UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

DEFENDANTS WHITMER AND GORDON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General
Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

Dated: June 12, 2020

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4. Will a preliminary injunction serve the public interest?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Chafin v. Chafin, 568 U.S. 165 (2013).

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993).

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

Mathews v. Eldridge, 424 U.S. 319 (1976).

McKay v. Federspiel, 823 F.3d 862 (6th Cir. 2016).

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

INTRODUCTION

In a pandemic involving person-to-person spread of a novel, potentially fatal virus that spreads easily and aggressively, particularly through respiratory droplets, does it make sense to restrict indoor fitness activity? By its nature, such activity – sustained heavy breathing, common ventilation, sharing of equipment and other objects and spaces – significantly increases the risk of spread. Thus, it makes eminent sense to restrict this activity.

Under settled law, the government may temporarily restrict commercial activity when sufficient public health concerns take priority. The seriousness of the current pandemic is beyond dispute. The temporary nature of the narrow restrictions that Plaintiffs have challenged in this case is also undisputed. Plaintiffs' claims should fail for lack of standing, including lack of organizational standing for the lead Plaintiff. This Court should deny preliminary injunctive relief for those reasons alone.

On their merits, Plaintiffs' claims fare no better. Claims similar to those raised by the Plaintiffs have already been evaluated and rejected as unlikely to be successful on the merits in other federal courts as well as the Michigan Court of Claims. The Court of Claims' reasoned analysis applies just as well in this case, recognizing the significant judicial deference due to the reasonable and temporary measures challenged here.[1]

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[1] *Martinko, et. al. v. Governor Whitmer, et. al.,* Michigan Court of Claims Case No. 20-62-MM, April 29, 2020 Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, p. 14 (Attached as Exhibit A).

It is well established that, "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 27 (1905). To that end, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." *Id*. at 26. As Chief Justice Roberts reasoned in a case concerning a regulation issued to address the COVID-19 pandemic, the broad authority given to and duly exercised by state officials should not be "subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *South Bay United Pentecostal Church v. Gavin Newsom, Governor of California*, 509 U.S. ___ (2020) slip op., p. 2 (summary order released May 29, 2020) (Roberts, C.J., concurring) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)). (Exhibit B.)

The well-settled rule of law from *Jacobson* permits a state, in times of public health crises, to reasonably restrict the rights of business and individuals alike in order to secure the safety of the community. The scourge of COVID-19—a novel virus that quickly spread across the entire planet, infecting millions, and killing over four hundred thousand—presents such a crisis. Jurisdictions across the globe have had to take action to ensure that healthcare systems are not overwhelmed. Schools were shuttered, gatherings postponed, and business operations curtailed.

Michigan is one of the states hardest hit by the pandemic. As of June 11, 2020, there have been 65,449 persons confirmed infected and 5.985 have died, all in about three months. There is no dispute that in the absence of any vaccine, social distancing has been the most effective way to combat the virus and keep these numbers from escalating. Recognizing this, Defendant Governor Gretchen Whitmer and Director Robert Gordon have taken bold, yet reasonable and necessary, steps to prioritize social distancing in Michigan.

In a series of executive orders, Governor Whitmer exercised her authority under Michigan law to put measures in place to suppress the spread of the virus and protect the public health. The restrictions that Plaintiffs challenge here are part of this broader network of response efforts to suppress the spread of COVID-19, protect the State's health care resources from rapid depletion, and avoid many needless deaths. As a result of these restrictions, countless lives have been saved, the curve of the virus's spread has been flattening, and the Governor has been able to gradually and correspondingly lift a number of the previously imposed restrictions—including the very ones challenged here.

The judicial creation of exceptions to these public health measures on a case-by-case, piecemeal basis infringes on the state's authority to act in a public health crisis and threatens its overarching plan to cope with the dangers and protect the lives and welfare of all Michiganders. Even if they were justiciable, the claims Plaintiffs raise lack merit and they should be dismissed.

STATEMENT OF FACTS

The nature of the COVID-19 pandemic.

The facts surrounding the COVID-19 pandemic are well established. SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is novel. There is no general or natural immunity built up in the population (meaning everyone is susceptible), no vaccine, and no known treatment to combat the virus itself (as opposed to treatment to mitigate its symptoms).

It is widely known and accepted that COVID-19, the disease that results from the virus, is highly contagious, spreading easily from person to person via "respiratory droplets."[2] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease.[3] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces, and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover, since many of those infected experience only mild symptoms, a person could spread the disease before he even realizes he is sick. Most alarmingly, a person with

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[2] World Health Organization, *Modes of transmission of virus causing COVID-19*, available at https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations. (Attached as Exhibit C).

[3] Centers for Disease Control, *Social Distancing, Quarantine, and Isolation*, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html. (Attached as Exhibit D).

COVID-19 could be not yet symptomatic, but still spread the disease.[4] Everyone is vulnerable either as a potential victim of this scourge or a carrier of it to a potential victim.

Because there is no way to immunize or treat for COVID-19, the Centers for Disease Control and Prevention have indicated the best way to prevent illness is to "avoid being exposed."[5] And as experience from prior pandemics such as smallpox and the 1918 Spanish Influenza indicates, early intervention to slow COVID-19's transmission is critical.

In keeping with this advice, governmental entities have stressed the critical import of "social distancing," the practice of avoiding public spaces and limiting movement.[6] The objective of social distancing is what has been termed "flattening the curve," that is, reducing the speed at which COVID-19 spreads. If the disease spreads too quickly, the limited resources of our healthcare system could easily become overwhelmed.[7]

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency

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[4] (*Id.*)

[5] (*Id.*)

[6] (*Id.*)

[7] *See New York Times, Flattening the Coronavirus Curve* (March 27, 2020), available at https://www.nytimes.com/article/flatten-curve-coronavirus.html. (Attached as Exhibit E). Take Italy, for example, where the healthcare system was so overloaded in just three weeks of dealing with the virus that it could not treat all patients infected, essentially leaving some to die.

powers available to the Governor under Michigan law.[8] On March 13, 2020, Governor Whitmer issued Executive Order 2020-5, prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[9] Yet, even in the face of the social distancing recommendations and the six-foot rule, on Saturday, March 14, the public was out in droves.

On March 16, 2020, the Governor ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[10] And on March 17, 2020, the Governor issued an order rescinding Executive Order 2020-5, changing the cap on assemblages to fifty persons in a single shared indoor space, and expanding the scope of exceptions from that cap.[11]

The Governor issues and continually revises Stay Home orders to stem the tide of COVID-19 infections.

On March 23, 2020, Governor Whitmer issued Executive Order 2020-21, which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social

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[8] E.O. No. 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html. (Attached as Exhibit F).
[9] E.O. No. 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html. (Attached as Exhibit G).
[10] E.O. No. 2020-9, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. (Attached as Exhibit H).
[11] E.O. No. 2020-11, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521890--,00.html. (Attached as Exhibit I).

distancing, and other limited exceptions.[12] The order also prohibited, with limited exceptions, all public and private gatherings of any number of people that are not part of a single household.[13]

Over the weeks that followed, the Governor reissued that Stay Home order periodically, adjusting its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic. The complementary restrictions on access to certain places of public accommodation also remained in place.[14]

On June 1, 2020, the Governor issued another executive order, E.O. 2020-110, (Exhibit K), which continued the incremental and data-driven reopening of the State by rescinding the latest iterations of the Stay Home and public-accommodations orders – E.O.s 2020-69 and 2020-96 – and replacing their restrictions with narrower and more permissive limitations on certain gatherings, events, and businesses. This order leaves in place the restriction that certain places

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[12] E.O. No. 2020-21, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html. (Attached as Exhibit J).

[13] (*Id.*)

[14] *See* E.O. Nos. 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, and 2020-96 (Stay Home orders); 2020-20, 2020-43, and 2020-69 (public accommodations orders). Alongside these executive orders, Director Gordon, acting pursuant to his authority under MCL 333.2253, issued emergency orders concluding that COVID-19 had reached epidemic status in Michigan and that the measures imposed in the Stay Home orders and certain related executive orders were necessary to control the epidemic and protect the public health. The first of these emergency orders was issued on April 2, 2020, with subsequent versions rescinding and replacing the prior versions of the order issued May 18, 2020 and May 21, 2020. As presented, Plaintiffs' challenges appear directed primarily at the Governor's executive orders and only nominally against Director Gordon's April 2 Order.

of public accommodation – including indoor gyms, fitness centers, and the like, as well as indoor entertainment and recreational facilities such as trampoline parks, climbing facilities, dance halls, and the like – remain "closed to ingress, egress, use, and occupancy by members of the public." It also, however, makes clear (as the prior public-accommodations orders did) that employees of these businesses were permitted on site, and further provides that the following outdoor services and activities were permitted:

> Outdoor fitness classes, athletic practices, training sessions, or games, provided that coaches, spectators, and participants not from the same household maintain six feet of distance from one another at all times during such activities, and that equipment and supplies are shared to the minimum extent possible and are subject to frequent and thorough disinfection and cleaning.

E.O. 2020-110(14)(a). In addition, the order does not prevent gyms and similar businesses from offering online and certain in-home services to their clients, or from selling products via delivery, curbside pickup, or at outdoor classes and the like.

On June 5, 2020, the Governor issued E.O. 2020-115, (Exhibit L), which lifted many restrictions in Regions 6 (northern Lower Peninsula) and 8 (Upper Peninsula), including on indoor fitness activity, permitting gyms and similar businesses to fully resume in-person operations subject to certain safety measures. In taking this next step toward reopening, the Governor noted that these two regions of the State "have significantly fewer new cases [of COVID-19] per million each day than other regions in the state and have not shown an increase in viral activity in response to earlier relaxations of my orders." (E.O. 2020-115, Preamble.) Subject to her ongoing assessment of statewide data and the advice of public health

experts, the Governor has publicly stated that her goal is to be in a position to take this same step with the rest of the State by July 4, 2020.

Plaintiffs and the claims for which they seek preliminary injunctive relief.

Plaintiff League of Independent Fitness Facilities and Trainers, Inc. ("LIFFT") is a non-profit organization based in Wayne County, with about 400 members, of which at least 130 operate a fitness facility. (First Am. Compl., ¶ 10.) The remaining twenty-two Plaintiffs are individual fitness industry businesses that operate at least one location in Michigan. (Pl.'s Br. at 1, Page ID.267.) For purposes of preliminary injunction relief, they rely on the following claims:

1. procedural due process,
2. equal protection, and
3. dormant commerce clause.[15]

Threshold issues of justiciability stand in the way of each of these claims. And on their merits, each theory of constitutional violation is unfounded. For the reasons stated below, denying preliminary injunctive relief is appropriate.

STANDARD FOR PRELIMINARY INJUNCTION

In deciding whether to grant a preliminary injunction, a court weighs four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3)

[15] The first amended complaint includes additional claims (substantive due process, privileges and/or immunities, void for vagueness, and the declaratory state law claims) that Plaintiffs omitted from their arguments in support of a preliminary injunction.

whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012).

Importantly, "[t]he party seeking the preliminary injunction bears the burden of justifying such relief, including showing irreparable harm and likelihood of success," and faces a "much more stringent [standard] than the proof required to survive a summary judgment motion" because a preliminary injunction is "an extraordinary remedy." *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012). It is "reserved only for cases where it is necessary to preserve the status quo until trial." *Hall v. Edgewood Partners*, 878 F.3d 524, 526 (6th Cir. 2017).

ARGUMENT

Here, not only do the traditional factors weigh against providing the Plaintiffs with a preliminary injunction, but, as an initial matter, there also are threshold jurisdictional and prudential legal reasons not to grant such relief. In particular, standing is lacking because of the pre-enforcement posture of this case. And the lead Plaintiff lacks organizational standing.

