

To state a claim of substantive due process, a plaintiff must allege that the defendant deprived him of a fundamental right or a liberty interest that is accorded special constitutional protection. *Washington v. Glucksberg*, 521 U.S. 702, 719–720 (1997). Plaintiffs allege infringements on fundamental rights, including the right to engage in interstate commerce, which “is not the gift of the state,” *Hughes*, 426 U.S., at 807–808; the right to engage in interstate travel, *Guest*, 383 U.S., at 757–760; and the right of individuals to contract and engage in the common occupations of life, and to “enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.” *Roth*, 408 U.S., at 572 (cleaned up). ECF 8, ¶¶ 73, 83–84, 102–105, PageID.102–103, 105–106, 111. Due process protects man’s freedom to enjoy “all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by

any lawful calling; [and] to pursue any livelihood or avocation” *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

At its core, the Complaint posits that the right to engage in business, a right both deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty. “At common law, every man might use what trade he pleased.” 1 William Blackstone, *Commentaries* *427 (1765). Government may regulate a trade, “[b]ut the suppression of a trade is not a regulation. To be regulated, the trade must subsist.” *State v. Town Council of Columbia*, 40 S.C.L. (6 Rich.) 404, 415 (1853). See also *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 1128 (K.B. 1707) (every man has a right to earn a living, holding that “he that hinders another in his trade or livelihood is liable to an action for so hindering him”); *Case of the Tailors*, 77 Eng. Rep. 1218, 1219 (K.B. 1615) (“[A]t the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness”); *Davenant v. Hurdis*, 72 Eng. Rep. 769 (K.B. 1574) (laws that regulate trade are proper, but laws that restrain trade are unjust).

American courts have long struck down laws designed to stop people from gainful employment. See, e.g., *Truax v. Raich*, 239 U.S. 33, 38 (1915) (“The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to [constitutional] protection...”); *City of Memphis v. Winfield*, 27 Tenn. 707 (1848) (the supreme court of a slave state invalidated an ordinance making it illegal for free blacks and slaves to be out after 10 p.m., noting that the plaintiff—a free black man—“must live, and in order to do so he must work[;] everyone knows that in cities, very often, the most profitable employment is to be found in the night,” and any ordinance punishing the earning of a living was “unnecessary and oppressive.”).

American aversion to government picking winners and losers runs back to the Boston Tea Party. When George III granted the East India Company the right not only to ship tea, but the exclusive right to sell it in the colonies, workers who were legally closed out of a livelihood reacted with the famous protest. See SANDEFUR, at 218. Everyone has

an inalienable “right to life, liberty, and the pursuit of happiness.” U.S. Decl. of Indep. (1776). Jefferson’s inspiration for this phrase was the Virginia Declaration of Rights, which declared that “all men are by nature equally free and independent, and have certain inherent rights ... namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” Virginia Decl. Rights § 1 (1776). See also, *Butchers’ Union Slaughter-House & Livestock Landing Co. v. Crescent City Livestock Landing and Slaughter-House Co.*, 111 U.S. 746, 762 (1884) (tracing the “inalienable right” to “follow any of the common occupations of life” to the “pursuit of happiness clause” in the Declaration of Independence); National Archives, America’s Founding Documents (2016), <https://perma.cc/EX35-GVQW>. “[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails....” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).²³

Plaintiffs anticipate that the Government will argue that they are relying on pre-New Deal cases for principles of fundamental economic rights. Plaintiffs offer two responses to such reasoning.

First, *Jacobson*, a case upon which the Government leans so heavily, was a pre-New Deal case, at a time when the Court (rightly) was skeptical of *all* encroachments on personal freedoms, not just those favored by the courts—*i.e.*, what we today call “fundamental” rights. This counsels in favor of interpreting *Jacobson*’s “reasonableness” review as a far higher bar for the Government than mere rational-basis review. It is for this reason that Plaintiffs oppose “rational basis” review of the Lockdown Orders.

Second, however much it has been criticized in the modern era, the Supreme Court has never repudiated the centuries-old right to earn a living—a right as old as the common

²³ Plaintiffs submit that *Yick Wo* was as much a case about economic freedom as it was about racial discrimination.

law itself. See *Glucksberg*, 521 U.S., at 760 (Souter, J., concurring) (criticizing how the principle was applied from the Founding through the *Lochner*-era, but agreeing with the principle itself); SANDEFUR, *supra* (tracing the history of the right to earn a living back to Magna Carta).²⁴ There remains today a distinction between the right to work and the

²⁴ Justice Souter’s criticism of pre-New Deal economic liberty decisions is itself wanting. He claimed that the Court treated as constitutionally suspect economic regulations that abrogated the common law, likening decisions from that era to *Dred Scott*. See *Seminole Tribe v. Florida*, 517 U.S. 44, 166 (1996) (Souter, J., concurring). This is stunningly inaccurate, both as a matter of logic and experience.

As a matter of logic, the Court recognized that the Constitution incorporated common-law and natural rights as a baseline—the life, liberty, and property that preexist government and cannot be deprived by government without due process. If the government wanted to enact legislation in the interest of the public welfare, that was fine even at common law. But the pre-New Deal Court understood (rightly) that the judiciary needed to determine if that was really the government’s aim, or just a fig leaf. Since the New Deal, fig leaves are enough, since “rational speculation” is apparently all that’s necessary—no evidence is needed to justify destroying people’s businesses and threatening them with imprisonment for daring to put in an honest day’s work to feed their families. *LIFFT*, 2020 WL 3468281, at *3. Justice Willet nicely explained the poverty of this approach in *Patel v. Texas Dept. of Licensing & Regulation*, 469 S.W. 69, 92–123 (Tex. 2015), before his appointment to the Fifth Circuit. Plaintiffs contend it is time to revisit modern economic liberty jurisprudence as incompatible with the Fourteenth Amendment as originally understood if this is where “rational” basis review has led us.

As for experience, one need only reflect on the words of Frederick Douglass:

To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—that it was mine, that my hands were my own, and could earn more of the precious coin ... I was not only a freeman but a free-working man, and no master Hugh stood ready at the end of the week to seize my hard earnings.

Douglass, *The Life and Times of Frederick Douglass* 259 (1882). It is hard to fathom anyone forming any conclusion from these words other than the one penned by Justice Willet:

Frederick Douglass’s irrepressible joy at exercising his hard-won freedom captures just how fundamental—and transformative—economic liberty is. Self-ownership [what some today call a person’s

government’s ability to regulate the manner in which the work is performed. Plaintiffs submit that the right to earn a living—which in corporate form is the right to engage in business—is a fundamental right subject to strict scrutiny. Since the New Deal, government has a freer hand in dictating *how* commerce can be conducted, with such regulation usually subject to rational-basis review. But the Lockdown Orders did not just regulate commerce (as in the case of so-called essential businesses), but it outright forbade work—indeed criminalized it. Plaintiffs challenge *that* portion of the Lockdown Orders, which is why they advocate for strict scrutiny of the Government’s actions in this case.

The Government does not, however, acknowledge that Plaintiffs have pleaded infringements of fundamental rights. Instead, it tries to characterize their substantive due process claim as one alleging arbitrary and capricious action only. ECF 18, PageID.412–413. To be sure, Plaintiffs allege that the Government has acted arbitrarily and capriciously, but only as to those constitutionally protected interests that the Court may deem non-fundamental.

As it relates to the arbitrary-and-capricious standard, the Government argues that the Lockdown Orders were not “illogical, arbitrary, or capricious” because they were “necessary” to protect the public from “the rapid spread of an aggressive, untreatable, and potentially fatal disease, and to ensure that th[e] State’s healthcare system had the capacity and resources to manage that spread.” ECF 18, PageID.413. As Plaintiffs have already explained, they dispute the Government’s assertions. They have questioned with well-pleaded facts whether the coronavirus is as aggressive, untreatable, and fatal as the Government claims, and whether the state’s healthcare system truly lacked the capacity

“agency”], the right to put your mind and your body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity.

Patel, 469 S.W., at 92.

and resources to treat patients. They also question whether locking down the entire state was “necessary” when cases of, and deaths attributed to, the virus were clustered in urban areas and nursing homes, and when the disease overwhelmingly targeted the elderly. See Argument II.B.

Plaintiffs again emphasize that this is a Rule 12(b)(6) motion. The Court must accept *Plaintiffs’* well-pleaded facts as true, not the counter-narrative that the Government is trying to push in its Motion. With the appropriate standard in mind, Plaintiffs submit that they have pleaded a plausible claim that the Government has violated their substantive due process rights under the standards for fundamental rights, protected liberty interests, and arbitrary and capricious action.

G. Equal Protection

To state an equal-protection claim, a plaintiff must plead that: (1) the government treated him differently than another, similarly situated person; and (2) this difference in treatment burdens a fundamental right, targets a suspect class, or has no rational basis. *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (CA6 2011).

Plaintiffs plead disparate treatment. The Lockdown Orders allow some businesses to operate while prohibiting others from doing so. Although the Government may argue that Plaintiffs are not among the class of public accommodations and amusements that were categorically closed, such an approach would misapprehend the nature of the Lockdown Orders. Those orders forbade customers from leaving their homes to do business with Plaintiffs, and the nature of each Plaintiffs’ business necessitates in-person business transactions. Real estate cannot be shown virtually with the same level of meaningful inspection attendant to in-person showings—and they absolutely cannot be done if photographers cannot travel to homes to take proper images for 3-D rendering. Landscaping cannot be done remotely. Dental cleanings cannot be performed digitally. Jewelry cannot be created, inspected, valued, or repaired by videoconference. Cars can’t drive themselves to the carwash. So, even when the Lockdown Orders technically

permitted businesses to remain open, it still criminalized the means of conducting business. Functionally, that is no different than outright closure.

Plaintiffs also plead that they are similarly situated to those businesses allowed to operate. They can operate just as safely as the so-called essential businesses that could remain open under the Lockdown Orders. ECF 8, ¶¶ 96–97, 113, PageID.108–109, 113. The Court must accept that allegation as true at this stage of the proceedings. The Government contends that Plaintiffs were not similarly situated, but that is a fact-driven argument on the merits. Such arguments are premature under Rule 12(b)(6).

Plaintiffs plead that this difference in treatment burdened their fundamental rights. See Argument II.F. Strict scrutiny applies when disparate treatment burdens fundamental rights. *Lac Vieux Desert Bank of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 410 (CA6 1999) (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Classifications ... affecting fundamental rights are given the most exacting scrutiny.”)). The Government does not address Plaintiffs’ assertion of fundamental rights, acknowledge their factual challenge to the compelling governmental interest factor, or acknowledge their assertion that the Lockdown Orders are not narrowly tailored to achieve the asserted governmental interest. Compare, *e.g.*, ECF 8, ¶¶ 11–17, 42–68, 113, PageID.89–91, 96–101, 113.

If the Court should hold that Plaintiffs assert nonfundamental rights, then they have pleaded in the alternative that there was no rational basis for the mass closure of all businesses throughout the State, ECF 8, ¶¶ 114–115, PageID.113, especially given the fractional and localized infections, the nature of the at-risk population, and the misleading statistics affecting the death count. See Argument II.B. The Government reflexively offers purportedly “rational” bases, but this is premature argument on the merits.

Discovery and trial will probe what constitutes a life-sustaining activity. However it is defined, is such activity safely conducted by “essential” businesses if they follow CDC guidance, or is it merely that the Government believes there is an acceptable level of

risk? If safety is the metric, and Plaintiffs can operate their businesses with the same level of safety, then how are they differently situated? On the other side of the coin is the issue of acceptable levels of risk. But why wouldn't other businesses operating with the same protocols in place carry the same (acceptable) level of risk?

The Government also says that preserving the supply of PPE are additional rational bases, ECF 18, PageID.415, but how is shuttering businesses statewide a "rational" way of preserving the supply of PPE when the Government says *homemade* masks are sufficient to accomplish this goal? See, e.g., EO-70(15)(a); EO-77(15)(a); EO-92(15)(a); EO-96(15)(a); EO-110(4)(a); EO-115(6)(b). And what constitutes a sufficient supply of PPE? According to Michigan's official coronavirus website, Regions 2N and 2S, which cover the Detroit area, have a combined 311,648 face shields, 8.1 million gloves, and 675,898 N95 masks. State of Michigan, Data About Places, Statewide Hospital Available PPE (Jun. 26, 2020), <https://bit.ly/MichCorona virusDashboard>. Plaintiffs understand that these are current numbers, and not reflective of the PPE supply in late March when the Lockdown Orders took effect, but what were the numbers? Why was that supply so inadequate as to justify closing rural parts of the state? When did the supply stabilize when compared to the lifting of the stay-home orders and the closure orders?

Nor does the Government explain how shuttering businesses makes it "easier" for contact tracing. ECF 18, PageID.415. What constitutes a "contact?" Momentarily walking by someone, or a sustained interaction? What is necessary for tracing? Businesses routinely collect contact information from customers for marketing campaigns by mail, email, and texting. Businesses can *facilitate* tracing by recording the name, address, and telephone number of each customer.

These are not exhaustive questions, but they highlight the kind of fact-based merits questions that Plaintiffs have a right to explore during discovery to prove the absence of a rational basis (should the Court disagree with their fundamental-rights argument). At this point, however, merely to ask these questions, much less answering them, go beyond

the pleadings. The Court cannot reach them on a Rule 12(b)(6) motion. The analysis under Rule 12(b)(6) stops once the Court concludes that Plaintiffs have pleaded that they are similarly situated. And they have.

H. Procedural Due Process

To state a procedural due process claim, a person must plead that: (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) that he was deprived of that interest; and (3) that the government did not afford adequate procedural protections before depriving him of that interest, or within a reasonable time thereafter. *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 904 (CA6 2014). The Complaint pleads all three elements.

First, Plaintiffs claim that the Government has deprived them of life, liberty and property interests without providing a pre- or post-deprivation process. ECF 8, ¶ 98, PageID.109–110. See also Argument II.F and II.G. Plaintiffs submit that, as people before the law, they have a constitutionally protected life interest against government action that endangers their very existence. “[T]he Fourteenth Amendment prohibits state officials from taking life except in accordance with due process of law.” *Roberts v. Acres*, 495 F.2d 57, 59 (CA7 1974) (citing *United States v. Price*, 383 U.S. 787 (1965), and *Screws v. United States*, 325 U.S. 91 (1946)). Lockdown Orders that indefinitely close businesses and deprive them of the revenue needed to survive are, functionally, corporate death warrants. Plaintiffs acknowledge that, like the virus, this is a novel argument; no case has recognized a lawful corporation’s right to life. They aim to establish that principle in this case. But, at the pleading stage, it is sufficient to assert the interest.

Plaintiffs are not conjuring up an implausible life interest out of the ether. Corporate personhood has led to the recognition of a host of rights that natural persons enjoy—e.g., freedom of speech, *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); freedom of religion, *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), freedom of association, *NAACP v. Alabama*,

357 U.S. 449 (1958); freedom from unreasonable searches and seizures, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), and freedom from excessive fines, see *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (framing the same as a deprivation of property without due process). Plaintiffs acknowledge that corporate personhood is a fiction to protect natural people; when constitutional rights are extended to corporations, the purpose is to protect the rights of those people. *Burwell*, 573 U.S., at 706–707.

Recognizing a life interest for corporations would protect the interests of owners and employees who rely on corporations for the income necessary to sustain life. This same logic supports Plaintiffs' assertion that they have a right to engage in business.

Plaintiffs also assert more traditional interests. They claim a protected liberty interest in conducting their lawful business. ECF 8, ¶¶ 92, 98, PageID.107–109. Plaintiffs also claim that their businesses themselves are a protected property interest, along with lost revenue. *Ibid.* The Government does not dispute that these interests are adequately pleaded. ECF 18, PageID.410–412.

Second, Plaintiffs squarely allege that the Government deprived them of these interests through the Lockdown Orders. ECF 8, ¶¶ 26–41, 66, 87–100, PageID.93–96, 101, 107–111. Here, again, the Government does not appear to dispute that the Complaint adequately pleads this element. ECF 18, PageID.410–412.

Third, Plaintiffs allege that the Government provided no process before or after depriving them of their constitutionally protected interests. This appears to be the only element in dispute.

The Government argues no process is required—ever—if it classifies its actions as “temporary” and not “final,” citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). ECF 18, PageID.410. The Government misreads *Mathews*. The length of the deprivation is a factor in *how much* process is due, but *some* process is due as long as the deprivation is more than de minimis. *Goss v. Lopez*, 419 U.S. 565, 575–576 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). Government action closing businesses for months on end (with

many never to reopen) meets the low threshold above which some process is required. Cf. *Wegener v. City of Covington*, 933 F.2d 390 (CA6 1991) (holding that a § 1985 claim premised on a theory that a fire captain and police lieutenant conspired to shut down a lawful business ***early, for one night***, without due process was sufficient to state a claim).²⁵

The Government then argues, seemingly in the alternative, that it should prevail on the merits because “Plaintiffs have offered nothing in the federal constitution or cases construing it that would have required any more here than general promulgation of the [Lockdown Orders].” ECF 18, PageID.411–412 (citing *Hartman v. Acton*, —F. Supp. 3d—; No. 20-1952; 2020 WL 1932896 (SD Ohio Apr. 21, 2020)). See also *Bi-Metallic Inv. Co. v. State Bd. of Equal.*, 23 U.S. 441, 445 (1915). It is appropriate to emphasize once again that this a Rule 12(b)(6) motion; Plaintiffs are not required to prove their case in their Complaint. In any event, although enacting generally applicable laws satisfies due process, the Sixth Circuit recently held that, “at some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy” *Roberts*, 958 F.3d, at 413–414. Plaintiffs expect discovery will show that the number and nature of the carve-outs in the Lockdown Orders—coupled with the constant revision of those orders aimed at mooted court challenges—render them an exception-ridden policy under *Roberts*.