I. Plaintiffs' claims are not justiciable.

A. Plaintiffs lack standing to bring their pre-enforcement claims.

To have Article III standing, a plaintiff must have a personal stake in the outcome of a controversy, and that stake must be in the form of an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). An allegation of future injury may suffice only if the threatened injury is "certainly

impending," or there is a "'substantial risk' that the harm will occur." *Id.* And as the Supreme Court has made clear, when—as here—the merits of a constitutional question pit the judiciary to pass on the constitutionality of the other branches of government, the standing inquiry is "especially rigorous." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

Plaintiffs bring their claims in a pre-enforcement posture. As such, to satisfy the "injury-in-fact" requirement of Article III standing, they must allege (1) an intention to engage in the conduct they claim is unconstitutionally proscribed and (2) a credible threat of prosecution. *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016). Here, Plaintiffs have alleged neither. In fact, Plaintiffs commendably acknowledge that they have not violated the orders and give no reason to believe that they intend to. Plaintiffs' standing cannot the "especially rigorous" scrutiny that applies to their claims. *Clapper*, 568 U.S. at 408. As a result, Plaintiffs lack of Article III standing.

B. Plaintiff LIFFT lacks organizational standing.

For additional reasons, the lead Plaintiff LIFFT lacks standing. An organization can establish standing two ways. First, it may assert "organizational standing" on its own behalf because it has suffered a palpable injury as a result of the defendants' actions. *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 332–33 (6th Cir. 2002). Second, an organization may claim standing as a representative of its members who would have standing to sue individually. *Id.*

Here, LIFFT primarily alleges derivative injuries based on claims about its members. It alleges no direct injury coupled with a causal connection between the

injury and the executive orders. As a result, any claim of injury is conjecture and insufficient to establish standing.

Further, regardless of whether LIFFT is asserting standing on its own behalf or on behalf of its members, LIFFT, for the reasons already discussed, has failed to allege facts sufficient to establish the injury-in-fact requirement for the pre-enforcement claims it seeks to bring. As a result, LIFFT lacks standing. *See Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 607 (6th Cir. 2007) ("If Plaintiffs cannot establish constitutional standing, their claims must be dismissed for lack of subject matter jurisdiction.")

II. Plaintiffs are not likely to succeed on the merits.

Even if Plaintiffs' claims were justiciable, they fail to state any viable claim for relief. First, the restrictions in the Governor's executive orders are a proper exercise of the authority given to the States to combat a public health crisis. Second, even if the Court were not evaluating the claims under the deferential standard set forth in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), but instead under a more standard analysis of the alleged constitutional violations, the restrictions pass muster.

A. The States have wide latitude in dealing with great dangers to public health.

The worldwide impact of COVID-19 is recognized by all. Such an extraordinary circumstance requires extraordinary governmental measures. The measures taken in the Governor's executive orders were necessary to meet the

demands of these extraordinary times and are reasonable and constitutional. Accordingly, judicial invalidation of those orders is not warranted.

1. *Jacobson v. Commonwealth of Massachusetts*

Faced with "great danger[ ]," state actors are permitted great latitude to secure the public health. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905). And in this time of crisis, securing the public health requires temporary sacrifices by each of us: "Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Id.* at 26.

In *Jacobson*, the U.S. Supreme Court considered a claim that the state's mandatory vaccination law, which applied to every person in Cambridge, Massachusetts, due to a growing smallpox epidemic, violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." *Jacobson,* 197 U.S. at 26. The Supreme Court upheld this sweeping, invasive measure as a proper exercise of the States' police power because of the exigencies and dangerousness of the public health crisis. It affirmed that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. As the Court stated,

> in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Jacobson, 197 U.S. at 29.

Jacobson even highlighted the circumstance, without hesitation, in which seemingly healthy people were quarantined against their will aboard a ship on which others had cases of serious diseases. *Id.* at 29. The Court noted that such a drastic measure was reasonable "until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared." *Id.* Recognizing the separation of powers, and the limits on the judiciary to invade the authority of a co-equal branch, the Court refused to "usurp the functions of another branch of government" by second-guessing the executive's exercise of police power in such circumstances. *Id.* at 28.

Of course, constitutional rights do not disappear in the face of a public health crisis, but the analysis of the government's action changes. Review is "only" available if the challenged action "has *no real or substantial relation to those objects* [of securing public health and safety], or is, *beyond all question, a plain, palpable invasion of rights secured by the fundamental law*." *Id.* at 31 (emphasis added).

Jacobson's principle is no outlier. *See*, *e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *Compagnie Francaise de Navigation a Vapeur v. La State Bd of Health*, 186 U.S. 380, 393 (1902) (upholding Louisiana's right to quarantine even apparently healthy passengers aboard a vessel over a due process challenge).

And *Jacobson* not only remains good law, *see, e.g.*, *Kansas v Hendricks*, 521 U.S. 346, 356 (1997) (block quoting *Jacobson* in support of the proposition that "an

individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context"), but federal circuits have recently had occasion to apply *Jacobson* to COVID-19-related regulations, upholding certain restrictions that burden a fundamental right. *See, e.g., In re Abbott*, 954 F.3d 772, 786 (5th Cir., April 7, 2020) ("*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.") (emphasis in original); *In re Rutledge*, 956 F.3d 1018 (8th Cir., April 22, 2020).[16]

Recently, the Sixth Circuit has confirmed that *Jacobson* is the proper starting point for considering restrictions promulgated in response to the COVID-19 crisis that touch upon constitutional rights. *See Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020). In those cases, the

[16] Numerous other federal courts across the country have recognized that *Jacobson* is the proper starting point for considering restrictions promulgated in response to the COVID-19 crisis that touch upon constitutional rights. And those courts have routinely held, across a wide range of challenges, that state actions like those at issue here were an appropriate and constitutional response to the scourge of COVID-19. *See, e.g., Open Our Oregon v. Brown*, No. 6:20-CV-773-MC, 2020 WL 2542861 (D. Or. May 19, 2020); *Amato v. Elicker*, No. 3:20-CV-464 (MPS), 2020 WL 2542788 (D. Conn. May 19, 2020); *Geller v. de Blasio*, No. 20CV3566 (DLC), 2020 WL 2520711 (S.D.N.Y. May 18, 2020); *McGhee v. City of Flagstaff*, 2020 WL 2308479 (D. Ariz., May 8, 2020); *Givens v. Newsom*, 2020 WL 2307224 (E.D. Cal., May 8, 2020); *SH3 Health Consulting, LLC v. St. Louis County Exec.*, 2020 WL 2308444 (E.D. Mo., May 8, 2020); *Cross Culture Christian Center v. Newsom*, 2020 WL 2121111 (E.D. Cal., May 5, 2020); *Lighthouse Fellowship Church v. Northam*, 2020 WL 2110416 (E.D. Va., May 1, 2020); *Shows v. Curtis*, 2020 WL 1953621 (W.D. N.C., April 23, 2020); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. April 23, 2020); *Robinson v. Attorney General*, 957 F.3d 1171 (11th Cir. April 23, 2020); *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896 (S.D. Ohio Apr. 21, 2020); *Lawrence v. Colorado*, No. 120CV00862DDDSKC, 2020 WL 2737811 (D. Colo. Apr. 19, 2020); *Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586 (D. N.M. April 17, 2020).

Court determined that despite the very deferential standard of *Jacobson*, the Plaintiffs were likely to succeed on the merits of their claims challenging a complete abortion ban in Tennessee and a total ban on group religious services in Kentucky.

Quite plainly, the restrictions considered by the Sixth Circuit in *Adams & Boyle*, *Maryville Baptist Church, Inc.*, and *Roberts* were different in kind and severity than the limited and temporary (and now partially rescinded) restrictions challenged by the Plaintiffs in this case. Unlike those cases, this case does not involve a complete ban on the exercise of fundamental constitutional rights. Instead, the Plaintiffs challenge temporary and partial restrictions on certain commercial activity—none of which comes close to plainly or palpably invading a fundamental right beyond all question, and all of which had a real and substantial relation to stopping the spread of the virus, preventing the overwhelming of this state's health care system, and avoiding needless deaths.[17]

Recently, the U.S. Supreme Court refused to grant injunctive relief for a party challenging under the First Amendment a California executive order that created limitations on public gatherings, including those of public worship, based on

[17] It is also worth noting that Governor Whitmer's orders have not sought to place restrictions on the fundamental constitutional rights asserted by the Plaintiffs in *Adams & Boyle* and *Maryville Baptist Church, Inc.* – abortion and free exercise of religion. And when courts have evaluated constitutional challenges of the sort at issue here – i.e., to restrictions on business activities – they have consistently rejected those challenges. *See, e.g.*, *Open Our Oregon v. Brown*, No. 6:20-CV-773-MC, 2020 WL 2542861 (D. Or. May 19, 2020); *Amato v. Elicker*, No. 3:20-CV-464 (MPS), 2020 WL 2542788 (D. Conn. May 19, 2020); *SH3 Health Consulting, LLC v. St. Louis County Exec.*, 2020 WL 2308444 (E.D. Mo., May 8, 2020); *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896 (S.D. Ohio Apr. 21, 2020).

considerations of health and safety. *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California*, 509 U.S. ___ (2020) (summary order released May 29, 2020). In his opinion concurring in the denial of relief, Chief Justice Roberts expressly relied on *Jacobson* in explaining that the Constitution "principally entrusts" these questions of safety to "the politically accountable officials of the States." *Id.* at slip op., p. 2 (citing *Jacobson*, 197 U.S. at 38). Notably, as here, when those officials act "in areas fraught with medical and scientific uncertainties," Chief Justice Roberts explained that "their latitude 'must be especially broad.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). And when operating within those broad limits, he explained, these officials "should not be subject to second-guessing" by the federal judiciary, which lacks comparable expertise in public health. *Id.* (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).)

There is no viable path for Plaintiffs around *Jacobson*'s well-settled rule of law. Plaintiffs cannot dispute the gravity of the pandemic in Michigan. It is a once-in-a-century kind of epidemiological public health crisis caused by a potentially fatal virus that remains easily transmittable and still lacks adequate treatment, let alone a vaccine. In such times, the State has wide plenary authority to temporarily restrict activity that presents a diffuse but real threat to the public health.

Thus, under *Jacobson* and applicable principles of separation of powers, judicial deference to the Governor's authority responding to the crisis is paramount.

Indeed, the Michigan Court of Claims has recognized as much in denying a motion for a preliminary injunction. As so aptly stated by the Michigan Court of Claims:

> The role courts play under *Jacobson* and *Lansing Bd of Ed* is not to "second-guess the state's policy choices in crafting emergency public health measures," *In re Abbott*, 954 F3d at 784, but is instead to determine whether the state regulation has a "real or substantial relation to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Id*., quoting in part *Jacobson,* 197 US at 31. Part of this review includes looking to whether any exceptions apply for emergent situations, the duration of any rule, and whether the measures are pretextual. *Id*. at 785.

(Ex A, p. 11.) As will be discussed in more detail, Plaintiffs' claims cannot survive this settled standard. Therefore, they are not likely to succeed.

2. Application of *Jacobson* to the current health crisis and the restrictions challenged by Plaintiffs.

Plaintiffs allege the they should be permitted as a matter of constitutional law to resume their indoor fitness business activities. This claim plainly fails under *Jacobson*'s duly deferential review.

Under *Jacobson*, in the face of the current public health crisis, the Governor's executive orders are entitled to great deference, despite any impingement on individual rights, and must be upheld unless there is "no real or substantial relation" to the public health crisis, or the orders were, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

With this standard in mind, *Jacobson* requires that the Governor's challenged executive orders be upheld in their entirety. While the impact of any restriction on some aspect of normalcy outside of a pandemic is no doubt important, the restrictions are temporary and in specific response to a widespread public

health crisis. The Court should view each restriction through the lens of the general public health justifications and the over-arching and urgent goal of limiting the spread of this novel virus. A myopic, activity-specific framing of any issue is not a proper part of the analysis. Appropriate understanding of the nature of the pandemic and the four corners of the executive orders is adequate to the task before the Court.

While no line-drawing is immune to disagreement, judicial deference is owed to the Governor's assessment of how to most effectively limit the spread of the virus while not unduly restricting life-sustaining activity and services. That assessment has included consideration of the temporary nature of any restriction and what as a general matter could be endured while flattening the curve and then containing the virus's spread.

The point is not to imagine how each specific activity of daily life might be accomplished safely by using social distancing and other recommended prophylactic measures. In a drought, where the point is to avoid uncontrolled wildfires, there can be no allowance for those who promise to be really careful with their campfire. In a deadly pandemic such as this, the point—the necessity—is to only allow those risks to public health that can and must be taken; the stakes are too high to do otherwise.

To wit, a simple trip to an indoor fitness business for a workout might appear both innocuous and inoculated for purposes of the virus.

But appearances are deceiving. Customers and employees all share space, breathe the same air, and touch common surfaces. For these factors, the context of an indoor fitness facility is critical. Why? Because even the most ventilated indoor facility is susceptible to respiratory spread of the virus. The danger is only amplified when people congregate (even with social distancing) in a confined space and work out. By its nature, working out is sustained vigorous physical activity, which necessarily means heavy breathing and sweating and, therefore, acute, propulsive bursts of virus shedding by anyone in that confined space who might be infected.[18] Apart from individual exercisers in proximity, there is the added risk of individuals working out together or organized groups working out for extended trainer-led sessions. And the risk of viral spread is only heightened further by the sharing of exercise equipment among many different people over the course of the day, even when good-faith efforts are made to clean that equipment after each use.

At a fitness center, these factors merge to significantly increase the incidence of this highly contagious and asymptomatically transmittable virus spreading. Like innumerable small breezes against a sail, enough will push a sailboat over a waterfall if the course is not changed and the sail not brought under control. Use of

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[18] *See* CDC Research Paper, *Cluster of Coronavirus Disease Associated with Fitness Dance Classes, South Korea*, available at https://wwwnc.cdc.gov/eid/article/26/8/20-0633_article; *see also USA Today, Is group exercise safe? Study raises questions about coronavirus risk in gyms* (June 5, 2020), available at https://www.today.com/health/coronavirus-group-exercise-are-classes-safe-coronavirus-risk-gyms-t183428 (summarizing South Korea study of 112 infections linked to fitness dance classes at twelve gyms); *New York Times*, *Is It Safe to Go Back to the Gym?* (May 13, 2020), available at https://www.ytimes.com/2020/05/13/well/move/coronavirus-gym-safety.html

personal protective equipment (PPE), sanitizers, and the like will only do so much to avoid these harms and presents the downside of depleting resources critically needed to provide emergency care to those afflicted by COVID-19 and other conditions immediately threatening their health and safety.

This last point merits emphasis. Until recently, Michigan, like other states, had been in the throes of an impending and dangerous shortage of health care resources available to handle the steep and immediate demands created by this pandemic, from PPE for medical professionals (and other critical infrastructure workers), to ventilators and other necessary medical supplies, to hospital beds. As the virus began to ravage the State, health systems were quickly reaching or exceeding their capacity. Medical supplies were dwindling, and beds in intensive care units were in short supply. There was a very real and imminent danger that hospitals could be completely overrun. Indeed, the TCF Center (formerly Cobo Center) – typically the home of auto shows and black-tie galas – was retrofitted as a makeshift field hospital in anticipation of local bed shortages.[19] That it has not seen thousands of patients is a blessing, and a result of the carefully calibrated measures put in place to stem the tide.

[19] Detroit Free Press, *TCF Center transformation ahead of schedule, ready for patients April 8* (April 4, 2020), available at https://www.freep.com/story/news/local/michigan/2020/04/04/coronavirus-covid-19-tcf-center-field-hospital/2948726001/

Accordingly, there is ample good reason to temporarily regulate fitness centers, as the executive orders challenged here do.[20] And there is ample good reason for those regulations to remain in place longer than those that restrict activity that does not pose the same level of risk of infection and spread—such as activity that is outdoors or more sedentary or isolated. The restrictions at issue serve to protect the public health of the State and its residents, and to prevent its health care system from collapsing under the strain of easily transmittable, potentially fatal, and still untreatable virus. They—like the broader set of measures regarding travel and in-person work and activities that were put in place by the Governor's emergency orders—are temporary, tailored, and aimed at guiding the state as swiftly and safely as possible through the severe dangers posed by this pandemic.

Plaintiffs complain that the restrictions they challenge are lasting too long. But adequate time must be given for the public health goals to be served and a transition to economic normalcy to return—and due deference must be given under *Jacobson* to the Governor's assessment and actions in that regard.[21] *See, e.g., South Bay United Pentecostal Church*, 509 U.S. ___ (Roberts, C.J., concurring in summary

[20] Plaintiffs refer to an alleged national absence of any outbreak connected to a fitness center. Even if true, that would only stand to show the effectiveness of the lockdown orders and social distancing practices. It would not imply the absence of a rational basis to order the temporary shutdown of indoor commercial fitness activity.

[21] The incubation period of the virus and its duration of contagion are other important variables not yet fully understood. Accordingly, a variable dial approach to reopening should be preferred over the flipping of a switch that Plaintiffs' legal position might suggest.

denial order) (explaining that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," and the judgment of "the politically accountable officials" to whom those decisions are entrusted "should not be subject to second-guessing" by the courts).

And indeed, this careful and gradual transition is exactly what has been happening with the rescission of various executive orders and the promulgation of new, narrower ones. While circumstances rapidly escalated and the virus began to ravage the State, more restrictive measures were necessary to combat the spread and save lives. As circumstances have improved and the number of infections and deaths have trended downward, the restrictive measures have eased, sometimes on a regional basis, based on the best available data and the advice of public-health experts. This is the very essence of the emergency management authority afforded the Governor under the principles announced in *Jacobson*.

Judicial deference is appropriate not just on the substance of this challenge but the timing as well. As a matter of separation of powers, distinctions between essential and non-essential and safe and unsafe are best left to the branch designed for and equipped to make those calls. The Governor's executive orders should not be undercut by disparate preliminary judicial carveouts in the wake of a particular litigant's race to the courthouse.

In sum, the limited and temporary restrictions in the Governor's orders have been necessary and appropriate, with a "real [and] substantial relation" to stopping

the spread of the virus, and they most certainly do not constitute, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 US at 31. As stated by the Michigan Court of Claims:

> What the Court must do—and can only do—is determine whether the Governor's orders are consistent with the law. Under the applicable standards, they are.

(*Martinko* Opinion, Ex A, p. 14, citation omitted). Accordingly, Plaintiffs cannot overcome *Jacobson* and their claims fail as a matter of law.

B. Plaintiffs do not have a viable procedural due process claim.

The same is true of Plaintiffs' claims even absent *Jacobson*'s deferential standard. First, Plaintiffs have failed to state a viable procedural due process claim. The general touchstone for such claims is notice and an opportunity to be heard on a pre- or post-deprivation basis. *See Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976). But under the holding of *Mathews*, none of the instant Plaintiffs have suffered a final deprivation of any protected interest. The challenged executive orders contain temporary restrictions, not final ones. Additionally, *Mathews* concerned termination of disability benefits and not a generally applicable emergency order in a pandemic that need only be disseminated to the public through the usual media channels. Indeed, due process is "flexible and calls for such procedural protections as the particular situation demands." *Morissey v. Brewer*, 408 U.S. 471, 481 (1972).

Here, Plaintiffs seem to be seeking some sort of process by which they could challenge a determination that their commercial activity is "non-essential." But they fail to present a viable claim that any additional process was due here to

commercial fitness businesses or organizations. Many millions of individuals, businesses, and enterprises were all subject to the same general, temporary orders. Plaintiffs have offered nothing in the federal constitution or cases construing it that would have required any more here than general promulgation of the temporary executive orders issued under emergency authority. *See, e.g., Hartman v Acton*, No. 2:20-CV-1952, 2020 WL 1932896, at *6-10 (S.D. Ohio Apr. 21, 2020) (in the context of a TRO, rejecting a plaintiff business owner's procedural due process challenge to Ohio's COVID-19-related "Stay-at-home order" that "direct[ed] non-essential businesses to cease operating their physical locations").

Plaintiffs rely on non-binding authority from Pennsylvania. *Friends of Danny DeVito v. Wolf*, __ A.3d ___ (Penn., Apr. 13, 2020), 2020 WL 1847100. Plaintiffs suggest that a waiver process for a post-deprivation challenge of essential versus non-essential designations like the one in Pennsylvania should be required in Michigan. But one state's policy choice is not another state's constitutional mandate. *DeVito* included no such holding, nor did it hold that procedural due process requires that businesses be afforded the opportunity to dispute the State's determinations regarding what categories of businesses may be open.

To the contrary, *DeVito* emphasized that, under settled law, the purpose of post-deprivation process is to protect individuals and businesses from "mistaken or unjustified" deprivations. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). And *DeVito* recognized that Pennsylvania's "waiver" process was sufficient to meet this standard, because it provided a way for individual businesses to demonstrate that

they did not, in fact, fall within one of the categories of businesses deemed "non-life-sustaining" and thus closed under Pennsylvania's order. *See* 2020 WL 1847100 at *20-21. As *DeVito* made clear, however, this "waiver" process did not provide a mechanism for businesses that did fall within one of the closed categories to challenge that categorical closure decision or to secure an exemption from it—nor did procedural due process require any such thing. *See id.*

Here, Plaintiffs do not claim that they were mistakenly classified as falling within a certain category of businesses under the Governor's orders. They simply disagree with how that category of businesses is treated under the orders. That disagreement is not enough to ground a viable procedural due process claim. There is no claim that any of the Plaintiffs were mistakenly or finally deprived of anything. The restrictions on Plaintiffs are temporary, and the public health concerns justifying them are compelling and paramount. Plaintiffs can point to nothing to indicate that, given this "particular situation," due process would "demand[]" that they be afforded any further "procedural protections." *Morissey*, 408 U.S. at 481. Accordingly, Plaintiffs have not shown a substantial likelihood of success on this claim.

C. Plaintiffs do not have a viable equal protection claim.

Plaintiffs also fall far short of establishing an equal protection claim. "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights

must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* Courts apply a "strong presumption" that a challenged law is valid and plaintiffs have the heavy burden of negating "every conceivable basis" which might support the law. *Id.* at 314-15.

For the reasons already stated, each challenged restriction has a rational basis. During this pandemic, it makes eminent sense to adopt measures that require social distancing, limit person to person contact, and preserve valuable health care resources. This unsurprisingly has meant different things for different businesses. For fitness centers, it means adapting and doing as much as can be done – again, temporarily – remotely via technology or outdoors.

Plaintiffs incorrectly presume that their businesses are indistinguishable from different businesses that are now subject to looser restrictions. Not so.

Even in a lockdown, people have to eat. So it is both rational and expected that grocery stores and food businesses would continue limited in-person operations while Plaintiffs could not. Plaintiffs, however, stress that they too provide a means to engage in life-sustaining activity, and decry the opening of businesses that, in their view, are not comparably beneficial, such as nail salons and massage parlors.

The health benefits of exercise are well recognized. Indeed, that this why the Stay Home Order, from its first iteration, has consistently permitted outdoor activity like "walking, hiking, running, cycling or any other recreational activity." *See* E.O. 2020-21, § 7(a)(1). For the reasons already discussed, however, indoor

commercial fitness activity is another matter altogether that can be and has been reasonably restricted due to the pandemic. It is a particular species of exercise that logically and legally need not fall within the same exception for types of exercise that do not pose the same combination of heightened risks of infection and spread.[22] Likewise, that combination of heightened risks sets Plaintiffs apart from other businesses that have been permitted to resume providing in-person, indoor services more fully at this point. Meanwhile, businesses that tend to present a risk profile more comparable to Plaintiffs', such as indoor places of recreation, remain subject to the same operational restrictions as Plaintiffs.