The Government also says that Plaintiffs are “seeking some sort of process by which they can challenge” their classification as nonessential under the Lockdown Orders, and it argues that this question is not amenable to declaratory relief. ECF 18,

²⁵ Once it is determined that process is required, the *Mathews* balancing test guides how much process is due. The Government suggests that *Mathews* is not the right test because the Lockdown Orders are general, emergency orders, but it offers no alternative method by which to decide how much process is due. Plaintiffs submit that *Mathews* remains the appropriate standard here. After all, the Supreme Court has applied the *Mathews* test even in wartime. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (applying the *Mathews* test to determine how much process to give an unlawful enemy combatant).

PageID.411. That incorrectly characterizes Plaintiffs’ claim. Plaintiffs argue, as a matter of substantive due process, that the Government cannot indefinitely and arbitrarily close businesses. See Argument II.F. But, if the Court decides otherwise, then the Government still cannot arbitrarily classify businesses as essential and nonessential under the Equal Protection Clause. See Argument II.G, *supra*. Yet, even if the Government can so classify and close businesses as “unsafe” in the name of public health, then the affected businesses must be given some process to challenge that finding, to prove that they *can* safely operate on the same terms as those businesses allowed to remain open without posing an unreasonable risk to public health.²⁶ Under *Mathews*, courts must balance (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value (if any) of additional or substitute safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail. *Id.*, at 335. This is a fact-intensive inquiry; it is premature to decide this at the pleading stage, particularly since the level of process due may differ based on the interest to be protected and the level of scrutiny due.

I. Void for Vagueness

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). The Lockdown Orders purport to

²⁶ This highlights why it is incorrect to treat Shortt Dental differently than other Plaintiffs, as the Government tries to do in its Motion. ECF 18, PageID.411. Although Shortt Dental was authorized to perform emergency procedures, it was not at liberty to perform *all* procedures. For several months, routine dental checkups and nonemergency surgeries and other procedures were banned. EO-17(2). In that posture, it was affected in the same way as all other “nonessential” businesses. Moreover, the discretion purportedly given to dentists was still subject to a threat of criminal prosecution, meaning that the Government reserved the right to quarterback the exercise of that discretion. EO-17(7).

carry the force of law, and (except for ER-1) they make any willful violation of their terms a misdemeanor punishment by imprisonment or a fine.

The Government says that there is nothing vague about the orders. In its view, Plaintiffs understood that they were unable to operate, and that is enough. Plaintiffs respectfully disagree.

Although in years past a plaintiff would be required to show that a law was constitutionally vague “in all of its applications,” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982), the Supreme Court has recently relaxed that rule. No longer is a vague law constitutional “merely because there is some conduct that clearly falls within the provision’s grasp.” *Sessions v. Dimaya*, —U.S.—; 138 S.Ct. 1204, 1222 n.7 (2018); *Johnson v. United States*, —U.S.—; 135 S.Ct. 2551, 2560–2561 (2015).

Plaintiffs allege that the Lockdown Orders are not sufficiently precise that ordinary people can understand what conduct is prohibited. The Complaint notes that EO-77 allows certain businesses to keep operating 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 business falls within a favored sector. ECF 8, ¶ 122, PageID.114. Although EO-77(8) incorporates CISA’s guidance from March 19, 2020, this does not cure the defect. CISA’s guidance is equally vague.

Plaintiffs do not criticize CISA. CISA’s role was to provide strategic guidance to ensure homeland security and implement the President’s Coronavirus Guidance for America. Krebs, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response* at 1, ¶¶ 1–2 (Mar. 19, 2020), <https://perma.cc/Z3UZ-6TLE>. In fulfilling its statutory functions under the Homeland Security Act, CISA provided nonexhaustive, high-level guidance to state and local officials so that *they* could specifically and concretely identify and define essential industries and workers within their jurisdiction. *Id.*, at 2, ¶ 3. Michigan chose to incorporate the high-level guidance by reference without concretizing it to Michigan’s economy and workforce.

Take one example. CISA identifies “employees supporting or enabling transportation functions,” and “employees of firms providing services that enable logistics operations.” *Id.*, Attach. at 6. Would this include Plaintiffs Intraco, an exporter, and Casite, which distributes after-market products for automobiles? Even if it did, workers described by CISA only include “some workers” in the designated sectors. EO-77(8). Employers were able to designate such workers who were “necessary” to enable, support, or facilitate certain types of work in these sectors, EO-77(8)(b), but “businesses ... that abuse[d] their designation authority [would] be subject to sanctions to the fullest extent of the law.” EO-77(8)(b)(6). Businesses had to read together two documents from two different governments writing to two different audiences. And if they misinterpreted those documents—seeing as lawyers were also deemed nonessential, businesses might not have had ready access to counsel—they could be criminally prosecuted for “abusing” their designation authority. Not only is this impermissibly vague, such vagueness encourages arbitrary enforcement.

There is also the matter of the voluminous publication of FAQs. If ordinary people could understand the Lockdown Orders, then there would be no need for 125+ FAQs.

Finally, after Plaintiffs filed their Complaint, the executive orders were amended to include new language that created only more vagueness. Starting with EO-92, “nothing in [the orders] shall be taken to abridge the protections guaranteed by the state or federal constitution....” EO-92(17). As Plaintiffs assert in their Complaint, the executive orders infringe on protected liberty interests (*e.g.*, the right to engage in commerce, the right to engage in the common occupations of life, etc.) and on protected property interests (*e.g.*, the right to operate a lawful business, lost revenue and value to the business, etc.). ECF 8, ¶¶ 87–117, PageID.107–113. After May 18, 2020, an ordinary person is left with conflicting messages: these constitutional interests remain fully protected, but you are forbidden from exercising them under threat of criminal prosecution. A prime example of this irreconcilable conflict can be observed in *Emagine Theatres v. Whitmer*, No. 1:20-cv-

00570 (WD Mich.) (Maloney, J.) (alleging that the Government threatened to prosecute a business for exercising its freedom of speech under the First Amendment despite the “no abridgment” clause).

Plaintiffs expect discovery will yield additional evidence of the vagueness problem. There have been media reports attesting to the confusion over the scope of the orders.²⁷ The Attorney General also invited residents to submit requests for interpretations of the executive orders to miag@michigan.gov.²⁸ She responded to at least some of those questions through various media, including YouTube,²⁹ before it was later determined that the “Department of Attorney General is prohibited by law from providing legal advice to private individuals.”³⁰

Accordingly, Plaintiffs have adequately stated a claim that the Lockdown Orders are void for vagueness.

²⁷ See, e.g., Livengood, *Whitmer’s extended shutdown order sows confusion as political opponents stoke resistance*, Crain’s Detroit Business (Apr. 13, 2020); Beggin, *Can you buy seeds in Michigan? Confusion reigns over Whitmer stay-home order*, Bridge Magazine (Apr. 13, 2020), <https://perma.cc/2UH6-SFDF>; Jaehnig, *Ambiguous executive order has caused mass confusion statewide*, The Daily Mining Gazette (Apr. 15, 2020), <https://perma.cc/WCF2-N7L5>; Egan & Gray, *Businesses, police in Michigan face confusion on first day of ‘stay home’ order*, Detroit Free Press (Mar. 24, 2020), <https://perma.cc/2L7Q-EQCK>; Lloyd, *Breaking down the confusion behind COVID-19 executive orders*, 9&10 News (May 25, 2020), <https://perma.cc/792K-RSH3>; DesOrmeau, *After 102 executive orders, confusion is commonplace on what’s allowed in Michigan and what isn’t*, MLive (May 30, 2020), <https://perma.cc/5Z2Z-MYWH>.

²⁸ State of Michigan, *AG Nessel addresses confusion over businesses deemed ‘critical’ during stay safe, stay home order* (Mar. 28, 2020), <https://perma.cc/7WL2-QG27>.

²⁹ See, e.g., *Michigan AG Dana Nessel answers questions related to COVID-19 and Governor’s executive orders*, MLive (Mar. 30, 2020), <https://youtu.be/Ib09PF0KZ2I>.

³⁰ Department of Attorney General, *Questions regarding the meaning of the Governor’s executive order* (undated, last accessed Jun. 27, 2020), <https://perma.cc/49WM-2V3L>.

III. *Epidemiology Amici: The amicus brief submitted by epidemiologists not only ignores the standard of review, but the information provided lacks value.*

Plaintiffs have already argued why the Court should deny amici leave to file their brief. ECF 22, PageID.568–574. If the Court grants them leave to file their brief, Plaintiffs take this opportunity to address the substance of amici’s arguments.

1. ***Eisenberg Dashboard.*** Amici claim, without any real caveat or qualification, that the Government’s actions in this case saved 3,500 lives. ECF 19-1, PageID.540, 549–551. This is a factual allegation outside the record. It therefore cannot be considered under Rule 12(b)(6). Even if it could be considered, amici’s claim isn’t as impressive as it seems after looking at the dashboard of data cited for this proposition. The dashboard says that it is “***highly preliminary and uncertain***” and ***cannot*** be used “***for prediction of specific numbers.***” Eisenberg, *et al.*, Michigan COVID-19 Modeling Dashboard, Current Forecasts and Social Distancing Tabs (Apr. 25, 2020), <https://perma.cc/P7X7-GQF7>. In other words, amici tout the “lives saved” statistic for the very purpose that the dashboard itself says it cannot be used for. It is surprising and deeply troubling to see the “lives saved” statistic presented in such firm terms when Dr. Eisenberg herself is one of the listed amici. ECF 19-1, PageID.561.

2. ***Influenza Comparison.*** Amici claim that Michigan’s death toll has exceeded 5,700, with nearly 1,400 dying in Detroit alone, a number that means COVID-19 is forty times deadlier than influenza. ECF 19-1, PageID.544. The asserted comparison to flu statistics reaches outside the pleadings, and it cannot be considered under Rule 12(b)(6). Even if the Court could consider such information through judicial notice, amici’s allegations ignore Plaintiffs’ well-pleaded factual allegations that the Government’s method of counting deaths artificially inflates the death toll to maintain the fiction of an emergency. Amici are free to disagree with those allegations, but the Court must accept them as true at this stage of the proceedings.

3. ***NPIs.*** Amici write extensively about non-pharmaceutical interventions (“***NPIs***”). ECF 19-1, PageID.546–547. All of these averments are beyond the scope of

the pleadings and are not properly considered under Rule 12(b)(6). Yet, even if the Court could consider them, the interventions listed by amici—*e.g.*, sanitization and wearing masks—are not at issue in this case. Indeed, Plaintiffs have no qualms about enhanced cleaning procedures or adhering to the use of facial masks. ECF 8, ¶¶ 96, 97, 106, 113, PageID.108–109, 112–113. The issue is whether the Government has the power close down businesses statewide. Amici want to engage in a policy debate (*i.e.*, is it a good idea), instead of a legal debate (*i.e.*, is it **lawful**, however good the idea may seem to some). Amici go on to say that closing businesses has been a “frequent and fundamental strategy in responding to outbreaks.” ECF 19-1, PageID.547 (citing Jarvis, et al., *Quantifying the impact of physical distance measures on the transmission of COVID-19 in the UK*, BMC Medicine 18:124 at 2 (May 7, 2020) (“JARVIS”). Conceptually, Plaintiffs do not object to temporary, targeted closures for thorough sanitizing in response to outbreaks. But that isn’t what happened here. The entire state was locked down, including vast regions of the state where there were no cases and/or no deaths.

Plaintiffs also note with interest that amici support the “frequent and fundamental” assertion by citing a study of social-distancing policies in Great Britain, which noted that “many countries have adopted **unprecedented** physical distancing policies.”³¹ JARVIS, at 2 (emphasis added). We share a common history, but the current laws and policies of the United Kingdom cannot inform the constitutional question at hand: do the dormant Commerce Clause and the Fourteenth Amendment permit or prohibit a state from closing all businesses under threat of criminal prosecution? In that sense, the study of a foreign country’s response to the coronavirus is of no value to the constitutional questions at hand. Beyond that, the Jarvis authors themselves acknowledge that the policies implemented in response to the coronavirus are unprecedented. Something cannot be a

³¹ Another of amici’s articles makes the same observation: “the modern world has never confronted this pathogen, **nor deployed anti-contagion policies of such scale and scope.**” See ECF 19-1, PageID.549, which cites Hsiao, et al., *The effect of large-scale anti-contagion policies on the COVID-19 pandemic*, Nature (Jun. 8, 2020).

“frequent and fundamental strategy” and “unprecedented” at the same time.

In addition, the Jarvis study notes several limitations on the survey, including the fact that those who adhere to social distancing measures may have been more likely to respond to the survey, “resulting in selection bias and in an overestimate of the impact of those measures.” *Id.*, at 7. The study also noted that UK testing algorithms focus on people in hospitals, and that an actual decline in community spread could be offset by the problem of nosocomial infections—*i.e.*, infections caught while in the hospital. *Id.*, at 8. So, in addition to having no real value to the constitutional questions at hand, the Jarvis article’s acknowledged shortcomings leave it with little weight.

4. ***Flu Pandemic of 1918.*** Amici point to the 1918 influenza pandemic and cite an analysis that found death rates to be 50% lower in cities that adopted social distancing measures as compared to those that did not. ECF 19-1, PageID.547 (citing Hatchett, *Public health interventions and epidemic intensity during the 1918 influenza pandemic*, 104 Proceedings of the Natl. Acad. of Sciences of the United States of Am. 18 (Feb. 14, 2007) (“HATCHETT”). Although Plaintiffs do compare the Lockdown Orders to actions taken by Michigan governors in the past, the Complaint does not speak to actions taken in other states. Such information cannot be considered under Rule 12(b)(6). Even if it could be considered, there is much to unpack in the Hatchett article. As this is already a lengthy brief, and this material should not be considered at all, Plaintiffs will focus on only a few key points in the interest of judicial economy.

Perhaps most importantly, the Hatchett article admits that the non-pharmaceutical interventions only work while they are in place: “Altogether, we take these findings as evidence that NPIs were capable of reducing influenza transmission in 1918, but that their benefits (as one would expect) were limited to the time that they remained in effect.” HATCHETT, at 5. Once lifted, a second, larger wave appeared. *Ibid.*

If highly effective NPIs are put into place early in the epidemic, and these result in a smaller epidemic, then a large proportion of the

population will remain susceptible to the renewed spread of the virus once interventions are relaxed. In the absence of an effective method of otherwise inducing immunity in the uninfected population (*i.e.*, a well matched vaccine) such an epidemic is likely to have two phases, with the first phase mitigated by NPIs and the second commencing after NPIs are relaxed. In our review of 17 cities, we observed that cities that implemented NPIs sooner had lower peak mortality rates **during the first wave** and were **at greater risk of a large second wave.**”

Ibid. (emphases added). So, absent a vaccine, “flattening the curve” can accomplish only one thing: not overwhelming hospitals. The same number of people will ultimately contract the coronavirus, and the same percentage of those people who would have developed COVID-19 will still do so, just spaced out over time. In other words, NPIs merely delay the inevitable.

The Hatchett article also notes that schools, churches, and theatres were closed, not all businesses. *Id.*, at 5. Of these, researchers could not determine “the relative contributions of individual interventions.” *Ibid.* Stated differently, they do not know if one, two, or all three working together produced the desired result of flattening the curve.

In addition, Hatchett’s appendix describes the NPIs instituted in the cities under study. *Id.*, at SI Appx. Eight out of 17 staggered retail hours to reduce congestion in stores and on transit systems. *Ibid.* Only two implemented community-wide mask ordinances. *Ibid.* Only **one** city, St. Louis, declared a general business closure. *Ibid.* See also St. Louis Post-Dispatch, *Wide Business Closing Order to Check Influenza in Effect Today in St. Louis; Closing Order in Force, and is Generally Obeyed*, Nov. 9, 1918, p.1, <https://perma.cc/8C5F-2DNZ>. This is no comparison to closing an entire state for months, including massive areas substantially unaffected by the virus. If anything, this only proves Plaintiffs’ point that the Lockdown Orders are unprecedented, not a “frequent and fundamental strategy” as amici contend.