Simply put, there are multiple, readily apparent rational bases that inform and support the restrictions that have been put in place and when and how they have been lifted. Plaintiffs' mere disagreement with this reasoning and the lines that have been drawn from it does not negate the many "reasonably conceivable state[s] of facts" that support it or overcome the "strong presumption" that it is constitutionally valid. *FCC*, 508 U.S. at 313–14. Accordingly, Plaintiffs' equal protection challenge is not likely to succeed.

[22] To the extent that Plaintiffs raise the health concerns of their customers, Plaintiffs have failed to cite any recognized theory of third party standing that would apply here. Even with such standing, alternative means of exercise that are permitted would mean no injury in fact and no redressability here. Furthermore, Plaintiffs have failed to acknowledge or address the various ways in which they can still serve the health needs of their customers, such as through remote, outdoor, or in-home services.

D. Plaintiffs do not have a viable dormant commerce clause claim.

By empowering Congress to regulate interstate commerce, the Commerce Clause is interpreted to, correspondingly, prohibit states from interfering with the same. U.S. Const., Art. I, s. 8, cl. 3. This negative implication, commonly known as the "dormant commerce clause," "prohibit[s] outright economic protectionism or regulatory measures designed to benefit in-state economic actors by burdening out-of-state actors." *E. Ky. Res. v. Fiscal Court*, 127 F.3d 532, 540 (6th Cir. 1997). A two-tiered analysis applies to such claims. "The first prong targets the core concern of the dormant commerce clause, protectionism – that is 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 449 (6th Cir. 2009) (quoting *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). The second applies where, as here, the order invokes no inkling of in-state protectionism but, instead, applies to all businesses operating with this state. In this situation, the order is presumed valid unless its burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Plaintiffs bear the burden of demonstrating this second prong weighs in their favor. It is a burden they cannot meet here.

Any burden of the executive orders on interstate commerce or out-of-state actors is minuscule compared to the benefit to the state and local communities as a whole. The challenges presented by the spread of COVID-19 have required swift and nimble action throughout Michigan to stop the spread of a highly contagious and deadly disease. This includes the complained-of restrictions on indoor

commercial fitness activity raised in Plaintiffs' amended complaint. Many businesses and individuals throughout the State have faced these necessary and temporary restrictions.

But nothing in the executive orders regulates interstate commerce as interstate commerce. Impacts on such commerce may be inevitable, but that is not the focus of any of the challenged restrictions. This factor alone distinguishes this case from recognized dormant commerce clause challenges. Additionally, none of the challenged orders seek to regulate any conduct outside of the State of Michigan. While Plaintiffs were impacted by the restrictions and presumably engaged in some measure of interstate commerce, those factors alone fall far short of a viable commerce clause challenge.

Further, in *Pike*, the Supreme Court specifically recognized that its holding was influenced by the fact that it was not dealing with "state legislation in the field of safety where the propriety of local regulation has long been recognized." *Pike*, 397 U.S. at 143. This is not the case here. Dealing with public health in general and a pandemic in particular fall squarely within deeply rooted local and state police powers, and Plaintiffs offer nothing to show that the limited and temporary restrictions they challenge are somehow "clearly excessive" in comparison to the critical protections those restrictions provided to the residents, communities and health care system of this State during this pandemic. Therefore, Plaintiffs' claim for relief under dormant commerce clause doctrine is not likely to succeed.

III. Plaintiffs make an inadequate showing of irreparable harm.

Not only have Plaintiffs failed to show a likelihood of success on the merits of their claims, they have also failed to show, as they must, that they will suffer irreparable injury without the preliminary injunction they request. *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005). "A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet v. Lexington–Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).

As demonstrated in the preceding sections, Plaintiffs' constitutional rights are not being violated, and their bald assertions about insolvency, loss of customers, goodwill, and future business do not amount to irreparable harm.

Plaintiffs' failure to offer any evidentiary support for their vague assertions of injury cannot be ignored in light of the heavy burden upon them. Nor is it appropriate to presume such injury from the existence of the Executive Orders in recent months. The fact that the need for social distancing has impacted some of the services Plaintiffs offer does not automatically translate into the doomsday outcomes they postulate. Society is adapting to mitigate the impact of COVID-19. The fitness industry is no exception.

Plaintiffs also say nothing about the adjustments and accommodations they have made to provide supportive services, such as online, outdoor, or in-home training, to their customers while the temporary limitations on their normal operations are in place. Technology in the form of video, audio, and web-based services can mitigate the closure of physical facilities. The same is true for outdoor

classes and trainer input for individually executed remote participation. And Plaintiffs remain free to sell any products they may carry via delivery or curbside pickup, or at any outdoor classes they may offer.

Loss of goodwill, further, is speculative and unwarranted. Customer blame, if any, would be directed at the pandemic or at government response to it, and not to any specific fitness center subject to the same industry-wide restrictions impacting its friends and competitors alike.

In the absence of evidence to the contrary, this factor favors Defendants.

IV. A preliminary injunction would not serve the public interest.

The third and fourth factors are similar—whether an injunction will cause substantial harm to third parties, and whether it would serve the public interest. In regard to the fourth factor, the public interest "will not be as important as the other factors considered in the award of preliminary injunctive relief in actions involving only private interests, [but] it will be prominently considered in actions implicating government policy or regulation, or other matters of public concern." 13 Moore's Federal Practice § 65.22 (Matthew Bender 3d. ed).

Here, issuing an injunction that precludes enforcement of any part of the Governor's executive orders would harm third parties and would not benefit the public. The orders were put in place after careful consideration of the unique nature of the threat facing Michigan and the advice of numerous individuals and entities with unique expertise. A piecemeal lifting of restrictions by this Court, without regard to the State's carefully considered, deliberate, ongoing plan to combat the crisis and safely transition back to normalcy, increases the risk and

potential harm to everyone. For the reasons already briefed, a particular party's race to the courthouse should not control who is and is not excepted, particularly in a time of great public need when all in Michigan must grab hold of an oar and row in the same direction. As a result, the third and fourth factors favor Defendants as well.

CONCLUSION AND RELIEF REQUESTED

Defendants Whitmer and Gordon respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction and grant any other appropriate relief to Defendants.

Respectfully submitted,

/s/ *John G. Fedynsky*
John G. Fedynsky (P65232)
Assistant Attorney General
Attorney for Defendants
Whitmer and Gordon
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
517.335.7573
fednyskyj@michigan.gov
P65232

Dated: June 12, 2020

CERTIFICATE OF SERVICE

I certify that on June 12, 2020, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/ *John G. Fedynsky*
John G. Fedynsky (P65232)
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

Index of Exhibits

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

Index of Exhibits

Exhibit	Description
A	Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, *Martinko, et. al. v. Governor Whitmer, et. al.*, Michigan Court of Claims Case No. 20-62-MM, April 29, 2020
B	Summary Order, *South Bay United Pentecostal Church v. Gavin Newsom, Governor of California*, 509 U.S. ___ (2020) (released May 29, 2020)
C	*Modes of transmission of virus causing COVID-19*, World Health Organization, available at https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations
D	*Social Distancing, Quarantine, and Isolation,* Centers for Disease Control, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting sick/social-distancing.html
E	*Flattening the Coronavirus Curve*, *New York Times* (March 27, 2020), available at https://www.nytimes.com/article/flatten-curve-coronavirus.html
F	E.O. No. 2020-4
G	E.O. No. 2020-5
H	E.O. No. 2020-9

I	E.O. No. 2020-11
J	E.O. No. 2020-21
K	E.O. No. 2020-110
L	E.O. No. 2020-115

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT A

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT A

STATE OF MICHIGAN

COURT OF CLAIMS

STEVE MARTINKO, et al,

Plaintiffs,

OPINION AND ORDER REGARDING PLAINTIFFS' APRIL 23, 2020 MOTION FOR A PRELIMINARY INJUNCTION

v

Case No. 20-00062-MM

Hon. Christopher M. Murray

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANIEL EICHINGER, in his official capacity as Director of the Michigan Department of Natural Resources, and DANA NESSEL, in her official capacity as the Attorney General for the State of Michigan,

Defendants.
_____/

I. INTRODUCTION

This matter was filed by five Michigan residents who claim that three of Governor Whitmer's executive orders, Executive Orders 2020-21 and 2020-42,[1] and now Executive Order 2020-59, infringe on their constitutional rights to procedural due process and substantive due

[1] Plaintiffs recognize that EO 2020-21 was rescinded by EO 2020-42, and they claim that EO 2020-42 "extended the timeline originally set by [EO] 2020-21 and grossly expands its restrictions on businesses' and individuals' fundamental rights." After the verified complaint was filed, EO 2020-42 was rescinded by EO 2020-59, which (among other things) eliminated the prohibitions on traveling intrastate to another residence, from not using motorized boats on the waterways, and to an extent allows the re-opening of some businesses and state parks. Although plaintiffs challenge the same restrictions set forth in EO 2020-42, the Court will for clarity sake refer to the restrictions within the current executive order, EO 2020-59, unless the timing period is relevant to any issue.

process. Specifically, plaintiffs' verified complaint alleges that the "mandatory quarantine" imposed by EO 2020-59 violates their right to both procedural due process (Count I) and substantive due process (Count II), and that the intrastate travel restrictions contained in EO 2020-42 also violate their rights to procedural due process (Count III) and substantive due process (Count IV). They also allege in Count V of their verified complaint that the Emergency Management Act, MCL 30.401 *et seq*., is an unconstitutional delegation of legislative power to the Governor. Plaintiffs have requested the Court issue a preliminary injunction—but not a permanent one—restraining these defendants from continuing to implement the provisions of EO 2020-59.[2] Once restrained, plaintiffs seek a declaration that the challenged restrictions and the EMA are invalid.[3]

II. JURISDICTION

Defendants first argue that this Court lacks subject matter jurisdiction because plaintiffs seek only injunctive relief based upon federal constitutional claims, which deprives the Court of jurisdiction to decide the matter. Defendants rely upon MCL 600.6440, which provides:

> No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

[2] On April 23, 2020, the Court denied plaintiffs' motion for an *ex parte* temporary restraining order on the ground that plaintiffs had not shown the threat of immediate and irreparable harm of physical injury or loss of property.

[3] The Court appreciates the speed at which counsel submitted briefs, and for the high caliber of the briefs submitted.

Because a federal court can exercise jurisdiction against state officers in their official capacity when seeking only prospective injunctive relief, defendants argue, MCL 600.6440 applies and the Court lacks jurisdiction to decide the matter.

The legal principles put forward by defendants are sound, but they do not apply to plaintiffs' case. First, the statute refers to claims filed in the Court of Claims against the state, its departments, agencies, etc., and does not pertain to claims brought in this Court against individuals, as plaintiffs have done here. Thus, it is irrelevant whether claims against state officers in their official capacity brought in federal court might essentially be considered claims against the state. Second, with respect to defendants' argument, plaintiffs seek declaratory rulings on each of their three challenges, and one of those challenges—the claim that the EMA violates the separation of powers doctrine—is based upon state law. So too is their challenge to the intrastate ban on travel to vacation rentals. Additionally, in their complaint plaintiffs seek "other and further relief as the Court deems appropriate," which whatever that could end up being, it would go beyond the declaratory and limited injunctive relief requested in the complaint, and could include damages, even if only nominal. Because plaintiffs' claims and forms of relief do not meet all the requirements of MCL 600.6440, this Court does not lack subject matter jurisdiction.

III. MOOTNESS

Defendants also argue that plaintiffs' case is moot because they only challenge EO 2020-21 and EO 2020-42, which have been rescinded, and EO 2020-59 is the only existing executive order containing these restrictions. True enough, but as defendants seem to recognize, it was *after* plaintiffs' filing last week that the Governor issued EO 2020-59, and plaintiffs have not had time to seek to amend their complaint, and several of plaintiffs' challenges to the prior EOs—the stay-at-home provision and the ban on intrastate travel to vacation rentals—remain within EO 2020-

59. Those two challenges are therefore not moot, as the Court can still render complete relief against those provisions. See *CD Barnes Assoc, Inc v Star Haven, LLC*, 300 Mich App 389, 406; 834 NW2d 878 (2013). The remainder of the challenges to EOs 2020-21 and 2020-42, as well as to the Department of Natural Resources rule[4], have been removed by EO 2020-59, and are now moot.