5. ***Courtemanche Article.*** Amici cite a national, peer-reviewed study on four social distancing measures, claiming it supports the idea that these measures

“significantly reduced the daily growth rate of COVID-19,” and that the country would have faced about “35 million more cases of the disease nationwide.” ECF 19-1, PageID.549 (citing Courtemanche, *Strong social distancing measures in the United States reduced the COVID-19 growth rate*, 39 Health Affairs 7 (Jul. 2020) (“COURTEMANCHE”)). Of course, as Plaintiffs have emphasized—and epidemiologists should know—there is a difference between the coronavirus and the disease it can (but does not invariably) cause. Even assuming *arguendo* that the 35 million figure was realistic (and it wasn’t), those are cases, not deaths. As Plaintiffs have pleaded, the supermajority of the infected are asymptomatic or experienced mild-to-moderate reactions to it (*i.e.*, they did not require hospitalization). See ECF 8, ¶ 43, PageID.96. If anything, this supports Plaintiffs’ point that an increase in confirmed cases, without a corresponding increase in deaths, only increases the survival rate. *Ibid.*

Courtemanche notably compares the study data to “counterfactual simulations” to determine whether NPIs affected the growth rate for the virus. COURTEMANCHE, at 5. To develop the simulation, he assumed a growth rate based on modeling predictions that relied on data from before the introduction of NPIs and shelter-in-place orders (“**SIPOs**”). *Ibid.* There were, however, eight states that did not introduce SIPOs, from which actual data could have been drawn. In addition, no effort was made to determine which of the NPIs had real effect, because researchers elected to limit the counterfactuals to no NPIs and no SIPOs. Moreover, the NPIs studied did not include general business closures. Researchers looked at SIPOs, school closures, bans on large social gatherings, and closures of entertainment-related businesses. *Id.*, at 2. Even so, they still found that school closures and bans on large social gatherings did not influence the growth rate. *Id.*, at 4.

Courtemanche, like the Eisenberg dashboard, specifically “**urge[s] caution** about taking the specific numbers of cases averted too **literally**. Simulations that use estimated parameters to predict outside the range of observed policy variation are **inherently** subject

to a ***high level of uncertainty that is difficult to quantify.***” *Id.*, at 5. Courtemanche acknowledged, for example, that the simulations were unrealistic because “voluntary social distancing by individuals and businesses would have likely increased” had governments not instituted NPIs. *Id.*, at 6.

Perhaps most noteworthy about the Courtemanche paper is this: “[O]ur results are not informative about the effectiveness of intermediate measures, such as lifting a[n] SIPO but requiring masks in public or opening restaurants at reduced capacity.” *Id.*, at 6. In other words, this study sheds no light on whether less restrictive alternatives—like those in place now—could have achieved the same outcome without the economic devastation the Lockdown Orders visited upon us. Of course, given the alleged infringement upon fundamental rights, strict scrutiny saddles the Government with the burden of proving that it used the least restrictive means to achieve its interest. This study doesn’t move the needle on that issue.

6. ***Hslang Article.*** Amici cite Hslang for the proposition that school and business closures significantly reduced the virus’s growth rate worldwide. ECF 19-1, PageID.549 (citing Hslang, et al., *The effect of large-scale anti-contagion policies on the COVID-19 pandemic*, Nature (Jun. 8, 2020) (pre-peer review publication) (“HSLANG”)). There are at least three points to consider about Hslang.

First, it conflicts with Courtemanche, inasmuch as it claims to have detected growth-limiting effects from school closures. Although school closures are not at issue in this case, Plaintiffs note that disagreement amongst the “experts” on the efficacy of individual NPIs undercuts the “medical consensus” amici try to portray (and which was important to the *Jacobson* Court).

Second, Hslang only analyzed confirmed *infections*, not hospitalizations or death, which were the two metrics that purportedly drove the lockdown. HSLANG, at 4.

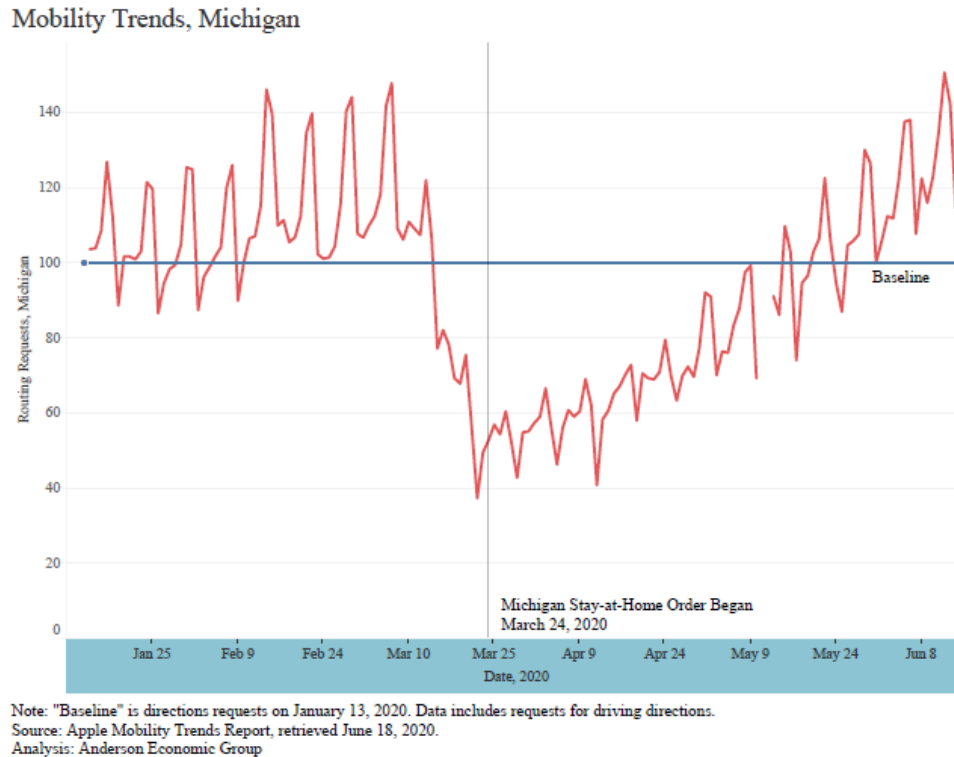
Third, as Plaintiffs allege in the Complaint, there is a difference between the virus and the disease, one does not inevitably cause the other, and the supermajority of people

who catch the virus are asymptomatic (*i.e.*, they do not develop the disease) or they suffer only mild-to-moderate disease symptoms that do not require hospitalization. ECF 8, ¶¶ 42–43, PageID.96. Thus, the number of cases alone does not move the needle on whether a public health emergency exists. It is the virus’s alleged lethality that purportedly justifies dynamiting constitutional bedrock.

7. ***Ebell Article.*** Amici cite another recently published study comparing the rate of increase in coronavirus infections in Clarke County, Georgia, against surrounding counties that implemented a local SIPO later than Clarke County. ECF 19-1, PageID.550 (citing Ebell, et al., *Mandatory social distancing associated with increased doubling times*, *Am. J. of Preventative Medicine* (May 30, 2020) (pre-proof copy) (“EBELL”)). Beyond the limitations acknowledged by the authors, a key assumption has since been tested in the real world, and the results may or may not match expectations. Ebell assumes a 5-day median for incubation, plus a 5-day lag in test results. This article was prepared based on data from March and April 2020. Two months later, we aren’t seeing explosions of cases after weeks of close-quarters protests and riots; at least that’s the official story (one that defies common sense). If the policies are so successful, and the Hatchett article tells us that second waves follow the lifting of NPIs, then why aren’t we seeing massive spikes after a month of protests if Ebell and others are right that NPIs and SIPOs limit the speed of the spread? Does this not empirically undercut their counterfactual models? Expert discovery will yield more definite answers.

If the Court could reach any of this at the pleading stage, it would have to draw reasonable inferences in Plaintiffs’ favor, including shortcomings and limitations in the research articles themselves, as compared to each other, and countervailing data. For example, AEG has analyzed mobility trends in Michigan using Apple data, which show a massive drop in queries for direction during the two weeks ***before*** the Lockdown Orders went into place. This suggests that voluntary behavior—which, of course, does not offend the Constitution in the slightest—was far more responsible for limiting the spread

of the virus than mandatory and constitutionally-suspect orders:



8. ***Imperial College.*** Amici also rely on a June 2020 report from Imperial College on state-level tracking of COVID-19 in the United States, despite the College's earlier and wildly inaccurate predictions of death rates. ECF 19-1, PageID.553 (citing Unwin, *Report 23: State-level tracking of COVID-19 in the United States*, Imperial Coll. (May 24, 2020) ("IMPERIAL COLLEGE")).³² As with all of the other articles, none of the factual averments in amici's brief or in the article can be judicially noticed; they cannot be properly considered under the Rule 12(b)(6) standard. Still, there are a few observations worth making here.

First, the College admitted that its results "must be heavily caveated: our results do not account for additional interventions that may be introduced such as mass testing,

³² Compare with Walker, *The global impact of COVID-19 and strategies for mitigation and suppression*, at Table 1, Imperial Coll. (Mar. 26, 2020) (originally projecting 3 million dead in 8 months without mitigation efforts and 520,000 dead in 8 months even with mitigation efforts).

contact tracing, ***and changing workplace*** / transit ***practices*** ... Therefore, our scenarios are pessimistic in nature and should be interpreted as such.” IMPERIAL COLLEGE, at 16, § 3. Amici make no mention of these caveats. Nor do they acknowledge that the College refrained from studying whether workplace could reopen with new practices that could mitigate the spread of the virus.

Second, the College found that transmission of the coronavirus is “correlated with population density.” *Id.*, at 5, § 2.2. This actually supports Plaintiffs’ thesis that a statewide closure of business does not square with the asserted public health concerns, since most of the state is rural with low population density.

Third, amici say that the College “confirms” that the “aggressive actions implemented in Michigan ... significantly lowered the transmission rates of the virus, thus reducing the number of cases and deaths.” ECF 19-1, PageID.553. Yet the College does not say this in its report. The College ***assumes*** NPIs decrease mobility and ***hypothesizes*** that increasing mobility (when lockdown orders are relaxed or lifted) will cause an increase in infections. That’s hardly news. It’s as intuitive as applying pressure to a wound; it’ll start to bleed again if you stop applying pressure. It is consistent with what Hatchett observed back in 2007: NPIs are only effective while they are in place. Amici—like the Government—need to be clear on what the goal is. Is it to keep the curve manageable so that hospitals can keep pace with cases requiring hospitalization? If so, the Anderson Economic Group’s report shows that mission was accomplished within three weeks, in which case any suppression of constitutional freedoms beyond that date are void *ipso facto*, apart from any argument about the lawfulness of those suppressions during the three-week period. Or is their goal to reach and maintain zero cases and deaths while we wait for a vaccine that may never come, at the indefinite expense of our inalienable rights to life, liberty, and the pursuit of happiness—especially for the 80%+ who are at low risk? If that’s the objective, constitutional rights must always trump epidemiologists’ policy preferences. Life is not, and has never been, a risk-free endeavor.

Freedom is not contingent on safety. “Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.” Franklin, *The Works of Benjamin Franklin Vol. VII: Letters and Miscellaneous Writings 1775–1779*, p.58 (Putnam ed. 1904), <https://perma.cc/9RLB-4W4K>.

9. **Oyster Bay Polio Outbreak.** Amici point to a polio outbreak in Oyster Bay, New York, in 1916, as proof that questioning medical experts causes death. ECF 19-1, PageID.556 (citing Risse, *Revolt against quarantine: Community responses to the 1916 polio epidemic, Oyster Bay, New York*, 14 Transactions & Studies of the Coll. of Phys. of Phila. 1, 23–50 (1992) (“RISSE”)). The paternalism is palpable. Risse noted that Oyster Bay was a vacation community with a poorer year-round population compared to wealthier urbanites who summered there. The locals could not afford improvements to public sanitation. They were skeptical that public health officers were ginning up health scares to press them into spending money they couldn’t afford on infrastructure they didn’t need. RISSE, at 23–27. A polio outbreak coincided with this public debate. *Id.*, at 27–30. Quarantine measures were put in place, with arbitrary enforcement. *Id.*, at 30, 37. About two months later, the number of cases (not deaths) reached 100. *Id.*, at 37. Suffering increased unemployment and remaining skeptical of the “experts,” who had reputations to protect for continuing quarantine measures (lest they be proved wrong about instituting them in the first place), residents revolted and the town council lifted restrictions. *Id.*, at 37–43. A whopping **six** additional cases occurred. That’s it. Six. *Id.*, at 44. Although Risse notes that Oyster Bay had a greater per capita rate of infection than anywhere else in New York, he does not tell us what the death toll was. *Id.*, at 46. The Government has identified two objectives: (1) flattening the curve; and (2) saving lives. Risse’s article tells us little about flattening and nothing about lives saved.

10. **Thunström Economics Article.** Finally, amici proffer a cost-benefit analysis, citing an article that says that the damage lockdowns will cause is far less than the value of lives saved when assigning a dollar value to human life. ECF 19-1, PageID.556–557

(citing Thunström, et al., *The benefits and costs of using social distancing to flatten the curve for COVID-19*, J. Cost-Benefit Analysis (Apr. 14, 2020, publication forthcoming) (“THUNSTRÖM”)). Plaintiffs disagree, analytically and philosophically.

Analytically, Thunström’s math rests upon a key assumption: GDP will decline by 6.2% in 2020, and then rebound 5.5% in 2021, 3.5% in 2022, and 2.0% in 2023. THUNSTRÖM, at 7. Perhaps at the beginning of pandemic, that seemed reasonable. Unfortunately, the near total shutdown of the national economy lasted for months. Consequently, the economic news is far bleaker. The blue-chip consensus is that GDP has dropped 35% through June 4, and the Atlanta Fed’s GDPNow estimate is that GDP actually dropped by as much as 55% through June 4. Atlanta Fed GDPNow™ Estimate for 2020:Q2, Fed. Reserve Bank of Atl. (Jun. 26, 2020), <https://perma.cc/S6ZP-WZK2>. Fortunately, GDPNow estimates that the economy has “improved” to -39% GDP as of June 26, 2020. <https://perma.cc/9WM4-7QJK>. Many states are announcing a new round of closures, so the positive trend is far from assured. Nonetheless, we are looking at a far greater drop than Thunström assumed. And, Plaintiffs note, Thunström’s research says the tipping point where the costs exceed the benefit is a decline in GDP (with social distancing) of 8.5% or more. THUNSTRÖM, at 12. We are looking at a decline in GDP far beyond that.

Yet philosophically—and more importantly—Plaintiff’s reject amici’s cost-benefit premise. You cannot put a price on human life. This case is not about money versus lives. It is about saving lives on both sides of the equation. People are dying from COVID-19, but people are also dying from suicide, drug overdoses, alcohol abuse, and domestic violence because they can’t work. “Doctors in Northern California say they have seen more deaths from suicide than they’ve seen from the coronavirus during the pandemic. ‘The numbers are unprecedented,’” Dr. Michael deBoisblanc of John Muir Medical Center in Walnut Creek, California, told ABC 7 News about the increases of deaths by suicide, adding that he’s seen a ‘year’s worth of suicides’ in the last four weeks alone.” Miller,

California doctors say they've seen more deaths from suicide than coronavirus since lockdowns, Washington Examiner (May 21, 2020), <https://bit.ly/CalifLockdownSuicides>.

A recent study estimates that the United States will experience up to 150,000 excess “deaths of despair” than it otherwise would have because of SIPOs and other NPIs that shuttered the economy. Patterson, et al., *Projected Deaths of Despair During the Coronavirus Recession* 11, Table, Well Being Trust (May 8, 2020) (“PATTERSON”), <https://perma.cc/Y6XH-9JYM>. Michigan alone is conservatively projected to see an extra 1,588 deaths of despair.³³ *Id.*, at Appx. Michigan is also seeing spikes in domestic violence from 25–48% around the state. See, e.g., Hogan, *Domestic violence cases spike 48%; prosecutor calls it a worrisome trend*, ABC 13 News (Apr. 3, 2020), <https://perma.cc/VW44-T527>; WWJ News, *Domestic violence calls spike 25% under Michigan 'stay home' order*, WWJ Newsradio 950 (Mar. 25, 2020), <https://perma.cc/MEL5-F3H5>. Opioid-related deaths are up. “‘If you’re alone, there’s nobody to give you the Narcan,’ said one coroner.” Sanchez & Eldeib, *Overdose deaths have skyrocketed in Chicago, and the coronavirus pandemic may be making it worse*, ProPublica Illinois (May 30, 2020),

These are our family, our friends, our neighbors, our coworkers, our employees. The Government wants to claim it is acting to save lives. It doesn’t get to do that by imposing conditions that kill others. That’s picking who lives and who dies, and that is emphatically not the proper role of government in a free society.

CONCLUSION

The Government and amici focus their time arguing whether the Lockdown Orders are good public policy and have a rational basis. That debate is for another day. Today,

³³ In fairness, the Patterson study says it is not advocating to fully reopen the economy immediately and without restrictions. PATTERSON, at 14, Policy Solutions. Of course, neither are Plaintiffs. It is plain, though, that work provides dignity and meaning to people’s lives—it is how we pursue happiness. Taking that away from them does much more than violate abstract notions of constitutional rights.

there are only two questions before the Court: (1) does it have subject-matter jurisdiction; and (2) does the Complaint state a claim upon which relief can be granted?

The standard of review for both questions is the same. The Court must accept Plaintiffs' well-pleaded factual allegations as true and draw all reasonable inferences in their favor.