The Court therefore concludes that the only remaining ripe challenges to the executive orders are (1) the stay-at-home provision, (2) the prohibition of traveling to a third-party vacation rental, and (3) the limited public access to certain public land. And, of course, plaintiffs' challenge to the constitutionality of the EMA remains a live controversy.

IV. STANDARDS FOR A PRELIMINARY INJUNCTION

"The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655–656; 588 NW2d 133 (1998). The status quo has been defined as " 'the last actual, peaceable, noncontested status which preceded the pending controversy.' " *Buck v Thomas Cooley Law School*, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006), quoting *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985). In *Mich AFSCME Council 25 v Woodhaven–Brownstown Sch*

[4] Specifically, plaintiffs challenge a Department of Natural Resources rule, implemented in furtherance of EO 2020-42, that "restricts the use of powerboats on public waterways yet allows sailboats and kayaks." Plaintiffs likewise question a DNR rule, also implemented in furtherance of EO 2020-42, that "further restricted access to public lands, parks and trails to residents of 'local communities.' " Much to the pleasure of outdoor enthusiasts, EO 2020-59 seems to have eliminated the restrictions on use of powerboats and use of state parks during certain hours of the day.

Dist, 293 Mich App 143, 146; 809 NW2d 444 (2011), the Court of Appeals instructed that, "[w]hen deciding whether to grant an injunction under traditional equitable principles,

> a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.[5]

Not surprisingly, the Court will first turn to the initial consideration, i.e., whether plaintiffs have shown a likelihood of prevailing on the merits. Though plaintiffs do not have to prove they *will* succeed on the merits, they do have to prove that they have a *substantial likelihood* of success on the merits. *Int'l Union v Michigan*, 211 Mich App 20, 25; 535 NW2d 210 (1995).

V. THE MERITS

A. BACKGROUND AND FACTS

Michigan residents, like all other Americans, cherish their liberty. We always have, though the liberties and freedoms we seek to protect have changed over time. At and before our founding, our forefathers fought for the inalienable right to own property, freely engage in commerce, represent ourselves through our own elected representatives, worship where and how we wanted, etc. The Declaration of Independence's list of grievances against the King of England prove as much, as do several of the amendments to the United States Constitution, and in particular, the Fifth and Fourteenth Amendments.

[5]Quoting in part *Alliance for the Mentally Ill*, 231 Mich App at 655–656.

Today we have all the freedoms and liberties that the founders fought for, and our branches of government exist in large part to ensure that those rights remain intact. See Declaration, ¶ 2.[6] The liberty and freedoms at stake in this matter do not in large part involve those rights and liberties the founders fought so hard for; instead, plaintiffs focus on the right to freely move about one's community and state, to do commerce when one pleases, and to travel about the state for vacation purposes. It is the restrictions to those activities within EO 2020-59 that plaintiffs challenge here.

As any reader of this opinion knows, the challenged executive orders were issued to address the public health crisis occasioned by the world-wide spread of the novel coronavirus, which hit our great state in early March. Specifically, on March 10, 2020, was when the first two cases of the virus were diagnosed in our state[7], while the first death resulting from the virus occurred on March 18, 2020.[8] As a result of the quick spread of the virus within our state borders, and to meet the myriad challenges that immediately arose Governor Whitmer issued numerous executive orders, including EO 2020-21, EO 2020-42 and EO 2020-59. The main element of the executive

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[6] The Court realizes that the Declaration is a political document, not a legal one, but it is good evidence of the founding political theories and objectives. See *Troxel v Granville*, 530 US 57, 91; 120 S Ct 2054; 147 L Ed 2d 49 (2000)(SCALIA, J., dissenting)("The Declaration of Independence ... is not a legal prescription conferring powers upon the courts[.]"); *Derden v McNeel*, 978 F2d 1453, 1456 n4 (CA 5, 1992)("[G]eneral statements about inalienable rights ... tell us little about the prerogatives of an individual in concrete factual situations."); *Coffey v United States*, 939 F Supp 185, 191 (EDNY, 1996)("While the Declaration of Independence states that all men are endowed certain unalienable rights including 'Life, Liberty and the pursuit of Happiness,' it does not grant rights that may be pursued through the judicial system." (citation omitted)).

[7] Executive Order No, 2020-21; Detroit Free Press, *Coronavirus Timeline* https://www.freep.com/story/news/local/michigan/2020/03/18/coronavirus-timeline-first-case-michigan-first-death/5069676002/ (accessed April 28, 2020). This article contains a compilation of information from the state Department of Health and Human Services.

[8] Detroit Free Press, *First Michigan Death Due to Coronavirus is Southgate Man in his 50s* https://www.freep.com/story/news/local/michigan/wayne/2020/03/18/coronavirus-deaths-michigan/5054788002/ (accessed April 28, 2020).

orders is the requirement that most residents remain in their home unless engaging in certain essential activities, or certain limited outdoor activities. The result of the order, from an economic standpoint, was thousands of Michigan residents being unable to work unless they could do so remotely, the closing of all restaurants, bars, and other small and large businesses.[9]

At the time the first stay-at-home order was issued on March 23, 2020—only 13 days since the first confirmed case in this state—there were already 1,328 confirmed cases and 15 deaths.[10] Today, just over one month later, Michigan has over 36,000 confirmed cases of the virus and over 3,000 related deaths.

B. THE MERITS

In their complaint, plaintiffs do not challenge the Governor's authority to issue the executive orders on this subject-matter. Instead, plaintiffs challenge the scope of the order through separate claims based on procedural due process and substantive due process. Although these claims entail different considerations and standards, see *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 573-574; 892 NW2d 388 (2016), the Court will address the claims together since, under these circumstances, each protected right is subject to the same overriding principle. In other words, the constitutional right asserted does not make a difference when considering this issue, because both are subject to a balancing with the state's interest to protect the public health. This holds true because, and perhaps contrary to common knowledge, most, if not all, individual constitutional rights are not absolute and are subject to a balancing with the

[9] Michigan was not alone in this regard. The Court takes notice that the worldwide economy has come to a virtual standstill as a result of state and national actions taken to control the virus.

[10] Detroit Free Press, *Michigan Coronavirus Cases, Tracking the Pandemic*, https://www.freep.com/in-depth/news/nation/coronavirus/2020/04/11/michigan-coronavirus-cases-tracking-covid-19-pandemic/5121186002/ (accessed April 28, 2020).

countervailing state interest. See *New Rider v Board of Ed of Independent School Dist No 1*, 480 F2d 693, 696 (CA 10, 1973) ("Constitutional rights, including First Amendment rights, are not absolutes.") and *In re Abbott*, 954 F3d 772, 784 (CA 5, 2020) (Recognizing, when addressing Texas emergency rules during the coronavirus pandemic, that individual rights secured by the Constitution could be reasonably restricted during a health crisis).

As can be seen, then, there are two competing constitutional principles at play. First, as plaintiffs note in their verified complaint, in *Ex Parte Milligan*, 71 US 2, 120-121; 18 L Ed 281 (1866), the United States Supreme Court recognized—in a case that arose during the height of the Civil War—that our rights enshrined in the Constitution do not become less important or enforceable because of exigent circumstances:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, 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, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Though our individual constitutional rights cannot be suspended or eliminated, they are, as noted, subject to reasonable regulation by the state. And, when it comes to the power of the state to act in the best interests of the public health when faced with a serious contagious disease, which is the state interest acted upon by the Governor,

> "[w]e are plowing no virgin field in considering the questions here involved. Numerous decisions, both federal and state, have considered the questions now before us. They are not all in accord and in some instances are not reconcilable. There is, however, a very marked trend in them in one direction, that which upholds the right of the state, in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, as will prevent the spread of this dread disease." [*People ex rel Hill v Lansing Bd of Ed*, 224 Mich

> 388, 390; 195 NW 95 (1923). See, also, *Jacobsen v Commonwealth of Mass*, 197 US 11, 25-26; 25 S Ct 358; 49 L Ed 643 (1905) (upholding state's power to require vaccination over plaintiff's Fourteenth Amendment liberty interest to not be told what to do), and *In re Abbott*, 954 F3d at 784-785.]

As noted earlier, plaintiffs' due process claims set out in Counts I and III are challenges to the quarantine[11] requirement and (as amended by the changes contained in EO 2020-59), the prohibition on intrastate travel to a vacation rental. Plaintiffs' specific assertion is that, although the state may have the ability to quarantine those who are infected with the virus, the state cannot quarantine everyone without some showing that the individual(s) are infected. Because EO 2020-59 does so, the executive order violates their right to procedural due process. The same holds true, they argue, for the prohibition of intrastate travel to a third parties' vacation home.[12]

In addressing this argument, it is imperative to recognize the limited question the Court is empowered to decide. Except in limited circumstances mentioned later, it is not for the courts to pass on the wisdom of state action that is granted to it by the general police power or by statute. Certainly the state cannot simply ignore the individual rights enshrined in our federal (or state) constitution in the name of a public health threat. Judicial review of state actions is therefore (and quite obviously) appropriate and necessary. But the *depth* of that review is limited, and does not include delving deep into the pros and cons of what is the better plan of action between two reasonable alternatives. This point was well-made by three concurring Justices in *Rock v Carney*,

[11] Plaintiffs characterize the "stay-at-home" provision as a quarantine, which defendants quarrel with, but quarantine is defined as "a restraint upon the activities or communications of persons … designed to prevent the spread of disease or pests." Merriam-Webster's Collegiate Dictionary (11th Ed).

[12] Plaintiffs have not asserted that they own a second home in Michigan or that they had rented a third parties' vacation home for use during a time in which any executive order remained in place.

216 Mich 280, 283; 185 NW 798 (1921), a case involving the state's response to the spread of venereal diseases during World War I:

> The questions involved in this litigation are of supreme importance, not only to the individuals composing this commonwealth, but also to the numerous boards of health and to the state itself. We approach their consideration with a due regard of their importance. Neither a desire to sustain the state, nor a supersensitiveness prompted by the delicacy of the examination here involved, should in any way enter into or control our decision. Policies adopted by the legislative and executive branches of the state government are not submitted to this branch for approval as to their wisdom. They stand or fall in this court because valid or invalid under the law, and their wisdom or want of wisdom in no way rests with us. If valid, they must be upheld by this court; if invalid, they must be so declared by this court. If these defendants have transcended their power, they must be held liable, and they may not be excused from liability by the fact that their motives were of the highest. If they had not transcended their power, they are not liable, and supersensitiveness or preconceived notions of proprieties, no matter of how long standing, do not render them liable. The case must be determined by the application of cold rules of law.

Thus, whether and to what extent this Court agrees with policy implemented in the executive orders is of no moment or consideration. Instead, the Court must dutifully apply the "cold rules of law" to determine the validity of the challenged provisions of the executive order.

Binding authority from the United States Supreme Court and the Michigan Supreme Court compels this Court to conclude that plaintiffs do not have a substantial likelihood of success on the merits. This is not because the rights asserted by plaintiffs are not fundamental—being forced (with some important exceptions) by the state to remain in one's home, in turn causing many residents to be unable to work, visit elderly relatives, and to generally move about the state. But those liberty interests are, and always have been, subject to society's interests—society being our fellow residents. They—our fellow residents—have an interest to remain unharmed by a highly communicable and deadly virus, and since the state entered the Union in 1837, it has had the broad

power to act for the public health of the entire state when faced with a public crisis. As the *Jacobsen* Court so aptly held:

> The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. *But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.* This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' In *Crowley v Christensen*, 137 US 86, 89; 34 L Ed 620, 621; 11 S Ct 13 (we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.' [*Jacobson*, 197 US at 26; citations omitted in part; emphasis supplied.]

The role courts play under *Jacobson* and *Lansing Bd of Ed* is not to "second-guess the state's policy choices in crafting emergency public health measures," *In re Abbott*, 954 F3d at 784, but is instead to determine whether the state regulation has a "real or substantial relation to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' " *Id*., quoting in part *Jacobson*, 197 US at 31. Part of this review includes

looking to whether any exceptions apply for emergent situations, the duration of any rule, and whether the measures are pretextual. *Id*. at 785.[13]

Turning to plaintiffs' specific challenges, the stay-at-home provision, the most restrictive portion of the executive order, was first implemented by the Governor on March 23, 2020, thirteen days after the first case of COVID-19 was diagnosed in the state. Though there were at that point approximately 1,328 cases in the state and 15 reported deaths, Governor Witmer was not acting on a blank slate. Instead, it was common knowledge that the virus had already rapidly spread throughout the state of Washington, was prevalent in several other states, and was devastating parts of Italy, China, and other countries. Indeed, the speed at which the virus spread was well known at the time the stay-at-home provision was implemented. It is true that this measure is a severe one, and greatly restricts each of our liberties to move about as we see fit, as we do in normal times. But the governor determined that severe measures were necessary, and had to be quickly implemented to prevent the uncontrolled spreading of the virus. As noted, Michigan was not alone in this regard:

> To be sure, [the order] is a drastic measure, but that aligns it with the numerous drastic measures Petitioners and other states have been forced to take in response to the coronavirus pandemic. Faced with exponential growth of COVID-19 cases, states have closed schools, sealed off nursing homes, banned social gatherings, quarantined travelers, prohibited churches from holding public worship services, and locked down entire cities. These measures would be constitutionally intolerable in ordinary times, but are recognized as appropriate and even necessary responses to the present crisis. [*In re Abbott*, 954 F3d at 787.]

[13] Plaintiffs' correctly note that *Jacobson* did not involve a state-wide requirement to stay at home, and instead addressed an involuntary vaccination program. But most cases have different facts, and it is the legal principle set forth in the decision that guides future courts. Thus, despite some factual differences, the Court relies (as did the *In re Abbott* court) upon *Jacobson* as it is the most relevant decision on this issue from the Supreme Court.

Plaintiffs suggest that the better—and more constitutionally sound decision—would have been to quarantine only those who have the virus. It may have been a better option to some, as doing so may have had a less severe impact on the movement of the Michigan population, and may have reduced unemployment. Or, as plaintiffs argue, a more narrowly tailored order by region may have been more reasonable for the entire state. But some of that is simply hindsight, and to accept it would be to impermissibly delve too deep into the choices made. Additionally, the Governor's concerns were not limited to what was most convenient or palatable at the time, as she also had to protect, to the extent possible, the health and safety of all Michigan residents and to not overburden the health care system. The introduction to EO 2020-59 outlines some of the other serious considerations that went into issuing the stringent order:

> To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

And, contrary to plaintiffs' arguments, the Supreme Court has upheld, against a constitutional challenge, a state's quarantine of individuals even when they are *not* infected with the disease being controlled. See *Compagnie Francaise de Navigation a Vapeur v Louisiana*, 186 US 380, 393; 22 S Ct 811; 46 L Ed 1209 (1902).

As noted, the Court's role is not to pick which alternative may be more reasonable, more preferential, or more narrowly tailored, as the latter is in deciding some constitutional cases. Monday morning quarterbacking is the role of sports fans, not courts reviewing the factual basis supporting executive action to protect the public health. Instead, it is the role of the executive and legislative branches to determine what *steps* are necessary when faced with a public health crisis.

In re Abbott, 954 F3d at 792 ("Such authority [to determine what measures are best to take] properly belongs to the legislative and executive branches of the governing authority"); *Rock,* 216 Mich at 296; *Lansing Bd of Ed*, 224 Mich at 397.[14] Under federalism principles, it is the States that retained the police power, and that power—though not unlimited—is quite broad. See *Nat'l Federation of Independent Business v Sebelius*, 567 US 519, 536; 132 S Ct 2566; 183 L Ed 2d 450 (2012) ("The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power") and *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 73; 367 NW2d 1 (1985) (discussing the scope of the police power and how that power extends to enacting regulations to promote public health, safety, and welfare, and providing that regulations "passed pursuant to the police power carry with them a strong presumption of constitutionality.").

What the Court must do—and can only do—is determine whether the Governor's orders are consistent with the law. *Rock*, 216 Mich at 283. Under the applicable standards, they are. The undisputed facts known at the time the first stay-at-home order was made, and the undisputed facts known today, compel the conclusion that the order had a real and substantial relation to the public health crisis. The challenged measures relate to limiting human interaction which helps control the spread of a virus considered to be extremely communicable. To make it voluntary, or more limited in scope, were perhaps other avenues to pursue, but even accepting that proposition does

[14] As will be discussed shortly, the Legislature has also spoken on the issue of how to address emergent situations. MCL 10.21; MCL 30.401 *et seq*. Additionally, the Court takes notice that the Legislature recently established an oversight committee to review the measures implemented through the Governor's various executive orders.

not make what the Governor reasonably chose to do invalid. Instead, the Governor's determination as to the speed and ease with which the virus spreads, and the potential impact that spread would have on the health care system, and the threat it had to the lives of thousands of Michigan residents in a short period of time, allows for the conclusion that the two challenged provisions had a real and substantial relation to the public health crisis. *Jacobson*, 197 US at 31. There is nothing presented to the Court to draw any other legal conclusion.[15]

Nor is there any evidence (or even a suggestion) that the stay-at-home provision was a pretext to accomplish some other objective. Additionally, the record is clear that these measures are temporary, and limited in time to address the speed at which the virus spreads, the status of the available health care system, and the need to get Michigan residents back to enjoying their liberties. Indeed, since this lawsuit was filed last week, the Governor issued EO 2020-59, easing some of the very restrictions challenged by plaintiffs, and has indicated more lifting of restrictions are imminent. Plaintiffs have not shown a substantial likelihood of success on the merits in their challenge to the executive order restrictions.

C. CONSTITUTIONALITY OF THE EMA[16]

Turning again to *In re Forfeiture of 2000 GMC Denali and Contents*, the Court set forth the rather difficult standards governing a challenge to the constitutionality of a state statute:

> A party challenging the constitutionality of a statute has the burden of proving the law's invalidity. *Gillette Commercial Operations North America & Subsidiaries v*

[15] Plaintiffs submitted documentary evidence which, if believed, could allow a governor to issue a more narrowly tailored order. But because this Governor made a different conclusion that was likewise based on other supporting evidence related to the virus, her decision had a real and substantial relation to the public health crisis.

[16] Plaintiffs do not challenge the Governor's exercise of authority under either statute, nor whether she needs legislative approval to continue her emergency declaration.

> *Dep't of Treasury*, 312 Mich App 394, 414-415; 878 NW2d 891 (2015). The challenging party must overcome a heavy burden because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). When interpreting a statute, our primary goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628; 765 NW2d 31 (2009). To do so, we examine the plain language of the statute itself, and "[i]f the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). [*In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 569.]

As far as the Court can discern, plaintiffs' challenge to the EMA is an as-applied one:

> A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge. This is an as-applied challenge, meaning that claimant has alleged " 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014), quoting *Village of Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v Guam Society of Obstetricians & Gynecologists*, 506 US 1011, 1012; 113 S Ct 633; 121 L Ed 2d 564 (1992) (SCALIA, J., dissenting). See also *United States v Frost*, 125 F3d 346, 370 (CA 6, 1997). [*In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 569-570.]

Plaintiffs' challenge to the delegation of power from the Legislature to the executive will likely not succeed. It is certainly true that the Legislature cannot grant some vague, unfettered discretion to the executive to carry out what is a legislative function. But if the challenged legislation contains sufficient guidance to the executive on how to execute the law to further the Legislature's policy, it does not violate the non-delegation doctrine. *City of Ann Arbor v Nat'l Ctr for Mfg Sciences, Inc*, 204 Mich App 303, 308; 514 NW2d 224 (1994) ("[T]he standards must be sufficiently broad to permit efficient administration so that the policy of the Legislature may be complied with, but not so broad as to give uncontrolled and arbitrary power to the administrators.").

As defendants point out, plaintiffs allege in their complaint that the powers granted to the Governor are "limited," and none of the provisions in the act are such that the executive would have "uncontrolled, arbitrary power." *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308; 240 NW2d 206 (1976). The provisions of the EMA are not vague, and contain specific procedures and criteria for the Governor to declare a state of disaster or emergency, and what conditions qualify as a disaster or emergency. See MCL 30.402(e) and (h); MCL 30.403(3) and (4). The EMA also grants the Governor additional, specific duties and powers when addressing any declared disaster or emergency, MCL 30.405, and sets for a comprehensive state and local jurisdictional system to address declared state-wide disasters or emergencies. MCL 30.407-MCL 30.411. As a result, plaintiffs are unable to establish a likelihood of success on the merits on this claim.

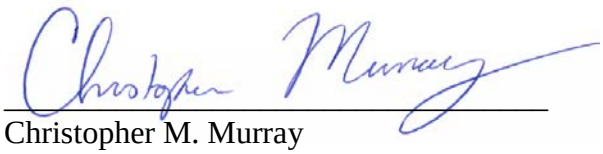
D. HARM TO THE PUBLIC INTEREST

Finally, and for many of the same reasons, the Court concludes that entry of a preliminary injunction would be more detrimental to the public than it would to plaintiffs. Although the Court is painfully aware of the difficulties of living under the restrictions of these executive orders, those difficulties are temporary, while to those who contract the virus and cannot recover (and to their family members and friends), it is all too permanent. That is not to say that every new virus will require the action taken here, but given the authority of the Governor to do so in the face of these circumstances, the Court must conclude issuing injunctive relief would not serve the public interest, despite the temporary harm to plaintiffs' constitutional rights.

VI. CONCLUSION

For these reasons, plaintiffs' motion for a preliminary injunction is DENIED.

Date: April 29, 2020



Christopher M. Murray
Judge, Court of Claims

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT B

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT B

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied.

JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would grant the application.

CHIEF JUSTICE ROBERTS, concurring in denial of application for injunctive relief.

The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

Applicants seek to enjoin enforcement of the Order. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC* v. *McKee*, 562 U. S. 996 (2010) (internal quotation marks omitted). This

power is used where "the legal rights at issue are indisputably clear" and, even then, "sparingly and only in the most critical and exigent circumstances." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson* v. *Massachusetts*, 197 U. S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall* v. *United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985).

That is especially true where, as here, a party seeks

emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.

SUPREME COURT OF THE UNITED STATES

No. 19A1044

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v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting from denial of application for injunctive relief.

I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

South Bay United Pentecostal Church has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

In my view, California's discrimination against religious worship services contravenes the Constitution. As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978) (Brennan, J., concurring in judgment). This Court has stated that discrimination against religion is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S.__,__ (2017) (slip op., at 15); see also, *e.g., Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *McDaniel*, 435 U. S. 618.

To justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Lukumi*, 508 U. S., at 531–532. California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Roberts* v. *Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*). What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.

California has not shown such a justification. The Church has agreed to abide by the State's rules that apply to comparable secular businesses. That raises important questions: "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Ibid.*

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Ibid.*

California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could "insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities." *Id.,* at 415. Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.

In sum, California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment. See *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312 (1986) (Scalia, J., in chambers). The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church's request for a temporary injunction. I respectfully dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT C

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT C

Modes of transmission of virus causing COVID-19: implications for IPC precaution recommendations

Scientific brief

29 March 2020

This version updates the 27 March publication by providing definitions of droplets by particle size and adding three relevant publications.