Jurisdiction. The Government argues that the claims are moot and unripe, that Plaintiffs lack pre-enforcement standing, and that MCA lacks organizational standing. The claims are not moot under the evading-review doctrine. The claims are ripe, and Plaintiffs have pre-enforcement standing, because Plaintiffs have already suffered an injury-in-fact. They would have conducted business but for the Lockdown Orders, and they faced a credible threat of prosecution if they violated those orders. MCA has organizational standing. Its individual members would have standing to sue over the lockdown orders. The interests are germane to the organization's purpose: promoting the operation of carwashes. Finally neither the claims nor the relief requested requires the participation of MCA's individual members in this litigation.

Rule 12(b)(6). Although Plaintiffs concede that the Court should dismiss Counts II–III, the rest of the claims in the Complaint state causes of action upon which relief can be granted.

In Count I, Plaintiffs allege that the Lockdown Orders impermissibly interfere with interstate commerce. The Government disagrees, but that is a merits question. The Court is not tasked at this stage with evaluating the likelihood of success on the merits.

In Count IV, Plaintiffs assert a procedural due process claim. They claim the Government violated several of their constitutionally-protected interests without providing process. Some process is due; how much is a fact-intensive question under *Mathews v. Eldridge* that must await an adjudication on the merits.

In Count V, Plaintiffs assert a substantive due process claim. They claim that the Government violated their fundamental rights. This requires the Government to prove

that it had a compelling governmental interest and that it selected the least restrictive means available to achieve that interest. The Government claims that COVID-19 established a compelling governmental interest in protecting public health, but Plaintiffs have factually challenged that assertion. In addition, Plaintiffs have alleged that they can operate their businesses just as safely as those allowed to remain open. At this stage, the Court cannot decide whether the Government had a compelling interest or whether the Lockdown Orders were narrowly tailored to achieve that interest. Those are fact-intensive inquiries that must be resolved on summary judgment or after trial. Even if the Court determines that *Jacobson* reasonableness review applies (which Plaintiffs contend is higher than rational-basis review), the question of whether the Lockdown Orders were reasonable can be answered only after discovery.

In Count VI, Plaintiffs assert an equal protection claim. They claim that they have been treated differently than other businesses, that they are similarly situated with those other businesses, and that the disparate treatment burdened fundamental rights (or, in the alternative, was unreasonable). The Government again disagrees on the merits, but the Court is only concerned with whether Plaintiffs' have stated a claim—not with whether they will ultimately prevail. Count VI states a claim for the same reason as Count V.

Finally, in Count VII, Plaintiffs claim that the Lockdown Orders are void for vagueness. Again, the Government disagrees. Yet the Complaint identifies bases for Plaintiffs' vagueness challenge, and carve-outs for constitutional rights in subsequent executive orders further support a plausible view that the Lockdown Orders are vague.

PRAYER FOR RELIEF

For these reasons, Plaintiffs respectfully ask the Court to deny the Government's motion.

Respectfully submitted,

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Dated: July 6, 2020

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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

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS**

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EXHIBIT 1

IN THE COURT OF CLAIMS
STATE OF MICHIGAN

THE HOUSE OF
REPRESENTATIVES, and
THE SENATE,

Plaintiffs,

v.

GOV. GRETCHEN E. WHITMER,
Defendant.

Case No. 20-000079-MZ

HON. CYNTHIA D. STEPHENS

**BRIEF OF AMICI CURIAE
SIGNATURE SOTHEBY'S INTERNATIONAL REALTY, INC.,
EXECUTIVE PROPERTY MAINTENANCE, INC.,
INTRACO CORPORATION, INC.,
CASITE INTRACO, LLC,
BAHASH & CO., LLC,
WILLIAM A SHORTT D.D.S. & THERESE F. SHORTT D.D.S., P.C., and
MIDWEST CARWASH ASSOCIATION**

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INTEREST OF AMICI CURIAE

The Constitution of the United States is a law for rulers and people, equally in war and in peace, ... at all times and under all circumstances. 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 US (4 Wall) 2, 121; 18 L Ed 281 (1866).

When [the executive] takes measures incompatible with the express or implied will of [the legislature], [her] power is at its lowest ebb ... [Executive] claim[s] to power ... must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Youngstown Sheet & Tube Co v Sawyer, 343 US 579, 637–638; 72 S Ct 863; 96 L Ed 1153 (1952).

Although the parties will surely advocate well for their respective institutional interests, an important viewpoint is missing from this dispute: the perspective of some who are affected by the Governor’s executive orders (“**EOs**”), suffering the loss of both self-government and civil liberties. Amici, businesses that are subject to the EOs, can provide the Court with this perspective.

Amici are people in the eyes of the law who enjoy constitutional rights. Before the EOs, their owners and employees were the beating hearts of our economy. Now these men and women are either jobless, struggling to make ends meet, or both, while their government threatens their licenses and their freedom if they dare work to put food on their tables and keep roofs over their heads.

* Rule 7.212(H)(3) Disclosure: No one except for the listed amici made a monetary contribution intended to fund the preparation or submission of this brief. None of the parties’ attorneys authored this brief in whole or in part.

AMICI CURIAE

Signature Sotheby's International Realty ("**Sotheby's**"), is a Michigan limited liability company with its principal place of business in Birmingham, Michigan. 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, none of its real estate agents worked for several weeks, and it had to lay off six employees. Even though EO 2020-70 released many restrictions on Sotheby's, it remains deeply troubled by the Governor's suggestion that her powers are like a "dial" that she can turn up and down at will, and her suggestion that she may issue similar orders, without legislative approval, if there is a "second wave" of infections.

Executive Property Maintenance, Inc. ("**EPM**"), is a Michigan corporation with its principal place of business in Plymouth, Michigan. 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, all EPM employees were ordered to stop work. Even though EO 2020-59 released many restrictions on EPM, it still suffers substantial injuries from the restrictions placed on its vendors and customers. EPM is also concerned about the Governor's suggestion that she may re-impose her job-killing orders in the future without legislative approval.

Intraco Corporation, Inc. ("**Intraco**"), is a Michigan corporation with its principal place of business in Troy, Michigan. 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 Governor's executive orders. 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.

Casite Intraco, LLC ("**Casite**"), is a Michigan limited liability company, and a wholly-owned subsidiary of Intraco, with its principal place of business in Troy, Michigan. 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.

Bahash & Company, LLC, doing business as **Hillsdale Jewelers**, is a Michigan limited liability company with its principal place of business in Hillsdale, Michigan. 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 at issue. All three of its employees, including owner-employee Chris Bahash, are unemployed.

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 in South Lyon, Michigan, with a second location in West Branch, Michigan. Shortt Dental

engages in intrastate commerce, but depends on interstate commerce for the goods necessary to perform intrastate services. Both locations have been forced to close because of the EOs. Shortt Dental normally employs 2 dentists, 4 dental hygienists, 12 office assistants, and 4 front desk workers, most of whom are currently unemployed. Shortt Dental's revenue has decreased at least 75% due to the EOs. The only service it currently provides is emergency care limited to patient complaints of acute pain.

Midwest Carwash Association, Inc. ("**MCA**"), is a Michigan corporation with its principal place of business in Lansing, Michigan. MCA is an association of carwashes located in Michigan, Wisconsin, Illinois, Indiana, and Ohio. It 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 EOs, 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 provide exterior carwashes safely and without risk to the public.

JURISDICTION

Amici agree with the House of Representatives and the Senate (the “**Legislature**”) that the Court has exclusive jurisdiction over this action for declaratory relief against the Governor under MCL 600.6419(1)(a).

QUESTIONS PRESENTED

- QUESTION NO. 1: Has the Governor exceeded her powers under the EMA?
- QUESTION NO. 2: Has the Governor exceeded her powers under the EPGA?
- QUESTION NO. 3: If not, has the Governor applied these Acts in a manner that violates the Separation of Powers Clause of the Michigan Constitution of 1963?

TIMELINE OF RELEVANT EXECUTIVE AND LEGISLATIVE ACTION

EO 2020-04. On March 11, 2020, citing the EPGA and the EMA, the Governor declared a “state of emergency” based upon two presumptive diagnoses of coronavirus disease (“**COVID-19**”), a respiratory illness caused by SARS-CoV-2, which stands for severe acute respiratory syndrome coronavirus two (the “**coronavirus**”). Exhibit 1.

EO 2020-20. On March 22, 2020, citing both Acts, the Governor closed to the public a wide range of public accommodations, including all restaurants, coffeehouses, and other places offering food or beverages for on-site consumption. Exhibit 2.

EO 2020-21. On March 23, 2020, citing both Acts, the Governor prohibited all in-person work that she deemed “not necessary to sustain or protect life.” Exhibit 3.

EO 2020-33. On April 1, 2020, citing both Acts, the Governor expanded the emergency declaration to include a state of disaster under the EMA. Exhibit 4.

2020 SCR 24. On April 7, 2020, the Legislature voted to extend the emergency and disaster declarations under the EMA through April 30, 2020. Exhibit 5.

EO 2020-42. On April 9, 2020, citing both Acts, the Governor extended EO 2020-21 through April 30, 2020, while imposing greater restrictions on the general public than before. Exhibit 6.

EO 2020-43. On April 13, 2020, citing both Acts, the Governor extended EO 2020-20 through April 30, 2020. Exhibit 7.

EO 2020-59. On April 24, 2020, citing both Acts, the Governor extended EO 2020-42 through May 15, 2020—beyond the April 30th deadline that the Legislature approved. It purports to loosen restrictions as part of a phased reopening of the economy. Exhibit 8.

2020 SB 858. On April 28, 2020, the Legislature passed a bill terminating the declared emergency and disaster while extending 28 executive orders through dates ending in May, June, July, and December 2020. Exhibit 9.

EO 2020-66. On April 30, 2020, the Governor declared an end to the states of emergency and disaster under the EMA. Exhibit 10.

EO 2020-67. On April 30, 2020, the Governor unilaterally extended the declared state of emergency under the EPGA. Exhibit 11.

EO 2020-68. On April 30, 2020, the Governor declared a “new” emergency and a “new” disaster under the EMA, citing the same public-health grounds as before. Exhibit 12.

EO 2020-69. On April 30, 2020, citing both Acts, the Governor extended EO 2020-43 through May 28, 2020. Exhibit 13.

EO 2020-70. On April 30, 2020, citing both Acts, the Governor extended EO 2020-59 through May 15, 2020, while also loosening restrictions as part of a phased reopening of the economy. Exhibit 14.

2020 SJ 37. On May 4, 2020, the Governor vetoed Senate Bill 858 of 2020. Exhibit 15.

EO 2020-77. On May 7, 2020, citing both Acts, the Governor extended EO 2020-70 through May 28, 2020, while also purporting to loosen restrictions as part of a phased reopening of the economy. Exhibit 16.

**PREVALENCE BY THE
GOVERNOR’S RECOVERY COUNCIL REGION
AS OF MAY 12, 2020
ALPHABETICAL WITHIN REGION**

Region 1—Detroit Region

County	Approx. 2010 Census	Confirmed Cases	% Confirmed	Deaths	% Deceased
Genesee	163,000	366	0.225	28	0.017
Lapeer	88,000	175	0.199	30	0.034
Livingston	181,000	377	0.208	22	0.012
Macomb	841,000	6,097	0.725	710	0.084
Monroe	152,000	399	0.263	18	0.012
Oakland	1,202,000	7,784	0.648	872	0.073
St. Clair	163,000	366	0.225	28	0.017
Washtenaw	345,000	1,206	0.350	82	0.024
Wayne	1,820,000	18,274	1.004	2,140	0.118

Region 2—Grand Rapids Region

County	Approx. 2010 Census	Confirmed Cases	% Confirmed	Deaths	% Deceased
Clare	31,000	12	0.039	2	0.006
Ionia	64,000	110	0.172	3	0.005
Isabella	70,000	61	0.087	7	0.010
Kent	602,000	2,416	0.401	45	0.007
Lake	11,000	2	0.018	0	---
Mason	29,000	23	0.079	0	---
Mecosta	43,000	16	0.037	2	0.005
Montcalm	63,000	47	0.075	1	0.002
Muskegon	172,000	401	0.233	20	0.012
Newaygo	48,000	36	0.075	0	---
Oceana	27,000	34	0.126	1	0.004
Osceola	23,000	9	0.039	0	---
Ottawa	264,000	430	0.163	20	0.008

Region 3—Kalamazoo Region

County	Approx. 2010 Census	Confirmed Cases	% Confirmed	Deaths	% Deceased
Allegan	111,000	161	0.145	2	0.002
Barry	59,000	52	0.088	1	0.002
Berrien	157,000	411	0.262	25	0.016
Branch	45,000	82	0.182	2	0.004
Calhoun	136,000	52	0.038	1	0.001
Cass	52,000	43	0.083	2	0.004
Kalamazoo	250,000	636	0.254	36	0.014
St. Joseph	61,000	71	0.116	1	0.002
Van Buren	76,000	94	0.124	4	0.005

Region 4—Saginaw Region

County	Approx. 2010 Census	Confirmed Cases	% Confirmed	Deaths	% Deceased
Alcona	11,000	4	0.036	1	0.009
Arenac	16,000	28	0.175	1	0.006
Bay	108,000	214	0.198	10	0.009
Gladwin	26,000	18	0.069	1	0.004
Huron	33,000	36	0.109	1	0.003
Iosco	26,000	55	0.212	8	0.031
Midland	84,000	67	0.080	8	0.010
Ogemaw	22,000	15	0.068	0	---
Oscoda	9,000	5	0.056	1	0.011
Saginaw	200,000	829	0.415	87	0.044
Sanilac	43,000	38	0.088	5	0.012
Tuscola	56,000	162	0.289	17	0.030

Region 5—Lansing Region

County	Approx. 2010 Census	Confirmed Cases	% Confirmed	Deaths	% Deceased
Clinton	75,000	126	0.168	10	0.013
Eaton	108,000	152	0.141	6	0.006
Gratiot	42,000	33	0.079	4	0.010
Ingham	281,000	594	0.211	17	0.006
Shiawassee	70,000	214	0.306	18	0.026

Region 6—Traverse City Region

County	Approx. 2010 Census	Confirmed Cases	% Confirmed	Deaths	% Deceased
Alpena	29,000	87	0.300	8	0.028
Antrim	23,000	10	0.043	0	---
Benzie	17,000	4	0.024	0	---
Charlevoix	26,000	13	0.050	1	0.004
Cheboygan	26,000	19	0.073	1	0.004
Crawford	14,000	57	0.407	4	0.029
Emmet	33,000	21	0.064	2	0.006
G. Traverse	87,000	21	0.024	5	0.006
Kalkaska	17,000	17	0.100	2	0.012
Leelanau	22,000	9	0.041	0	---
Manistee	25,000	11	0.044	0	---
Missaukee	15,000	16	0.107	1	0.007
Montmorency	10,000	5	0.050	0	---
Otsego	24,000	98	0.408	10	0.042
Presque Isle	14,000	11	0.079	0	---
Roscommon	24,000	20	0.083	0	---
Wexford	33,000	11	0.033	2	0.006

Region 7—Jackson Region

County	Approx. 2010 Census	Confirmed Cases	% Confirmed	Deaths	% Deceased
Hillsdale	46,000	152	0.330	22	0.048
Jackson	160,000	401	0.251	26	0.016
Lenawee	99,000	129	0.130	2	0.002

Region 8—Upper Peninsula

County	Approx. 2010 Census	Confirmed Cases	% Confirmed	Deaths	% Deceased
Alger	10,000	0	---	0	---
Baraga	9,000	1	0.011	0	---
Chippewa	38,000	2	0.005	0	---
Delta	37,000	14	0.038	2	0.005
Dickinson	26,000	5	0.019	2	0.008
Gogebic	16,000	4	0.025	1	0.006
Houghton	37,000	2	0.005	0	---
Iron	12,000	0	---	0	---
Keweenaw	2,000	0	---	0	---
Luce	7,000	1	0.014	0	---
Mackinac	11,000	6	0.055	0	---
Marquette	67,000	51	0.076	10	0.015
Menominee	24,000	6	0.025	0	---
Ontonagon	7,000	0	---	0	---
Schoolcraft	8,000	4	0.050	0	---

INTRODUCTION

Michigan is now two weeks deep into a constitutional crisis. It is not some abstract turf war between the political branches. For the first time in our state's history, power has been consolidated into the hands of one person. The Legislature—the voice of the people—has objected and been ignored. The judiciary, too, has been directly challenged. Inconvenient rulings are sidestepped with summary administrative action, as recently happened after a court insisted on giving a 77-year-old barber due process.

With the importance of this matter so framed, amici offer to the Court their views on the legality of the Governor's continued stay-home and closure orders ("**Lockdown Orders**") over the Legislature's objection. The Emergency Powers of the Governor Act of 1945 ("**EPGA**") and the Emergency Management Act of 1976 ("**EMA**") do not give governors indefinite, unlimited, and unfettered power for as long as they please. Yet this is, at bottom, the Governor's contention. She posits that the judiciary must defer to her assessment that an emergency exists, and that the Legislature is powerless to limit her exercise of power unless it can muster a veto-proof majority.