Modes of transmission of the COVID-19 virus

Respiratory infections can be transmitted through droplets of different sizes: when the droplet particles are >5-10 μm in diameter they are referred to as respiratory droplets, and when then are <5μm in diameter, they are referred to as droplet nuclei.[1] According to current evidence, COVID-19 virus is primarily transmitted between people through respiratory droplets and contact routes.[2-7] In an analysis of 75,465 COVID-19 cases in China, airborne transmission was not reported.[8]

Droplet transmission occurs when a person is in in close contact (within 1 m) with someone who has respiratory symptoms (e.g., coughing or sneezing) and is therefore at risk of having his/her mucosae (mouth and nose) or conjunctiva (eyes) exposed to potentially infective respiratory droplets. Transmission may also occur through fomites in the immediate environment around the infected person.[8] Therefore,

transmission of the COVID-19 virus can occur by direct contact with infected people and indirect contact with surfaces in the immediate environment or with objects used on the infected person (e.g., stethoscope or thermometer).

Airborne transmission is different from droplet transmission as it refers to the presence of microbes within droplet nuclei, which are generally considered to be particles <5μm in diameter, can remain in the air for long periods of time and be transmitted to others over distances greater than 1 m.

In the context of COVID-19, airborne transmission may be possible in specific circumstances and settings in which procedures or support treatments that generate aerosols are performed; i.e., endotracheal intubation, bronchoscopy, open suctioning, administration of nebulized treatment, manual ventilation before intubation, turning the patient to the prone position, disconnecting the patient from the ventilator, non-invasive positive-pressure ventilation, tracheostomy, and cardiopulmonary resuscitation.

There is some evidence that COVID-19 infection may lead to intestinal infection and be present in faeces. However, to date only one study has cultured the COVID-19 virus from a single stool specimen.[9] There have been no reports of faecal−oral transmission of the COVID-19 virus to date.

Implications of recent findings of detection of COVID-19 virus from air sampling

To date, some scientific publications provide initial evidence on whether the COVID-19 virus can be detected in the air and thus, some news outlets have suggested that there has been airborne transmission. These initial findings need to be interpreted carefully.

A recent publication in the New England Journal of Medicine has evaluated virus persistence of the COVID-19 virus.10 In this experimental study, aerosols were generated using a three-jet Collison nebulizer and fed into a Goldberg drum under controlled laboratory conditions. This is a high-powered machine that does not reflect normal human cough conditions. Further, the finding of COVID-19 virus in aerosol particles up to 3 hours does not reflect a clinical setting in which aerosol-generating procedures are performed—that is, this was an experimentally induced aerosol-generating procedure.

There are reports from settings where symptomatic COVID-19 patients have been admitted and in which

no COVID-19 RNA was detected in air samples.[11-12] WHO is aware of other studies which have evaluated the presence of COVID-19 RNA in air samples, but which are not yet published in peer-reviewed journals. It is important to note that the detection of RNA in environmental samples based on PCR-based assays is not indicative of viable virus that could be transmissible. Further studies are needed to determine whether it is possible to detect COVID-19 virus in air samples from patient rooms where no procedures or support treatments that generate aerosols are ongoing. As evidence emerges, it is important to know whether viable virus is found and what role it may play in transmission.

Conclusions

Based on the available evidence, including the recent publications mentioned above, WHO continues to recommend droplet and contact precautions for those people caring for COVID-19 patients. WHO continues to recommend airborne precautions for circumstances and settings in which aerosol generating procedures and support treatment are performed, according to risk assessment.[13] These recommendations are consistent with other national and international guidelines, including those developed by the European Society of Intensive Care Medicine and Society of Critical Care Medicine[14] and those currently used in Australia, Canada, and United Kingdom.[15-17]

At the same time, other countries and organizations, including the US Centers for Diseases Control and Prevention and the European Centre for Disease Prevention and Control, recommend airborne precautions for any situation involving the care of COVID-19 patients, and consider the use of medical masks as an acceptable option in case of shortages of respirators (N95, FFP2 or FFP3).[18-19]

Current WHO recommendations emphasize the importance of rational and appropriate use of all PPE,[20] not only masks, which requires correct and rigorous behavior from health care workers, particularly in doffing procedures and hand hygiene practices.[21] WHO also recommends staff training on these recommendations,[22] as well as the adequate procurement and availability of the necessary PPE and other supplies and facilities. Finally, WHO continues to emphasize the utmost importance of frequent hand hygiene, respiratory etiquette, and environmental cleaning and disinfection, as well as the importance of maintaining physical distances and avoidance of close, unprotected contact with people with fever or respiratory symptoms.

WHO carefully monitors emerging evidence about this critical topic and will update this scientific brief as more information becomes available.

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WHO continues to monitor the situation closely for any changes that may affect this interim guidance. Should any factors change, WHO will issue a further update. Otherwise, this scientific brief will expire 2 years after the date of publication.

WHO reference number: WHO/2019-nCoV/Sci_Brief/Transmission_modes/2020.2

Want to read more?

Related

Modes of transmission of virus causing COVID-19

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SOUTHERN DIVISION

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v

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Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT D

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT D

Coronavirus Disease 2019 (COVID-19)

Social Distancing

Keep Your Distance to Slow the Spread

Other Languages Print Page

Limiting face-to-face contact with others is the best way to reduce the spread of coronavirus disease 2019 (COVID-19).

What is social distancing?

Social distancing, also called “physical distancing,” means keeping space between yourself and other people outside of your home. To practice social or physical distancing:

- Stay at least 6 feet (2 meters) from other people
- Do not gather in groups
- Stay out of crowded places and avoid mass gatherings

In addition to everyday steps to prevent COVID-19, keeping space between you and others is one of the best tools we have to avoid being exposed to this virus and slowing its spread locally and across the country and world.

When COVID-19 is spreading in your area, everyone should limit close contact with individuals outside your household in indoor and outdoor spaces. Since people can spread the virus before they know they are sick, it is important to stay away from others when possible, even if you have no symptoms. Social distancing is especially important for people who are at higher risk of getting very sick.

prolonged period. Spread happens when an infected person coughs, sneezes, or talks, and droplets from their mouth or nose are launched into the air and land in the mouths or noses of people nearby. The droplets can also be inhaled into the lungs. Recent studies indicate that people who are infected but do not have symptoms likely also play a role in the spread of COVID-19.

It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes. However, this is not thought to be the main way the virus spreads. COVID-19 can live for hours or days on a surface, depending on factors such as sun light and humidity. Social distancing helps limit contact with infected people and contaminated surfaces.

Although the risk of severe illness may be different for everyone, anyone can get and spread COVID-19. Everyone has a role to play in slowing the spread and protecting themselves, their family, and their community.

Tips for social distancing

- Follow guidance from authorities where you live.
- If you need to shop for food or medicine at the grocery store or pharmacy, stay at least 6 feet away from others.
    - Use mail-order for medications, if possible.
    - Consider a grocery delivery service.
    - Cover your mouth and nose with a cloth face cover when around others, including when you have to go out in public, for example to the grocery store.
        - Stay at least 6 feet between yourself and others, even when you wear a face covering.
- Avoid large and small gatherings in private places and public spaces, such a friend's house, parks, restaurants, shops, or any other place. This advice applies to people of any age, including teens and younger adults. Children should not have in-person playdates while school is out. To help maintain social connections while social distancing, learn tips to keep children healthy while school's out.
- Work from home when possible.
- If possible, avoid using any kind of public transportation, ridesharing, or taxis.
- If you are a student or parent, talk to your school about options for digital/distance learning.

Stay connected while staying away. It is very important to stay in touch with friends and family that don't live in your home. Call, video chat, or stay connected using social media. Everyone reacts differently to stressful situations and having to socially distance yourself from someone you love can be difficult. Read tips for stress and coping.

What is the difference between quarantine and isolation?

Quarantine

Quarantine is used to keep someone who might have been exposed to COVID-19 away from others. Someone in self-quarantine stays separated from others, and they limit movement outside of their home or current place. A person may have been exposed to the virus without knowing it (for example, when traveling or out in the community), or they could have the virus without feeling symptoms. Quarantine helps limit further spread of COVID-19.

Isolation

Isolation is used to separate sick people from healthy people. People who are in isolation should stay home. In the home, anyone sick should separate themselves from others by staying in a specific "sick" bedroom or space and using a different bathroom (if possible).

What should I do if I might have been exposed? If I feel sick? Or have confirmed COVID-19?

If you think you have been exposed to COVID-19, read about symptoms.

If you or someone in your home might have been exposed

Self-Monitor

Be alert for symptoms. Watch for fever,* cough, or shortness of breath.

- Take your temperature if symptoms develop.

- Practice social distancing. Maintain 6 feet of distance from others, and stay out of crowded places.
- Follow CDC guidance if symptoms develop.

If you feel healthy but:

- Recently had close contact with a person with COVID-19, or
- Recently traveled from somewhere outside the U.S. or on a cruise ship or river boat

Self-Quarantine

- Check your temperature twice a day and watch for symptoms.
- Stay home for 14 days and self-monitor.
- If possible, stay away from people who are high-risk for getting very sick from COVID-19.

If you:

- Have been diagnosed with COVID-19, or
- Are waiting for test results, or
- Have symptoms such as cough, fever, or shortness of breath

Self-Isolate

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EXHIBIT E

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

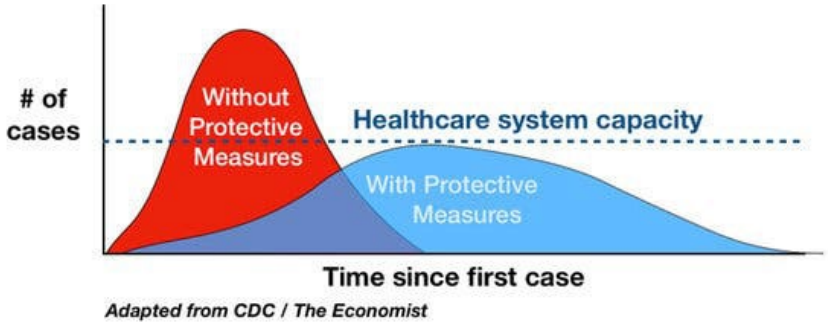
(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT E

Flattening the Coronavirus Curve

One chart explains why slowing the spread of the infection is nearly as important as stopping it.



The longer it takes for coronavirus to spread the population, the more time hospitals have to prepare. Drew Harris

By Siobhan Roberts

March 27, 2020

At the end of February, Drew Harris, a population health analyst at Thomas Jefferson University in Philadelphia, had just flown across the country to visit his daughter in Eugene, Ore., when he saw an article on his Google news feed. It was from The Economist, and was about limiting the damage of the coronavirus.

The accompanying art, by the visual-data journalist Rosamund Pearce, based on a graphic that had appeared in a C.D.C. paper titled "Community Mitigation Guidelines to Prevent Pandemic Influenza," showed what Dr. Harris called two epi curves. One had a steep peak indicating a surge of coronavirus outbreak in the near term; the other had a flatter slope, indicating a more gradual rate of infection over a longer period of time.

The gentler curve results in fewer people infected at this critical moment in time — preventing a surge that would inundate the healthcare system and ultimately, one hopes, resulting in fewer deaths. "What we need to do is flatten that down," said Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, during the coronavirus task force briefing at the White House on a Tuesday evening in early March. "You do that with trying to interfere with the natural flow of the outbreak."

The infographic reminded Dr. Harris of something similar that he had designed years earlier for a pandemic preparedness training program. "Folks in the preparedness and public health community have been

thinking about all of these issues for many years," Dr. Harris said in an email. "Understanding and managing surge is an important part of preparedness." But during the training course, Dr. Harris's students had struggled with the concept of reducing the epidemic curve, so he added a dotted line indicating hospital capacity — "to make clear what was at stake," he said.

After his visit with his daughter, Dr. Harris was waiting for his return flight in Portland when the first Oregon coronavirus case was announced; he had dinner at a busy airport bar and thought about how quiet the place would be in a week or two when the reality of the outbreak set in. Once home, he recreated his graphic and posted it on Twitter and LinkedIn, and was pleased to see the enthusiastic interest in flattening the curve.