Emergencies are defined in the EMA and limited to 28 days absent legislative approval. The Governor violated the Act when she re-declared an emergency after the Legislature declined to approve an extension. Even if this time limit did not exist, the Lockdown Orders still exceed the powers granted to her under the Act. On an objective view of the facts, no epidemic currently exists within the meaning of the statute. Even if one did exist, the Public Health Code limits how the Governor can restrict the freedom of those who are uninfected, even if they are suspected carriers of the virus. In addition, the Lockdown Orders fail to specify the conditions that, when achieved, will mark the end of the emergency, as is required under the Act. Moreover, the Lockdown Orders are substantively unreasonable.

The Governor has also exceeded her authority under the EPGA. This Act applies during local instances of civil unrest, not to statewide public health emergencies. Even if

the Act applied to the current situation, the EPGA only authorizes reasonable actions, and the Lockdown Orders are substantively unreasonable.

Assuming *arguendo* that one or both of the Acts applies and that the Governor is in full compliance with their terms, then the Court must reach the constitutional question of whether these statutes violate the Separation of Powers Clause as applied. Amici submit that the Lockdown Orders are unconstitutional exercises of legislative power by the Governor.

ARGUMENT

I. EMA: The Governor has exceeded her statutory powers under the Emergency Management Act.

A. The EMA prohibits a Governor from unilaterally declaring a “new” emergency or a “new” disaster after the initial 28-day period has lapsed under the Act.

Under the Emergency Management Act (“**EMA**”), a governor may declare an emergency if an emergency has occurred or the threat of an emergency exists. MCL 30.403(4). An “emergency” is “an occasion or instance in which the governor determines that state assistance is needed to supplement local efforts and capabilities to save lives, protect property, and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state.” MCL 30.402(h).

A governor may also declare a disaster if a disaster has occurred or the threat of a disaster exists. MCL 30.403(3). A “disaster” includes an “epidemic.” MCL 30.402(f). Neither the EMA nor any other statute defines the term “epidemic.”

Both types of declarations are limited to 28 days, unless the Legislature approves an extension of the emergency or disaster declaration for a specific number of days. MCL 30.403(3)–(4). If the Legislature does not approve an extension (or does not approve additional extensions), then the governor must declare the emergency and/or the disaster terminated after 28 days (or at the end of the authorized extension). *Ibid.*

On March 11, 2020, Governor Whitmer declared a state of emergency under the EMA. Exhibit 1, EO 2020-04. Absent legislative approval, this declared emergency would have automatically terminated 28 days later on April 8, 2020.

On April 1, 2020, the Governor expanded the emergency declaration to include a state of disaster under the EMA. Exhibit 4, EO 2020-33. Absent legislative approval, this declared disaster would have automatically terminated 28 days later on April 29, 2020.

On April 7, 2020, at the Governor's request, the Legislature voted to extend both the emergency and disaster declarations under the EMA through April 30, 2020. Exhibit 5, 2020 SCR 24. This had the salutary effect of aligning the dates for both declarations and setting a single end date for emergency management under the Act.

As the April 30th deadline approached, the Governor asked the Legislature to grant a second extension of the declared emergency and disaster. The Legislature declined to do so. Instead, it passed a bill on April 28th that would have terminated the emergency and disaster while codifying some of the Governor's executive orders into May, June, July, and December 2020. Exhibit 9, 2020 SB 858. The Governor vetoed the bill on May 4, 2020. Exhibit 15, 2020 SJ 37.

Between passage and veto, the April 30th deadline occurred without the Legislature approving an extension. As required by the EMA, the Governor declared the emergency and disaster terminated. Exhibit 10, EO 2020-66. Literally one minute later, she re-declared an emergency and a disaster under the EMA. Exhibit 12, EO 2020-68. The new declaration cites the same alleged epidemic as justification for invocation of the Act.¹ *Ibid.* However pure the Governor's motives might be, and however serious one might believe the coronavirus to be, we remain a people committed to the rule of law. Her actions cannot be squared with the plain language of the statute.

¹ EO 2020-68 also cites the economic fallout from the coronavirus—fallout largely attributable to the Governor's own executive orders locking down the state and criminalizing most forms of commerce. Economic harm does not qualify as an "emergency" or a "disaster," as those terms are defined in the EMA. See MCL 30.402(e), (h).

Statutory interpretation begins with the statutory text. *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). “[W]here the statutory language is clear and unambiguous, the statute must be applied as written.” *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). “[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *Roberts v Mecosta Cty Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Courts must construe the text as a whole. See *Sweatt v Department of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003).

EO 2020-68 conflicts with the plain language of the EMA. The Act requires that declared emergencies and disasters be “terminated” after 28 days absent an approved extension by the Legislature. MCL 30.403(3)–(4). The word “terminate” is not a technical word; it must therefore be construed and understood according to its common and approved usage. MCL 8.3a. In both civilian and legal dictionaries, the verb “terminate,” means “[t]o put an end to” or “to bring to an end.” Black’s Law Dictionary (11th ed. 2019); *Mac’s Shell Serv, Inc v Shell Oil Prods Co, LLC*, 559 US 175, 182–183; 130 S Ct 1251; 176 L Ed 2d 36 (2010) (same, citing Webster’s New Int’l Dictionary). Simply put, the EMA authorizes governors to act unilaterally for up to 28 days without legislative approval. MCL 30.403(3)–(4). After that, governors can act under the EMA only with legislative approval. *Ibid*. If the Legislature withholds its approval, then the Governor must declare the emergency or disaster terminated. *Ibid*.

Up through April 30th, Governor Whitmer conformed to the statutory scheme.² After declaring an emergency and a disaster, she requested—and the Legislature approved—an extension of both. Exhibit 5, 2020 SCR 24. When she asked for another extension, the Legislature declined to grant one. She then terminated the emergency and disaster.

² Although she may have adhered to the EMA’s procedural requirements, the Governor still exceeded her powers in substance, both before and after April 30th. See Part I.B, *infra*.

A statutory violation occurred when the Governor declared a “new” emergency and a “new” disaster premised upon the same circumstances that existed 60 seconds earlier when she terminated the original declarations. This new declaration eliminates the legislative oversight built into the EMA. If a governor can re-declare emergencies and disasters after 28 days (or after the expiration of an approved extension), then the approval process is pointless theater and the 28-day limit is no limit at all. This result is at odds with the canons of statutory construction. “Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory.” *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008). A provision “is rendered nugatory when an interpretation fails to give it meaning or effect.” *Apsey v Memorial Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007). Courts have also said that interpretations must avoid rendering a portion of a statute “meaningless” or “unnecessary.” *Herald Wholesale, Inc v Department of Treas*, 262 Mich App 688, 699; 687 NW2d 172 (2004); *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 399; 738 NW2d 664 (2007). In short, the Court must apply “any reasonable construction” before it accepts a reading that renders part of a statute “unnecessary.” *Ex parte Landaal*, 273 Mich 248, 252; 262 NW 897 (1935).

B. Even assuming *arguendo* that the Governor can declare new emergencies and disasters without Legislative approval, she has still exceeded her powers in four ways.

1. The Governor cannot prove that an epidemic exists throughout the entire state or that there is a statistically significant threat of a statewide epidemic.

When declaring an emergency or a disaster, the EMA requires a governor to specify the “area or areas threatened.” MCL 30.403(3)–(4). Since March 11, 2020, Governor Whitmer has declared the entire state to be threatened by an epidemic: COVID-19. Exhibit 1, EO 2020-04(1); Exhibit 4, EO 2020-33(1); Exhibit 12, EO 2020-68(1). Yet, over the past two months, we have seen that the entire state has not been uniformly affected. A review of the eight regions comprising the Governor’s Economic Recovery

Council reporting regions, in light of the data on the state’s official coronavirus webpage as of May 12, 2020, makes this plain.³

Before turning to a regional analysis, amici pause to define the term “epidemic.” As noted earlier, the term is not defined in any statute. The venerable Oxford English Dictionary defines the term to mean “prevalent among a people or a community at a special time, and produced by some special causes not generally present in the affected locality,” or more simply “widespread, widely prevalent, universal.” OED Online, www.oed.com/view/Entry/63307 (Mar. 2020). The OED traces the modern origin of this term to Dr. Thomas Lodge’s treatise on plagues, which defined an epidemic to be a sickness common to all people or to most of them. *Ibid.*

As will be seen in this section, COVID-19 is not epidemic throughout Michigan, and the Governor has put forward no evidence to establish that it is. Instead, she has oft repeated the mantra that “this is a global pandemic.” But the EMA speaks to epidemics in Michigan. Amici submit that Michigan law must be applied based on the facts as they actually exist in Michigan, not as they are elsewhere in the world.

Region 8—Upper Peninsula. There are 15 counties in the Upper Peninsula. Four of them still have no reported cases or deaths from COVID-19. In the 11 counties with confirmed cases, there are a total 96 reported cases and 15 deaths. The supermajority of

³ The data on the state’s webpage is misleading because it fails to distinguish between the coronavirus and the disease it can cause, COVID-19. The webpage reports “confirmed cases” of COVID-19, but it does not distinguish between: (1) the number of positive tests where a person never developed the disease; and (2) the number of positive tests where the person actually went on to develop the disease. By amalgamating the data in this way, it conveys a much higher incidence of the *disease* than actually exists. Yet even these inflated numbers do not add up to an epidemic, as will be seen in this section. To prove this point, amici will assume for purposes of their analysis that “confirmed cases of COVID-19” means confirmed cases of the *disease* and not merely to positive tests for the *virus*. Consequently, amici’s statistical analyses of these regions represent the *maximum* rates of disease diagnosis as of May 12, 2020. The numbers could only be smaller if asymptomatic positives for the virus were factored into the analysis.

cases and deaths are located in Marquette County, which reports 51 cases and 10 deaths, and Delta County, which reports 14 cases and two deaths. Each of the remaining counties with confirmed cases in the Upper Peninsula have had six cases or less, and only two of them have reported any deaths. According to the 2010 census, approximately 311,000 people live in the Upper Peninsula. This means, over an eight-week period, only 0.03% of people in the UP have been diagnosed with COVID-19, and only 0.005% have died from this disease. Any loss of life is tragic, but one cannot credibly claim that COVID-19 qualifies as an “epidemic” in the Upper Peninsula.

Region 7—Jackson Region. There are three counties in the Jackson region: Jackson, Hillsdale, and Lenawee counties. Combined, they have 682 cases and 50 deaths. According to the 2010 census, approximately 307,000 people live in this region. This means only 0.22% of the residents in this region have been diagnosed with COVID-19, and only 0.016% have died from it. This rate of infection and death does not qualify as an “epidemic.”

Region 6—Traverse City Region. There are 17 counties in the Traverse City region, where there are a total of 430 confirmed cases and 36 deaths. *Only three* counties in this region have recorded more than 25 confirmed cases: Alpena, Otsego, and Crawford counties. More than half the cases (242) and nearly all of the deaths (31) occurred in these counties. Of the remaining 14 counties, *none* have reached 25 cases of COVID-19. Seven counties in this region still have *no* deaths, and another six counties have only 1–2 deaths. *None* of the 17 counties have exceeded 10 deaths. According to the 2010 census, approximately 439,000 people live in this region. This means that only 0.10% of residents in these counties have been diagnosed with COVID-19, and only 0.007% of them have died from this disease. Again, this rate of infection and death does not qualify as an “epidemic.”

Region 5—Lansing Region. There are five counties in the Lansing region, where there are a total of 1,119 confirmed cases and 55 deaths.⁴ According to the 2010 census,

⁴ This marked disparity between confirmed cases and deaths in the Lansing region, compared to the Upper Peninsula, Traverse City, and Jackson regions underscores the

approximately 576,000 people live in this region. This means that only 0.19% of residents in the Lansing region have been diagnosed with COVID-19, and only 0.009% of residents have died from this disease. Again, this rate of infection and death does not qualify as an “epidemic.”

Region 4—Saginaw Region. There are 12 counties in the Saginaw region, where there are a total of 1,471 confirmed cases and 140 deaths.⁵ One county has no deaths, and six other counties have five or fewer deaths. Well over half of the confirmed cases and deaths are in Saginaw County, which has 829 confirmed cases and 87 deaths. According to the 2010 census, approximately 634,000 people live in this region. This means that only 0.23% of residents have been diagnosed with COVID-19, and only 0.022% have died from this disease. This rate of infection and death does not qualify as an “epidemic.”

Region 3—Kalamazoo Region. There are nine counties in the Kalamazoo region, where there are a total of 1,602 confirmed cases and 74 deaths—61 of which occurred in Kalamazoo and Berrien counties.⁶ Six of the remaining seven counties have recorded only 1–2 deaths. According to the 2010 census, approximately 954,000 people live in this region. This means that only 0.17% of residents have been diagnosed with COVID-19, and only 0.008% have died from this disease. This rate of infection and death does not qualify as an “epidemic.”

Region 2—Grand Rapids Region. There are 13 counties in the Grand Rapids region, where there are a total of 3,597 confirmed cases and 101 deaths.⁷ Four of the counties in this region still have *no* deaths. Of the remaining nine, five counties have between just 1–

point amici make in Note 3, *supra*. It is highly likely that more testing has occurred in the Lansing region and that the state has miscounted asymptomatic positives for the *virus* as confirmed cases of the *disease*.

⁵ See Note 4, *supra*.

⁶ *Ibid.*

⁷ *Ibid.* Of the 3,597 confirmed cases, more than half—2,416—were recorded in Kent County, which has experienced only 45 deaths.

3 deaths. According to the 2010 census, approximately 1,447,000 people live in this region. This means that only 0.25% of residents have been diagnosed with COVID-19, and only 0.007% have died from this disease. This rate of infection and death does not qualify as an “epidemic.”

Region 1—Detroit Region. There are nine counties in the Detroit region, where there are a total of 36,460 confirmed cases and 4,127 deaths. According to the 2010 census, approximately 5,217,000 people live in this region. This means that 0.70% of residents have been diagnosed with COVID-19, and 0.080% have died from this disease. Although this rate of infection and death does not qualify as an “epidemic” when viewed at a regional level, Wayne, Oakland, and Macomb counties have thousands of cases each. The Governor may therefore have a plausible claim that an epidemic exists in those counties. But, as noted earlier, the “confirmed” cases are inflated by an unknown number of non-disease cases because the state appears to be reporting all positive tests for the *virus* as a confirmed case of the *disease*. Thus, it is far from certain that an epidemic exists in those counties, either.

Statewide Assessment. When viewed statewide—which is a reasonable view to consider given that the Governor and the Director of MDHHS claim there is a statewide epidemic—there are 48,021 confirmed cases and 4,674 deaths. The state’s population is about 10,000,000 people, meaning that 0.48% of Michiganders have been diagnosed with COVID-19, and 0.047% have died from it.

Notably, these numbers do not break out the number of case and deaths occurring within nursing homes. It is widely reported nationally that nursing homes are hot spots where the coronavirus is more likely to cause COVID-19. There is evidence this is true in Michigan, too. For example, as of May 8, 2020, the City of Detroit reported 1,215 deaths, and attributed 293 of those deaths to nursing homes—a full 24% of all deaths in the city. City of Detroit, COVID-19 Cases Dashboard, <http://detroitmi.gov>. Wayne County has attributed 365 of the 938 deaths it has recorded in the county

(excluding Detroit) to nursing homes—*i.e.*, 39% of all “out-county” deaths.

Statistics by age are also telling. The state reports that 86% of all deaths have involved those who are 60 years of age or older. Wayne County reports that 821 of the 938 people who have died were over 60 years of age—*i.e.*, 87.5% of all out-county deaths. According to the Census Bureau, those in this age bracket represent about 17% of the state population. U.S. Census Bureau, QuickFacts: Michigan, Age and Sex Pop. Estimates, <https://www.census.gov/quickfacts/MI>.

The data do not suggest an epidemic. Instead, the data suggest that senior citizens—a group sadly prone to health challenges in the best of times—are prone to develop COVID-19 if they contract the coronavirus. Even assuming *arguendo* that the virus is prevalent within the state, the supermajority of people will never experience symptoms requiring medical treatment. For those who do, the survival rate approaches the upper 90th percentile.

With nonstop media reports and gubernatorial press conferences about a “global pandemic,” it has become an article of faith that an epidemic exists in Michigan. But the WHO’s declaration of a “pandemic” does not control the facts on the ground in our peninsulas. The data do not support the existence of an epidemic in Michigan within the meaning of the EMA. Absent proof of a statewide epidemic, the Governor has no authority to declare a statewide emergency or disaster. Accordingly, the Court should hold that EO 2020-68 is improper to the extent that it relies on the EMA.

2. The Governor’s power to respond to the epidemic is limited by the Public Health Code, which she has not suspended or modified.

The EMA permits a governor to suspend a statute, order, or rule that regulates the conduct of state business, when strict compliance would “prevent, hinder, or delay necessary action in coping with the disaster.” MCL 30.405(1)(a). Invoking this clause, Governor Whitmer has suspended a host of state laws by executive order. She has not, however, suspended any portion of the Public Health Code. Nor could she do so because it

is not a statute governing state business.

EO 22-77 orders Michiganders to stay at home (subject to certain exceptions not relevant here). The Governor justifies this massive restriction on liberty by assuming everyone is a potential carrier who could infect someone else. But the Public Health Code includes a detailed procedure that must be followed before the state can deprive someone of their freedom as a carrier of a communicable disease. The executive order makes no effort to conform to the Code and violates it in at least two ways.

First, the Department of Health and Human Services (“**MDHHS**”) or a local health officer must issue a written warning notice to the suspected carrier and can order the person to undergo medical tests to verify that they are a carrier. MCL 333.5203(1). Critically, “[a] warning notice shall be individual and specific *and shall not be issued to a class of persons.*” MCL 333.5203(2) (emphasis added). The warning notice must inform the suspected carrier that he has a right to a hearing to contest his designation as a carrier. MCL 333.5203(3). The Governor’s executive order is not a warning notice, is impermissibly aimed at a class of persons (all Michiganders) instead of an individual, and provides no procedural due process as required under the Public Health Code.

Second, the Code applies even during emergencies. MCL 333.5207(1). “To protect the public health *in an emergency*,” an MDHHS or local health officer can obtain *ex parte* a temporary detention order to facilitate observation, examination, testing, diagnosis, and treatment. *Ibid.* (emphasis added) A detention cannot last longer than 72 hours, excluding weekends and legal holidays, without a court hearing to determine whether it should continue. MCL 333.5207(3). As of this filing, the Governor’s executive orders have forcibly detained 10 million people for 51 days without a hearing.

3. The EOs fail to identify objective conditions permitting the end of the declared emergency and disaster.

The EMA requires governors to specify, among other things, “the conditions permitting the termination of the state of emergency [and/or disaster]” in their

proclamation or executive order declaring an emergency or disaster (the “**Conditions Clause**”). MCL 30.403(3)–(4). The reason for this requirement is implicit yet plain: if a governor is to exercise broad, unchecked powers in the name of an emergency, then she must also provide a clear goalpost by which the Legislature and the general public can judge when the emergency is over. Absent legislative approval, the 28-day period is the *absolute maximum* duration of the emergency; the duty to specify conditions for terminating the emergency establishes an objective metric by which an earlier end date can be identified and enforced.

EO 2020-04, by which the Governor first declared an emergency under the EMA, states only that the emergency will be “terminated when emergency conditions no longer exist and appropriate programs have been implemented to recover from any effects of the emergency conditions....” Exhibit 1, EO 2020-04(3). The executive order did not, however, identify what the emergency conditions were, other than to note that MDHHS identified the first two presumptively positive cases of COVID-19 in Michigan. *Id.*, at Preamble ¶ 4. The Governor provided no objective criteria against which to judge when conditions would permit the termination of the emergency.

EO 2020-33, by which the Governor expanded the emergency to include a disaster declaration, parrots the same vague language from EO 2020-04. It states, in relevant part, that “[t]he state of emergency and the state of disaster will terminate when emergency and disaster conditions no longer exist and appropriate programs have been implemented to recover from any effects of the emergency conditions....” Exhibit 4, EO 2020-33(3). The executive order says that hospitals in four counties were reporting that they were at full or nearly full capacity, that ventilators and personal protective equipment (“**PPE**”) were in short supply and in high demand, and that Michigan needed more medical personnel than were available to care for COVID-19 patients. *Id.*, at Preamble ¶ 2. To comply with the Conditions Clause, EO 2020-33 needed to specify, for example, what hospital capacity would be sufficient, how many ventilators and how much

PPE would satisfy demand, and how many medical personnel were needed to adequately care for COVID-19 patients, such that the emergency and disaster could be declared terminated. No such goalposts are identified in the order.

Finally, EO 2020-68 re-declared an emergency and disaster under the EMA, citing the same public-health grounds as before. Exhibit 12, EO 2020-68. This re-declaration of an emergency and disaster occurred literally one minute after the Governor declared the emergency and disaster terminated in EO 2020-66. EO 2020-68 makes no attempt to comply with the Conditions Clause. Rather it states only that Governor Whitmer “will evaluate the continuing need for this order prior to its expiration.” *Id.*, at EO 2020-68(4). The Governor’s failure to comply with the Conditions Clause seems to be a calculated decision. An undefined emergency helps her to justify a perpetual emergency under *the EPGA*, in case the Court holds her to the 28-day limit under the EMA.

4. The Lockdown Orders are not “necessary and appropriate” because they are substantively unreasonable.

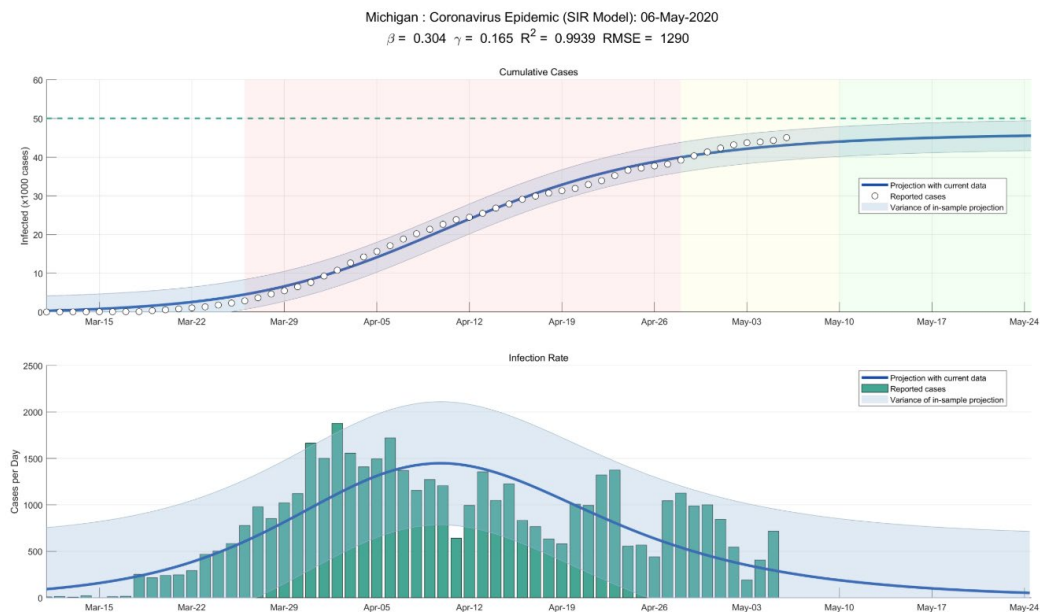
The EMA authorizes governors to take “necessary and appropriate” action to respond to emergencies and disaster. MCL 30.405(1). Amici contend that executive actions cannot be necessary and appropriate if they are substantively unreasonable, as is the case here.

a. The Stay-Home Orders

The blanket stay-home orders are an objectively unreasonable response to COVID-19. Even before it reached the shores of our pleasant peninsulas, it was widely reported that the elderly and the sick are most at risk. The overwhelming majority of people who contract the coronavirus outside of those risk groups are impacted only mildly.⁸ The

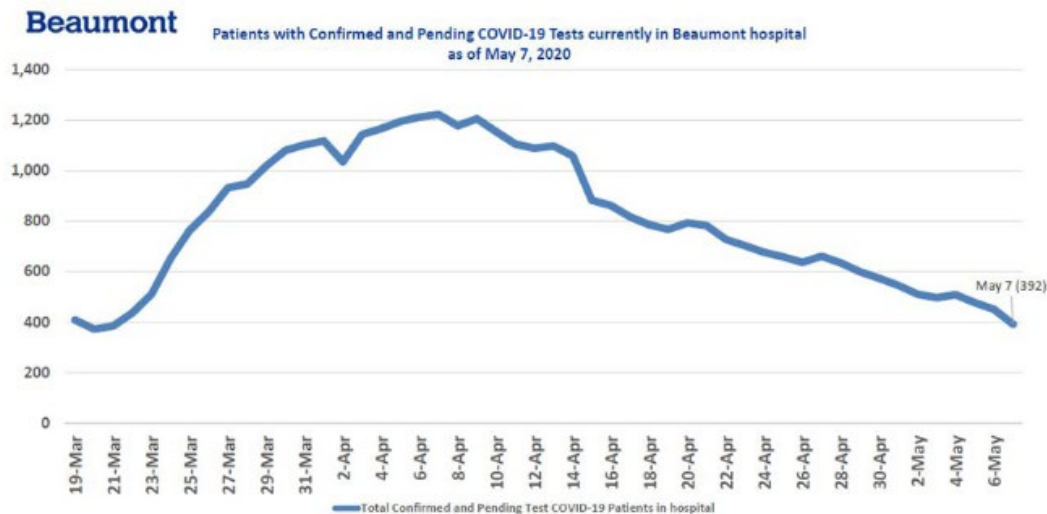
⁸ Shamus, *Seniors, sick are most vulnerable in coronavirus outbreak. Here’s how to keep them safe*, Detroit Free Press (Mar. 2, 2020), <https://perma.cc/JX5J-QNDM>; Marchione, *Flu vs. coronavirus: How they compare*, (Mar. 10, 2020), <https://perma.cc/7RU7-PEGT>; BBC News, *Coronavrus: Largest study suggests elderly and sick are most at*

Governor did not appear to tailor her executive orders to the facts and data, which she often claims are driving her decisions. Instead of quarantining the sick, or even limiting her stay-home order to seniors, she imposed overly restrictive limits on *everyone*—regardless of risk, regardless of exposure, regardless of location—limits that are akin to house arrest. Ostensibly, this was done to “flatten the curve,” the rate of infection, to avoid overwhelming hospitals. Deeply troubled by the Governor’s reaction to the virus and perceiving that this goal had been achieved, amici provided the Governor with an independent expert report showing that the curve had been flattened in the first week of April 22. Exhibit 17, Anderson Economic Group Report.



risk, <https://perma.cc/5284-VXYG> (Feb. 18, 2020); McCarthy, *New Chinese study finds that the elderly are most at risk from the coronavirus*, Forbes (Feb. 18, 2020), <https://perma.cc/3X2G-94BW>; Kelley, *CDC officials emphasize older Americans are at highest risk for serious coronavirus illness*, The Hill (Mar. 9, 2020), <https://perma.cc/N55E-9AKT>; Rong-Gong, King & Tchekmedyian, *As coronavirus spreads, warnings become more urgent for the elderly and frail*, LA Times (Mar. 8, 2020) (also noting that 80% of all infections are mild), <https://perma.cc/JNU7-G3QU>.

This tracks with hospital-level data that was recently released to the public by one of the largest hospital systems in the state:



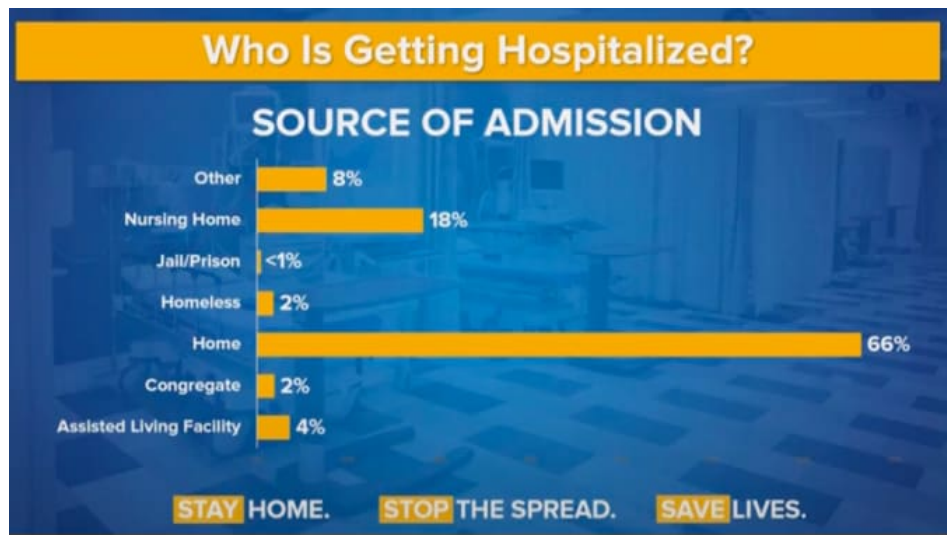
Yet, despite this data, the Governor *increased restrictions* on Michiganders, outright forbidding them from visiting family over Easter and Passover. It is unreasonable to set a goal, achieve it, and then maintain restrictions, much less to increase them. The current stay-home order still requires all Michiganders to stay at home unless granted permission to leave their residence for listed activities. Exhibit 16, EO 2020-77(2). Businesses around the state remain confused by Governor Whitmer’s inconsistent policies:

“I’m getting asked every day by businesses, ‘What do we do?’ or ‘When can we open?’” said Hackel. “If they haven’t been cleared to open already, I don’t know what to tell them. Especially when. Or if ever. The executive orders are pretty vague and undefined. All we hear from the governor’s office is they need more information, more data, and more testing before the state is completely opened up,” Hackel said. “But no one can say if they are looking for specific numbers. Or percentages. It’s frustrating.”

Martindale & LeBlanc, *Hackel: Businesses need to know when they can reopen*, Detroit News (May 13, 2020), https://bit.ly/DetroitNews_Hackel.

Experiences in other states demonstrate that stripping residents of their liberty is an unnecessary (and therefore unreasonable) response to the virus. Seven states did not impose stay-home orders: Arkansas, Iowa, Nebraska, North Dakota, South Dakota, Utah, Wyoming. When adjusted for population, these states have experienced *lower* numbers of infections and deaths than Michigan and other states that have imposed such orders. Exhibit 18, Johns Hopkins Univ. & Med, Coronavirus Resource Ctr, Graph of Cases, Deaths, and Testing in All 50 States per 100,000 People (May 12, 2020), <https://coronavirus.jhu.edu/testing/states-comparison>.

Indeed, it is particularly “shocking” that the newly hospitalized are those who had been staying home as ordered, as Governor Cuomo of New York recently acknowledged. Higgins-Dunn & Breuninger, *Cuomo says it’s ‘shocking’ most new coronavirus hospitalizations are people who had been staying home*, CNBC (May 6, 2020), <https://perma.cc/TXZ3-ZDWR>. The cognitive dissonance between the source of admissions and the mantra at the bottom of the graphic—similar to Governor Whitmer’s “stay home, stay safe, save lives” catchphrase—is jarring:



Ibid. Even if the Court concludes that stay-home orders are not *per se* unreasonable, they certainly are not based on the “facts and data.”

b. The Closure Orders

Second, the mass closure of businesses statewide is unreasonable because it destroys property interests, when the Act requires an executive order to protect both life *and* property.

The EPGA permits a governor to issue reasonable orders as he or she deems “necessary to protect life and property.” MCL 10.31(1). The Act contemplates that the governor will act to preserve both. Governor Whitmer, however, has pitted life against property.

Shuttered businesses cannot generate revenue. A company that cannot generate revenue cannot pay its bills. Closure or bankruptcy becomes inevitable. Businesses, of course, are owned by people. Their investments of time and money to grow their business produces a valuable property interest.

The closure orders in EO 2020-68 and EO 2020-77 (and their predecessors) have damaged, and continue to damage, the property interests of small business owners in Michigan. According to the U.S. Small Business Administration Office of Advocacy, Michigan has nearly 900,000 small businesses that make up 99.6% of all businesses in the state. Exhibit 19, 2019 Michigan Small Business Profile. A recent survey conducted by the Small Business Association of Michigan estimates that 1 in 7—or 14%—of small businesses may not survive the closure orders. Gardner, *Q&A with Brian Calley: 1 in 7 Michigan small businesses worry about survival*, Bridge Magazine (May 7, 2020), https://bit.ly/BridgeMagazine_Calley. That’s roughly 126,000 small businesses that are projected to fail, not because of bad decisions or old-fashioned competition, but because of unnecessary closures mandated by the Governor’s executive orders.

The EPGA directs the Governor save lives *and* property. The closure orders are having the opposite effect. In fact, more recent executive orders expressly acknowledge the economic disaster facing Michigan business owners.

Governor Whitmer stresses that she is working to keep Michiganders safe, and has repeatedly stated that it isn't "safe" to reopen businesses. "Safe" cannot mean "risk free." Risk is an inescapable element of daily life.

The Court should insist upon an objective definition for safe operations, so that it can judge the reasonableness of the closure orders. The CDC has issued guidance on social distancing, and the Governor has adopted that guidance in her closure orders, which allow so-called "critical" businesses to operate if they follow the CDC's guidance. The Governor has also allowed some "noncritical" businesses to reopen under limited conditions. They, too, must adhere to the CDC guidelines. Since these guidelines have for the past two months served as the baseline for "safe" operations, amici contend that it is objectively unreasonable to keep closed any business that can adhere to those guidelines.

II. EPGA: The Governor has exceeded her statutory powers under the Emergency Powers of the Governor Act.

A. The EPGA applies to local instances of civil unrest, not to statewide public health emergencies.

Although the EPGA provides broad emergency powers to governors, the manner in which those powers is exercised must be consistent with its purpose: to address local emergencies. The EPGA does not authorize *de facto* statewide house arrest.

Under the EPGA, a governor may "designat[e] *specific zones* within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated." MCL 10.31(1) (emphasis added). Governor Whitmer, however, has regulated the occupancy and use of buildings statewide. See, e.g., Exhibit 13, EO 2020-69; Exhibit 16, EO 2020-77. Her orders are inconsistent with the text of the Act because they encompass the whole state, and are not limited to specific zones.

The statutory text does not support a finding that the entire state can be a "specific zone." When analyzing the text, the Court must presume that the Legislature knows the rules of grammar, as such laws must be read in grammatical context. *In re AGD*, 327

Mich App 332, 344; 933 NW3d 751 (2019). The Act authorizes the Governor to respond to a public emergency “within” the affected area of the state. MCL 10.31(1). As a preposition, “within” means “in the inner part or interior of, inside of, in (a space, region, receptacle, etc.). OED Online, www.oed.com/view/Entry/229671 (Mar. 2020).

Although grammatically used as a preposition in the EPGA, the adverbial definition of “within” is also informative here: “in the limits of, or in the inner part of, a space or region, *esp. a city or country*; in the place or realm.” *Ibid.* (emphasis added). The use of “within” relative to something else implies that the former is engulfed by the latter. It follows that a place “within” the state is not coterminous with the entire state itself. If the Legislature meant for the EPGA to apply to the state as a whole, then it could have said so. “[N]othing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.” *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

Other provisions in the Act reinforce this reading of the text. The scope of a governor’s emergency power under the EPGA is limited to “the *area* involved,” and any orders she promulgates must be calibrated to “bring the emergency situation within the affected *area* under control.” MCL 10.31(1) (emphasis added). The Governor’s powers include controlling traffic “within the *area* or any section of the *area*” designated as the emergency area. *Ibid.* (emphasis added). And when the Governor controls the “ingress and egress of persons and vehicles” to and from properties, she does so within “designat[ed] zones within the area.” *Ibid.*

The limited caselaw interpreting the EPGA further supports localized application. In *Walsh v City of River Rouge*, 385 Mich 623, 640; 198 NW 2d 318 (1971), the Supreme Court held that the EPGA preempted municipal emergency orders in response to local race riots. The Court explained that the Act provides a “broad grant of extraordinary powers with a specific provision that mayors may apply to the Governor for the exercise by him of such powers[.]” *Id.*, at 640. See also MCL 10.31(1). County sheriffs may apply for a

declaration as well. MCL 10.31(1). Although the director of state police may also apply for a declaration and a governor may declare an emergency *sua sponte*, *ibid.*, the Court’s ruling reinforces that the Act is intended to address crises that befall local municipalities or regions of the state—not matters affecting the whole state.

Finally, the Governor relies on the construction provision in the EPGA, which provides that “[t]he provisions of this act shall be broadly construed to effectuate this purpose.” MCL 10.32. This begs a few questions.

What is the purpose of the Act? If it is to respond to local emergencies as the text provides, then allowing declarations of statewide emergencies means much more than “broadly construing” the statute to effectuate its purpose—it would mean judicially rewriting the statute and usurping the Legislature’s lawmaking powers. Corrigan & Thomas, *“Dice Loading” Rules of Statutory Interpretation*, 59 NYU Ann Surv Am L 231, 231–33 (2003).

Similarly, what types of emergencies are covered? Does a “broad construction” require courts to jettison normal canons of statutory construction like *noscitur a sociis*? Under that canon, ambiguous words in a list should be determined by the words immediately surrounding it. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002); Black’s Law Dictionary (11th ed. 2019). Phrases like “public crisis” and “public emergency,” when viewed through the lens of their neighboring terms “disaster,” “catastrophe,” and “rioting,” are reasonably understood to mean natural disasters (*e.g.*, wildfires, flooding and earthquakes) and various forms of civil unrest (*e.g.*, insurrection, bombings, and terrorist attacks). Sickness and disease are not with these classes of crises and emergencies. Does a “broad construction” mean abandoning this kind of reasoned analysis simply because the executive branch—which stands to benefit from exceptionally broad powers conferred under the Act—can couch a current event as an “emergency” or a “crisis” from the gubernatorial pulpit?

Likewise, when deciding how broadly to construe the Act, how broad is too broad? Does it mean that intent will always prevail over the literal sense of the statute's terms? Corrigan, *supra*, at 231–33. Do “specific zones” and “affected areas” become “the entire state” because a governor says that construction is helpful to addressing the situation at hand?

The construction clause cannot mean complete deference to executive will. Nor does it serve as a license to impose a judge's own policy preferences. Amici submit that a reasonable construction of the Act using existing canons of statutory construction provides a sufficiently broad interpretation to satisfy MCL 10.32. See, e.g., *Koontz*, 466 Mich, at 312 (“[w]hen interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute ... [b]ecause the proper role of the judiciary is to interpret and not write the law”).

B. Even assuming *arguendo* that the EPGA applies here, the Governor has still exceeded her powers because the Lockdown Orders are unreasonable.

1. *Jacobson* does not apply; the Court can and must decide whether the Governor's orders are reasonable.

The Governor leans on *Jacobson v Commonwealth of Massachusetts*, 197 US 11; 25 S Ct 358; 49 L Ed 643 (1905), for the proposition that states can do what they please, so long as they claim to be acting in the public health. Governor's Opp'n 20–21. Amici submit that the Governor misreads *Jacobson*, and it does not apply here in any event.

First, the Governor overstates *Jacobson* as upholding a “sweeping, invasive measure” as a proper exercise of police power in response to a public health crisis. The U.S. Supreme Court held that a state can mandate vaccinations in the face of a communicable disease that killed 30–70% of its victims on average, depending on the type of the virus, the person's sex, and pregnancy status. See CDC, *What is Smallpox?*, <https://www.cdc.gov/smallpox/about/index.html>; Lane, *Remaining Questions About Clinical Variola Major*, *Emerging Infectious Diseases* 17(4): 676–680 (Apr. 2011),

<https://bit.ly/SmallpoxArticle> Lane. As shown in Argument I.B(1), *supra*, and the Prevalence Charts, *supra*, at xvii–xix, COVID-19’s mortality rate in Michigan is, statistically, ***nearly zero***. And there is a no comparison between: (i) a one-time inoculation of the residents of a single town; and (ii) the Governor’s decisions to shutter the economy and place 10 million people under *de facto* house arrest. The first is reasonable, the latter is not.

Second, *Jacobson* dealt with a state *legislature*’s express authorization for local boards of health to inoculate residents. The Court held that it was “for the legislative department to determine” the appropriate responses to contagion in the community:

[T]he legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government.

Jacobson, 197 US, at 35. Here, the Legislature has passed no law expressly authorizing the Governor to keep people effectively locked in their homes under pain of imprisonment to combat contagion on the theory that everyone might be a carrier of the coronavirus. Indeed, as explained in Argument I.B(2), *supra*, the Legislature has established a procedure in the Public Health Code that balances residents’ interests in due process against the state’s interest in protecting public health. Governor Whitmer has disregarded that law. She is not on the same footing as Massachusetts was in *Jacobson*.

Third, *Jacobson* pre-dates modern substantive due process jurisprudence. In that case, the Court was asked to decide, among other things, whether the inoculation statute deprived a resident of liberty without due process of law. *Jacobson*, 197 US, at 14. The dawn of strict scrutiny is generally traced back to *United States v Carolene Prods Co*, 304

US 144; 58 S Ct 778; 82 L Ed 1234 (1938), a decision issued nearly 30 years after *Jacobson*. Since then, infringements upon fundamental rights are subject to a much more exacting standard than the Court applied in *Jacobson*. Although *Jacobson* remains “good law,” in the sense that it is still quoted for the proposition that state police powers include the power to act for the benefit of public health, any modern challenges to public health actions should be subjected to heightened scrutiny. Even if that were not the case, *Jacobson* itself acknowledges that judicial deference has limits:

[The] acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons *in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.*

Jacobson, 197 US, at 28 (emphasis added). That is the case here. See Argument I.B(4), *supra*.

Finally, *Jacobson* doesn’t apply in this context. The Legislature has not presented a federal question. Before the Court is a question of state law. The Court has a duty to determine whether the constitution and laws of this state prevent the Governor from imposing the kind of lockdown orders at issue here over the Legislature’s objection. *Jacobson* cannot speak to that duty, arising as it does under the constitution and laws of a separate sovereign.

2. The Lockdown Orders are objectively unreasonable.

The EPGA permits governors to issue “reasonable” orders necessary to protect “life and property.” MCL 1.31. EOs 22-68 and 22-77 are objectively unreasonable under the EPGA for the same reasons argued in Argument I.B(4), *supra*.

III. SEPARATION OF POWERS: The Lockdown Orders violate the Separation of Powers Clause.

The Michigan constitution expressly provides for the separation of powers: “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Const 1963, art 3, § 2. This clause plays a vital role in our constitutional order. It ensures that no branch of government can amass so much power that it presents a threat to liberty:

The framers of Michigan’s Constitution understood well the importance of separating the powers of government. The doctrine of separation of powers rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty.” James Madison expressed this sentiment more than 200 years ago when he wrote, “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.” Thus, governmental power was separated—with the Legislature exercising the “legislative power,” the Governor exercising the “executive power,” and the judiciary exercising the “judicial power.”

46th Cir Ct v Crawford Cty, 476 Mich 131, 141; 719 NW2d 553 (2006) (citations omitted).

“The legislative power of the State of Michigan is vested in a senate and a house of representatives.” Const 1963, art 4, § 1. Legislative power is the power to make laws, *In re Compl of Rovas Against SBC Mich*, 482 Mich 90, 98; 754 NW2d 259 (2008), and the power “to make law for the benefit and welfare of the state.” *46th Cir Ct*, 476 Mich, at 141, quoting Cooley, *Treatise on the Constitutional Limitations* 92 (Little, Brown & Co., 1886).

Under our constitution, the Governor has no lawmaking power, except as expressly provided in the constitution.⁹ Const 1963, art 3, § 2. “[I]f the Governor acts outside the

⁹ The constitution grants the governor only two legislative powers: (1) the power to reorganize executive branch agencies; and (2) the power to veto legislation. *County Com’rs of Oakland Co v Oakland Co Exec*, 98 Mich App 639, 651; 296 NW2d 621 (1980).

scope of his authority, his actions are considered ultra vires.” *McCartney v Attorney Gen*, 231 Mich App 722, 726; 587 NW2d 824 (1998) . The Lockdown Orders constitute improper executive lawmaking.

The Governor has repeatedly described her authority as a “dial,” meaning that she alone has the authority to enact a number of executive orders declaring the entire state to be under an emergency, and that she alone can determine what the emergency entails, where the emergency exists, and the duration of the emergency. Since April 30th, the Governor has issued a host of legislative mandates, including extensions of the expiration dates of personal protection orders, adjournment of FOIA requests, and determining arbitrarily which businesses are permitted to operate and which are required to remain closed.

Indeed, the Governor has relied upon the EPGA to issue executive orders that classify and designate whether certain businesses and life activities are “essential” or “non-essential.” These orders have permitted people to canoe and kayak in Michigan’s waters, but not to use motorboats. The orders have permitted people to walk outdoors, but not in parks or on golf courses. Businesses selling alcohol, cigarettes, lottery tickets—even recreational marijuana—have been deemed essential and are permitted to be open, but dental and other medical procedures are deemed nonessential. People are allowed to congregate in grocery stores and “big-box” retailers, but real estate offices (for a time), car washes, retail stores, and other commercial businesses that require far less engagement with the public must remain closed.

All of these arbitrary classifications are imposed under the very real threat of penal sanctions, licensing sanctions, and civil fines. The state is, for example, prosecuting a 77-year-old man for barbering, has issued him at least one \$1,000 civil fine under an emergency rule issued by MDHHS, and has summarily suspended his license—even after

See also *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 456; 770 NW2d 117 (2009).

a circuit judge refused to issue a TRO because the state couldn't show that giving the man a chance to defend himself in court would cause "irreparable injury." Berg, *AG: State suspends Owosso barber's license for refusing to shut down shop*, Lansing State Journal (May 13, 22), https://bit.ly/LSJ_OwossoBarber. Even with a mask, washing hands between haircuts, and sterilizing equipment between customers, the government deems it too "risky" for this man to operate. In the name of "saving lives," the state is out to destroy one. Food, shelter, and medicine are not free, yet the Governor has decreed that honest work to meet these basic human needs must take a backseat to "saving lives" (even though "facts and data" show that the curve has been flattened—the original justification for the Lockdown Orders).¹⁰

The Governor's argument for indefinite unilateral authority is, at bottom, a plea of necessity to combat what she sees as an historic emergency. Such pleas for power are rightly resisted as incompatible with the rule of law, for "the unarticulated assumption [is] that necessity knows no law." *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 646; 72 S Ct 863; 96 L Ed 1153 (Jackson, J., concurring). "The Constitution . . . is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be consistent with the letter and spirit of the Constitution." *Horne v US Dep't of Agric*, 575 US 350; 135 S Ct 2419, 2428; 192 L Ed 2d 388 (2015). "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Id.* The separation of powers sacrifices speed in lawmaking for the sake of liberty of Michigan citizens.

¹⁰ General Nessel is quoted in the article as saying, "[w]hen [this barber] is within inches of someone who is not wearing a mask—even if he's wearing one himself—it wouldn't be a stretch to believe he could become infected with COVID-19 [sic: the virus] and spread it [to] the people who came to him for haircuts." Governor Whitmer has likewise expressed hypothetical concerns about people inadvertently spreading the virus by touching gas pumps if she allows more people out of their homes. Rampant "whatiffery" is driving public policy, not "facts and data."

It is no answer that the EPGA and the EMA purport to give governors legislative authority. Chief Justice Cooley considered it a “settled maxim[] in constitutional law” that “the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.” Cooley, *Constitutional Limitations* 116 (2d ed. 1868). The Legislature may not “relieve itself of the responsibility” to make laws, nor may it “substitute the judgment, wisdom, and patriotism of any other body” for its own. *Id.*, at 116-17. At most, “the Legislature, within limits defined in the law, may confer authority on an administrative officer or board to make rules as to details, to find facts, and to exercise some discretion, in the administration of a statute.” *Ranke v Mich Corp & Secs Comm’n*, 317 Mich 304, 309; 26 NW2d 898 (1947). Enabling executive agencies to execute and administer the law is a far cry from executive lawmaking of the type seen in the Lockdown Orders.

Governor Whitmer recently told the press, “[t]here’s no textbook specific number that will tell you it is safe to reengage a particular sector of the economy. It depends on human nature,” noting that it “depends on human activity” and “proper protocols.” Durr, *No formula can determine when Michigan moves to next reopening phase, officials say*, MLive (May 13, 2020), https://bit.ly/MLive_WhitmerNoFormula. Such remarks reveal a stark truth: we have moved beyond any “emergency” that might have once existed. The Governor is now making long-term policy judgments for a new virus that may well be with us indefinitely—science, after all, has managed to eradicate only *two* viruses from existence, even with vaccines. This kind of policymaking is quintessentially legislative in nature, not executive.

Constitutional government in Michigan has survived through a civil war, two world wars, a cold war, and past epidemics and disasters in part because our elected officials respected the separation of powers. No one branch has ever claimed a right to seize unilateral power—until now.

CONCLUSION

For these reasons, amici respectfully urge the Court to grant the Legislature's motion for immediate declaratory judgment and declare the Governor's executive orders null and void retroactive to May 1, 2020.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: May 14, 2020



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EXHIBIT 2

STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN HOUSE OF
REPRESENTATIVES and
MICHIGAN SENATE,

Plaintiffs,

v

GRETCHEN WHITMER, in
her official capacity as Governor of the
State of Michigan,

Defendant.

No. 20-000079-MZ

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**GRETCHEN WHITMER'S MAY 12, 2020 RESPONSE TO PLAINTIFFS'
MOTION FOR IMMEDIATE DECLARATORY JUDGMENT**

under Const 1963, art 5, § 1; and the Governor’s ongoing COVID-19 executive orders violate the separation of powers. (Compl, Request for Relief.) The Governor now responds.

ARGUMENT

I. The Legislative Plaintiffs lack standing.

Dissatisfied by the Governor’s issuance of Executive Orders 2020-67 and 2020-68, the Legislative Plaintiffs have a clear, unique, and powerful remedy at law: they can change the law, even over the Governor’s objection. Instead, they have chosen to sue the Governor, asking this Court to do their work for them. This, they cannot do: they lack standing under the law to use the courts in that way.¹⁴ On this basis alone, the request for a declaratory judgment should be denied.

“Standing is the legal term used to denote the existence of a party’s interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy.” *League of Women Voters of Michigan v Secretary of State*, ___ Mich App

¹⁴ Furthermore, the Legislative Plaintiffs have even failed to meet the requirements that their own laws impose on all who may seek relief from this Court. Namely, they failed to verify their complaint “before an officer authorized to administer oaths.” MCL 600.6431(1). As a condition precedent for bringing a claim against the state, *Fairley v Dep’t of Corrections*, 497 Mich 290, 297 (2015), this requirement renders the complaint legally lacking. Here, the Legislative Plaintiffs sue Governor Whitmer in her official capacity. And since “‘a suit against a state official in his or her official capacity is . . . no different from a suit against the State itself,’” *Mays v Snyder*, 323 Mich App 1, 88–89 (2018), quoting *Will v Mich Dep’t of State Police*, 491 US 58, 66 (1989), their claim is one “against the state” that is subject to the verification requirements of MCL 600.6431(1). Lacking proper verification, the Complaint is inadequate as a matter of law. The Legislative Plaintiffs’ failure to cure this dispositive defect would mean any action of this Court other than dismissing the complaint would be void ab initio. *Fox v Board of Regents of the University of Michigan*, 375 Mich 238, 242–243 (1965).

____, ____ (2020) (Docket Nos. 350938, 351073), slip op at *6 (Exhibit D), quoting *Allstate Ins Co v Hayes*, 442 Mich 56, 68 (1993) (citations omitted). When standing is at issue, “the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable.” *Id.*, slip op at *6–7 (cleaned up). “[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment.” *Id.*, slip op at *7, citing *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010).

“A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties.” *League of Women Voters of Michigan*, ____ Mich App at ____; slip op at *7, quoting *Fieger v Comm’r of Ins*, 174 Mich App 467, 471 (1988). Where a cause of action has not been provided by law, a plaintiff must have “a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large.” *Id.*, slip op at *7, quoting *Lansing Schools Ed Ass’n*, 487 Mich at 372. Thus, relevant here, a litigant has standing if the litigant has a special right that will be detrimentally affected in a manner distinct from the citizenry at large, or has met the requirements of MCR 2.605. *Id.*

A. The Legislative Plaintiffs lack standing because they have no special interest in challenging the executive orders of the Governor that differs in any way from the general interest of the citizenry at large.

In *House Speaker (Dodak) v State Administrative Board*, 441 Mich 547 (1993), several individual members of the House and Senate sued challenging interdepartmental transfers by the State Administrative Board. *Id.* at 550–554. The Supreme Court observed that standing ensures that “a party’s interest in the outcome of litigation that will ensure sincere and vigorous advocacy.” *Id.* at 554. But evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient. Instead, standing requires a demonstration that the plaintiffs’ substantial interest will be detrimentally affected in a manner different from the citizenry at large. *Id.* at 554. In *Dodak*, the plaintiffs claimed “standing on the basis of their status as legislators” and alleged that the transfers “reduced their effectiveness as legislators and nullified the effect of their votes.” *Id.* at 555.

Citing federal precedent, the *Dodak* Court stated that “[u]nder limited circumstances, the standing of legislators to challenge allegedly unlawful executive actions has been recognized.” *Id.* at 555 (citation omitted). But a legislator bears a “heavy burden” to establish standing, especially where a dispute “may interfere with the separation of powers between the branches of government.” *Id.* (citation omitted). “For these reasons, plaintiffs who sue as legislators must assert more than ‘a generalized grievance that the law is not being followed.’ Instead, they must establish that *they have been deprived of a ‘personal and legally cognizable interest peculiar to [them].’*” *Id.* at 556 (emphasis added).

Here, the plaintiffs are nominally the legislative bodies, but the *Dodak* analysis is relevant to both individual legislators and to the body as a whole. As with an individual legislator, to establish standing, a legislative body must allege that it has been deprived of a cognizable interest peculiar to the body. *Tennessee General Assembly v US Dep't of State*, 931 F3d 499, 507 (CA 6, 2019), citing *Ariz State Legislature v Ariz Independent Redistricting Comm*, 135 S Ct 2652, 2664 (2015).

But just as “a generalized grievance that the law is not being followed” is not a sufficient injury to confer standing on an individual legislator, *Dodak*, 441 Mich at 556, neither is it a sufficient “institutional injury” to support standing as a legislative body. See, e.g, *Virginia House of Delegates v Bethune-Hill*, 139 S Ct 1945, 1953 (2019) (discussing legislative standing to defend constitutionality of statutes).

These principles were reaffirmed in *League of Women Voters*, where the Legislature brought an action against the Secretary of State. Slip op at *4. The suit sought a declaration that 2018 PA 608 was constitutional and a valid exercise of the Legislature’s authority. *Id.* The Legislature further sought an injunction compelling the Secretary to implement and enforce the Act in question. *Id.*

At the outset, the trial court determined that the Legislature had no standing to sue because it had not demonstrated a particularized injury. *Id.*, slip op at *4. The Court, applying *Dodak*, ultimately affirmed, stating:

the Legislature is suing to reverse actions by the Secretary, a member of the Executive Branch. The Legislature is thus plainly challenging the actions of members of the Executive Branch. *Dodak* stands for the proposition that courts should not confer standing in matters that have the real possibility of infringing upon the separation of powers. [*Id.*, slip op at *8.]

The situation at hand is analogous.

Here, the Legislative Plaintiffs are suing to reverse the actions of the Governor and are plainly challenging executive action. Undoubtedly, their success in this case would infringe upon the separation of powers by invalidating her implementation of the law and her exercise of the powers vested in her by law. Indeed, that is explicitly the relief that the Legislative Plaintiffs seek. Under *League of Women Voters* and *Dodak*, they cannot obtain that relief in a judicial forum.

The Legislative Plaintiffs claim that the Governor's actions violate the EPGA and the EMA. But even if that were true (it is not), such an alleged injury is not personal or unique to them. Those allegations amount to a contention that the law as contained in the EPGA and EMA is not being followed, which is insufficient to confer standing on the Legislative Plaintiffs. As the court noted in *League of Women Voters*, "once the votes of legislators have been counted and the statute enacted, their special interest as lawmakers has ceased." ___ Mich App at ___; slip op at *7.

The Legislative Plaintiffs fare no better by attempting to cast their claims as Michigan constitutional violations. Whether they frame the Governor's action as allegedly unlawful or unconstitutional, they lack standing to challenge the actions

for the same reasons. In either instance, the alleged injury or deprivation is no different than that accruing to the ordinary citizen. As stated by the Court of Appeals in *League of Women Voters*:

To accept the Legislature's argument that it has standing here would open the door for the Legislature to seek a declaratory judgment whenever the constitutionality of a statute was challenged. [___ Mich App at ___; slip op at *9.]

In short, the Legislative Plaintiffs simply have not demonstrated a special interest in challenging the executive orders of the Governor that differs in any way from the general interest of the citizenry at large. Where the Legislature has not shown a sufficient injury to an institutional interest, and where its action against the Governor raises separation of powers concerns, it has not “overcome [its] heavy burden” to establish standing. *Dodak*, 441 Mich at 555.

B. The Legislative Plaintiffs cannot meet their obligation to show that an actual controversy exists under MCR 2.605.

Nor can the Legislative Plaintiffs sidestep this result by framing their claims as requests for declaratory relief; *League of Women Voters* makes that clear. MCR 2.605 states that “[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” An “actual controversy” under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve that plaintiff's legal rights. *League of Women Voters of Michigan*, ___ Mich App at ___, slip op at *7, citing *UAW v Cent Michigan Univ Trustees*, 295 Mich App 486, 495 (2012). Where no such actual controversy exists, a plaintiff does

not have standing to bring a declaratory action. *Id.*, slip op at *4, citing *City of South Haven v Van Buren Cty Bd of Comm'rs*, 478 Mich 518 (2007).

A case of actual controversy is a “condition precedent to invocation of declaratory relief.” *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55 (2000). “In the absence of an actual controversy, the trial court lacks subject-matter jurisdiction to enter a declaratory judgment.” *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand)*, 293 Mich App 506, 515 (2011).

“In general, ‘actual controversy’ exists where a declaratory judgment or decree is *necessary to guide a plaintiff's future conduct in order to preserve his legal rights.*” *Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Tr Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 624 (2015), quoting *Shavers v Attorney General*, 402 Mich 554, 588 (1978) (emphasis added). See also *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Director*, 472 Mich 117, 126 (2005), overruled in part on other grounds, 487 Mich at 371 n 18.

Here, the gravamen of the Legislative Plaintiffs' complaint is that they passed laws that are not being followed by the Governor, and that the Governor's actions violate the Michigan Constitution. But if that were enough to create an actual controversy, the Legislature would have standing to bring a lawsuit against any government entity that, in the Legislature's eyes, has allegedly violated the Constitution or failed to enforce or comply with a statute. That outcome would be both an abuse of the court system and an improper curtailing of the legislative and political processes.

Nor do the Legislative Plaintiffs adequately explain how declaratory relief is needed here to guide their future conduct in order to preserve their legal rights.

Lansing Sch Ed Ass'n, 293 Mich App at 515. To be sure, the future conduct that the Legislative Plaintiffs seek to “guide”—that is, curtail—is the that of the Governor, not the Legislature. The law does not provide standing for the Legislature to seek such relief. Indeed, the Court of Appeals came to that conclusion in *League of Women Voters*:

Given the definition of “actual controversy” for purposes of MCR 2.605, we are not convinced that the Legislature has demonstrated standing to pursue a declaratory action here. No declaratory judgment is necessary to guide the Legislature’s future conduct in order to preserve its legal rights. The Legislature’s authority to enact laws is separate and distinct from this Court’s role in determining whether any law passes constitutional muster. These “rights” and obligations of the two separate branches of government will remain the same, no matter what the outcome in this matter, such that the preservation of the Legislature’s legal rights is not at issue. [*League of Women Voters*, ___ Mich App at ___, slip op at *7.]

The Legislative Plaintiffs contend that they have a special right that is affected in a manner different from the citizenry at large in their right to enact legislation – but this is more spin than reality. Any such contention is belied by the allegations of the complaint, where the Legislative Plaintiffs acknowledge that they have continued significant legislative activities throughout the COVID-19 crisis notwithstanding the Governor’s executive orders. In fact, the complaint specifically alleges that the Legislature has passed more than 100 bills on COVID-19 related issues. (Compl, ¶ 43). There is nothing in the Governor’s actions that interferes

with the Legislature's ability to legislate. The Legislative Plaintiffs' claim for declaratory relief fails because there is no threat to their power to enact legislation.

Courts are wisely reluctant to hear disputes that may interfere with the separation of powers between the branches of government. "It would be imprudent and violative of the doctrine of separation of powers to confer standing upon a legislator simply for failing in the political process." *Dodak*, 441 Mich at 544–545. That is exactly the situation in this case.

"[A] proper understanding of the doctrine of separation of powers suggests that the personal desires of legislative and executive officers to exercise their authority are not within the 'zone of interests' protected by the provisions of the Constitution and laws conferring such authority. Only the interests of particular individuals who would be aided by the exercise of that authority—and have been harmed by its unlawful deprivation—come within that zone, since the authority was conferred for the benefit not of the governors but of the governed." *Dodak*, 441 Mich at 544 n 17, quoting *Moore v United States House of Representatives*, 733 F.2d 946, 960 (CA DC, 1984). This is particularly applicable here, given that once the votes of the legislators have been counted and the statutes enacted, "their special interest as lawmakers has ceased." *League of Women Voters*, ___ Mich App at ___, slip op at *9.

The Legislative Plaintiffs have not established an actual controversy under MCR 2.605, and they therefore lack standing to bring this lawsuit.

EXHIBIT 3

05/15/2020

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STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES
and MICHIGAN SENATE,
Plaintiffs,

v Case No. 20-000079-MZ
Hon. Cynthia Diane Stephens
GOV. GRETCHEN WHITMER,
Defendant.

/

PAGE 1 TO 60

The Hearing before the Honorable
Judge Cynthia D. Stephens,
Taken via Hanson Remote,
Commencing at 10:00 a.m.,
Friday, May 15, 2020,
Before Shacara V. Mapp, CSR-9305.

Court reporter, attorneys & witness appearing remotely.

05/15/2020

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1 doesn't matter. But it would have to be to the private
2 citizenry. Because first, you said they had no
3 standing to begin with.

4 So if they had no standing to begin with,
5 certainly, it's not going to get more standing. But
6 you believe this is a private citizen issue; is that
7 correct?

8 MR. ALLEN: Your Honor, I don't believe it's
9 a private citizen issue. I think the characterization
10 that the governor can completely decide whether there's
11 an emergency or not is -- that's not our position. The
12 emergency and disaster are defined by the statute as
13 contained in certain --

14 JUDGE STEPHENS: But if the people don't --
15 okay. I get it. If the legislature doesn't agree,
16 they act one certain way. You said they didn't have
17 the authority to do that. So okay, the only person,
18 the only entity then, that can come in and say to the
19 governor, we know you've got good faith, but we think
20 you're wrong, this is not, in fact, an emergent
21 condition or it is not a crisis condition would have to
22 be a private citizen, wouldn't it?

23 MR. ALLEN: I think it -- that -- that would
24 be the case, Your Honor. And again this is not --

25 JUDGE STEPHENS: Okay.

EXHIBIT 4

66TH DISTRICT COURT
110 E Mack Street
Corunna, MI 48817

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Shiawassee County 66th District Court ROA Details

STATE OF MICHIGAN		CASE NO: 20-ST0337 D01 SM
66TH JUDICIAL DISTRICT	REGISTER OF ACTIONS	
ORI780025J		STATUS: PEND
PIN: 2064500556		

JUDGE OF RECORD:

JUDGE: CLARKSON, WARD L., P-36073

STATE OF MICHIGAN v

MANKE/KARL/WILLIAM

CTN: [REDACTED]

TCN:

SID:

ENTRY DATE: 05/08/20

OFFENSE DATE: 05/04/20

ARREST DATE:

VEHICLE TYPE:

VPN:

DOB: [REDACTED] SEX: M RACE: W

DL:

VEH YR:

VEH MAKE:

VIN:

PAPER PLATE:

DEFENSE ATTORNEY ADDRESS

BAR NO.

KALLMAN, DAVID A.,

P-34200

5600 W MOUNT HOPE HWY

Telephone No.

LANSING MI 48917

(517) 322-3207

OFFICER: LENKART/KEVIN CHIEF

DEPT: CITY OF OWOSSO

PROSECUTOR: KOERNER, SCOTT A.,

P-60295

VICTIM/DESC:

CNT: 01 C/M/F: M 3332443

PACC#333.2443

HEALTH DEPARTMENT VIOLATION OF LOCAL HEALTH DEPT ORDER

ARRAIGNMENT DATE: 06/29/20 PLEA: PLEA N-GLTY PLEA DATE: 06/29/20

FINDINGS: DISPOSITION DATE:

SENTENCING DATE:

FINE	COST	ST.COST	CON	MISC.	REST	TOT FINE	TOT DUE
0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

JAIL SENTENCE: PROBATION:

VEH IMMOB START DATE: NUMBER OF DAYS: VEH FORFEITURE:

CNT: 02 C/M/F: M 1033

PACC#10.33

EXECUTIVE ORDERS VIOLATION

ARRAIGNMENT DATE: 06/29/20 PLEA: PLEA N-GLTY PLEA DATE: 06/29/20

FINDINGS: DISPOSITION DATE:

SENTENCING DATE:

FINE	COST	ST.COST	CON	MISC.	REST	TOT FINE	TOT DUE
0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

JAIL SENTENCE: PROBATION:

VEH IMMOB START DATE: NUMBER OF DAYS: VEH FORFEITURE:

DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
05/04/20		
1	ORIGINAL CHARGE HLTH DEP VIO	SLD
2	ORIGINAL CHARGE VIO EXEC ORD	SLD
05/06/20		
1	AUTHORIZATION OF COMPLAINT DATE	SLD
	PROS KOERNER, SCOTT A.,	P-60295 SLD
05/07/20		
1	COMPLAINT ISSUANCE DATE	SLD
05/08/20		
	FILING DATE 050720	SLD
NAME: MANKE/KARL/WILLIAM CASE NO: 20-ST0337 PAGE 2		

DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
	MISCELLANEOUS ACTION ALL COUNTS	SLD
	SCHEDULED FOR ARRAIGNMENT 062320 830A CLARKSON, WARD L.,	P-36073 SLD
	NOTICE TO APPEAR GENERATED	
	ALL COUNTS	SLD
05/15/20		
	PREV. 1847 E. KILBOURN AVE.	SK

ADDR: OWOSSO

MI 48867

SK

06/23/20

SCHEDULED FOR ARRAIGNMENT 062920 130P CLARKSON, WARD L., P-36073 SNH
 APPEARANCE FILED BY ATTY DAVID A. KALLMAN SNH
 MISCELLANEOUS ACTION ALL COUNTS SNH
 JDG CLARKSON, WARD L., P-36073 SNH
 ATT KALLMAN, DAVID A., P-34200 SNH
 NOTICE TO APPEAR GENERATED
 ALL COUNTS SNH
 MISCELLANEOUS ACTION ALL COUNTS SNH
 STIPULATION AND ORDER FILED BY ATTY DAVID SNH
 KALLMAN AND SIGNED BY JUDGE CLARKSON SNH

06/25/20

1 MISCELLANEOUS ACTION HLTH DEP VIO SMW
 DEMAND FOR DISCOVERY FILED BY THE PEOPLE SMW

06/29/20

ARRAIGNMENT HELD ALL COUNTS SNH
 JDG CLARKSON, WARD L., P-36073 SNH
 PLEAD NOT GUILTY SNH
 SCHEDULED FOR PRE-TRIAL 071420 1100A DIGNAN, TERRANCE P., P-27180 SNH
 ADVISED OF RIGHTS SNH
 DEFENSE ATTORNEY PRESENT SNH
 RECORDED BY CER 3352 SNH
 NOTICE TO APPEAR GENERATED
 ALL COUNTS SNH

06/30/20

SCHEDULED FOR PRE-TRIAL 071320 1100A CLARKSON, WARD L., P-36073 SNH
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***** END OF REGISTER OF ACTIONS ***** 07/02/20 15:35

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