"Now I know what going viral means," Dr. Harris said. (For a more detailed analysis, see a recent paper in The Lancet, "How will country-based mitigation measures influence the course of the COVID-19 epidemic?")

The following is an edited version of our email conversation.

What does it mean to “flatten the curve”?

The ideal goal in fighting an epidemic or pandemic is to completely halt the spread. But merely slowing it — mitigation — is critical. This reduces the number of cases that are active at any given time, which in turn gives doctors, hospitals, police, schools and vaccine-manufacturers time to prepare and respond, without becoming overwhelmed. Most hospitals can function with 10 percent reduction in staff, but not with half their people out at once.

Some commentators have argued for getting the outbreak over with quickly. That is a recipe for panic, unnecessary suffering and death. Slowing and spreading out the tidal wave of cases will save lives. Flattening the curve keeps society going.

What exactly do those two curves show?

Both curves add up the number of new cases over time. The more people reporting with the virus on a given day, the higher the curve; a high curve means the virus is spreading fast. A low curve shows that the virus is spreading slower — fewer people are diagnosed with the disease on any given day. Keeping the curve down — diminishing the rate at which new cases occur — prevents overtaxing the finite resources (represented by the dotted line) available to treat it.

Think of the health care system capacity as a subway car that can only hold so many people at once. During rush hour, that capacity is not enough to handle the demand, so people must wait on the platform for their turn to ride. Staggering work hours diminishes the rush hour and increases the likelihood that you will get on the train and maybe even get a seat. Avoiding a surge of coronavirus cases can ensure that anyone who needs care will find it at the hospital.

What sorts of mitigation measures help transform the red curve into the blue curve?

Diseases spread when one person gives it to one or more others, who go on to give it to more people, and so on. How fast this occurs depends on many factors, including how contagious the disease is, how many people are vulnerable and how quickly they get sick.

The difference between seasonal flu and coronavirus is that many people have full or partial immunity to the flu virus because they have had it before or were vaccinated against it. Far more people are vulnerable to coronavirus, so it has many more targets of opportunity to spread. Keeping people apart in time and space with social distancing measures, self-isolation and actual quarantine decreases opportunities for transmission.

To take the subway example again, a packed car — or a packed subway platform — is a great place to spread the virus. But reducing the number of people on the train or platform, by asking people to work from home or to stagger their working hours, enables individuals to stay farther apart, limiting the spread of the virus. That is social distancing in action.

Mitigation efforts keep people farther apart, making every transmission opportunity marginally less likely. This slows the spread. We should, and will, take the most vulnerable people out of the population altogether by keeping them totally separate. This is what Washington State is trying to do by limiting visitors to nursing homes. Think of this as a reverse quarantine.

What are you doing day-to-day in response to these unusual times?

Like most everyone else, I'm more aware of my surroundings and behaviors. I try to use a sleeve or elbow to open doors, and I wash my hands or use hand sanitizers after I touch a surface that might be contaminated. And I made sure to have a good supply of my prescription and nonprescription medications, just in case any shortages occur after the shutdown of Chinese pharmaceutical suppliers. I'm following the lead of my public health officials here in Philadelphia, where there is only one case as of Tuesday, and travel isn't restricted. I'm avoiding crowds and sick people. I am going out, and will continue to do so unless a quarantine is ordered or public places are closed.

I know there is a good chance that I will catch the virus before a vaccine becomes available, but I also believe I'm very likely to do fine. I'm not in any high-risk group. But I worry about the more vulnerable folks and want

to do what I can to prevent the spread. I also worry about people who lack the resources I have. What happens to the self-employed, hourly workers and people in the gig economy when business stops? What about the homeless who depend upon charity and services for support? It's these second-order effects that could be just as devastating if this epidemic really takes off.

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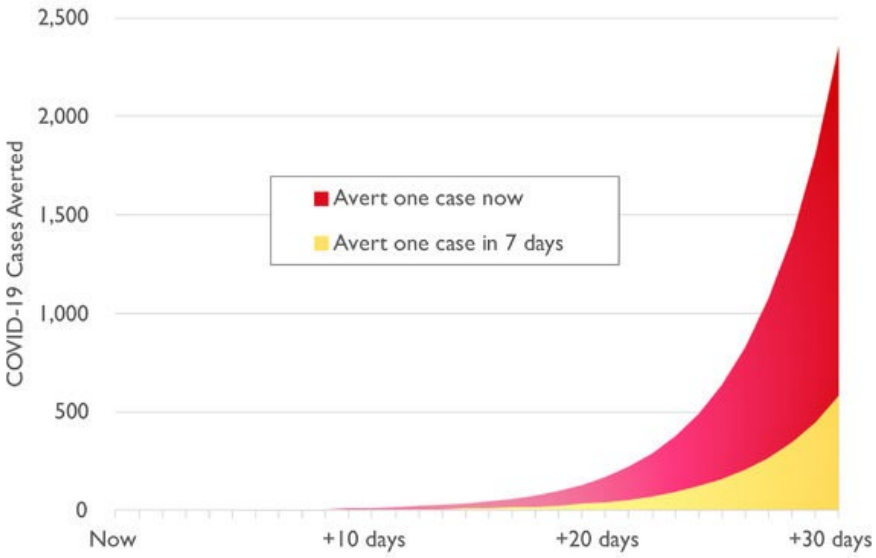
Coronavirus and statistics
The Exponential Power of Now
March 13, 2020



The Coronavirus, by the Numbers
March 5, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT F

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT F

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-4

Declaration of State of Emergency

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person.

COVID-19 has been identified as the cause of an outbreak of respiratory illness first detected in Wuhan City in the Hubei Province of China. Person-to-person spread of the virus has occurred in the United States, with some of those occurring in people with no travel history and no known source of exposure. On January 31, 2020, the United States Department of Health and Human Services Secretary Alex Azar declared a public health emergency for COVID-19, and affected state and local governments have also declared states of emergency.

The State of Michigan has been taking proactive steps to prevent and prepare for the spread of this disease. On February 3, 2020, the Michigan Department of Health and Human Services (MDHHS) activated the Community Health Emergency Coordination Center, and has been working diligently with local health departments, health systems, and medical providers throughout Michigan to make sure appropriate screening and preparations for COVID-19 are being made. On February 28, 2020, I activated the State Emergency Operations Center to maximize coordination with state, local and federal agencies, as well as private partners, and to help prevent the spread of the disease. On March 3, 2020, I created four task forces comprising key state government agencies to coordinate the state's response and work closely with the appropriate community and non-governmental stakeholders to combat the spread of COVID-19 and assess the impact it may have on Michiganders' day-to-day lives. And throughout this time, the State has been working with schools, businesses, medical providers, local health departments, and residents to make sure they have the information they need to prepare for potential cases.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan.

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Management Act, 1976 PA 390, as amended, MCL 30.403(4), provides that "[t]he governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists."

The Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31(1), provides that "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, . . . the governor may proclaim a state of emergency and designate the area involved."

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. A state of emergency is declared across the State of Michigan.

2. The Emergency Management and Homeland Security Division of the Department of State Police must coordinate and maximize all state efforts that may be activated to state service to assist local governments and officials and may call upon all state departments to utilize available resources to assist.

3. The state of emergency is terminated when emergency conditions no longer exist and appropriate programs have been implemented to recover from any effects of the emergency conditions, consistent with the legal authorities upon which this declaration is based and any limits on duration imposed by those authorities.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 10, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 3/10/2020 AT 11:30pm

SECRETARY OF SENATE
2020 MAR 11 AM 9:02

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT G

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT G

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-5

Temporary prohibition on large assemblages and events, temporary school closures

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19 and to provide essential protections to vulnerable Michiganders and this state's health care system and other critical infrastructure, it is reasonable and necessary to impose limited and temporary restrictions on large events and assemblages of people.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning on March 13, 2020 at 5:00 pm, and continuing through April 5, 2020 at 5:00 pm, all assemblages of more than 250 people in a single shared space and all events of more than 250 people are prohibited in this state, except for assemblages for the purpose of: industrial or manufacturing work; mass transit; or the purchase

of groceries or consumer goods. A single shared space includes but is not limited to a room, hall, cafeteria, auditorium, theater, or gallery. This prohibition does not abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

2. Beginning on March 16, 2020, all elementary school buildings and secondary school buildings in this state must close to students for educational purposes through April 5, 2020. This requirement includes all public, nonpublic, and boarding schools in the state. This requirement does not apply to residential facilities at schools and childcare providers at schools.

3. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order shall constitute a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 13, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

SECRETARY OF SENATE
2020 MAR 13 AM 11:43

FILED WITH SECRETARY OF STATE
ON 3/13/20 AT 11:14 A.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT H

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT H

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-9

Temporary restrictions on the use of places of public accommodation

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is reasonable and necessary to impose limited and temporary restrictions on the use of places of public accommodation.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning as soon as possible but no later than March 16, 2020 at 3:00 pm, and continuing until March 30, 2020 at 11:59 pm, the following places of public accommodation are closed to ingress, egress, use, and occupancy by members of the public:

   (a) Restaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverage for on-premises consumption;

(b) Bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption;

(c) Hookah bars, cigar bars, and vaping lounges offering their products for on-premises consumption;

(d) Theaters, cinemas, and indoor and outdoor performance venues;

(e) Libraries and museums;

(f) Gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas;

(g) Casinos licensed by the Michigan Gaming Control Board, racetracks licensed by the Michigan Gaming Control Board, and Millionaire Parties licensed by the Michigan Gaming Control Board; and

(h) Places of public amusement not otherwise listed above.

Places of public accommodation subject to this section are encouraged to offer food and beverage using delivery service, window service, walk-up service, drive-through service, or drive-up service, and to use precautions in doing so to mitigate the potential transmission of COVID-19, including social distancing. In offering food or beverage, a place of public accommodation subject to this section may permit up to five members of the public at one time in the place of public accommodation for the purpose of picking up their food or beverage orders, so long as those individuals are at least six feet apart from one another while on premises.

This section does not prohibit an employee, contractor, vendor, or supplier of a place of public accommodation from entering, exiting, using, or occupying that place of public accommodation in their professional capacity.

2. The restrictions imposed by this order do not apply to any of the following:

(a) Places of public accommodation that offer food and beverage not for on-premises consumption, including grocery stores, markets, convenience stores, pharmacies, drug stores, and food pantries, other than those portions of the place of public accommodation subject to the requirements of section 1;

(b) Health care facilities, residential care facilities, congregate care facilities, and juvenile justice facilities;

(c) Crisis shelters or similar institutions; and

(d) Food courts inside the secured zones of airports.

3. For purposes of this order:

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, or recreation facility, or an institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Place of public accommodation also includes the facilities of private clubs, including country clubs, golf clubs, boating or yachting clubs, sports or athletic clubs, and dining clubs.

(b) "Place of public amusement" means a place of public accommodation that offers indoor services or facilities, or outdoor services or facilities involving close contact of persons, for amusement or other recreational or entertainment purposes. A place of public amusement includes an amusement park, arcade, bingo hall, bowling alley, indoor climbing facility, skating rink, trampoline park, and other similar recreational or entertainment facilities.

4. The director of the Department of Health and Human Services, the Michigan Liquor Control Commission, and the executive director of the Michigan Gaming Control Board must issue orders and directives and take other actions pursuant to law as necessary to implement this order.

5. This order does not alter any of the obligations under law of an employer affected by this order to its employees or to the employees of another employer.

6. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Gretchen Whitmer

Date: March 16, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

Jocelyn Benson

SECRETARY OF STATE

SECRETARY OF SE
2020 MAR 16 PM1:38

SECRETARY OF SENATE
2020 MAR 16 PM1:38

FILED WITH SECRETARY OF STATE
ON 3/16/20 AT 1:10 P.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT I

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT I

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-11

Temporary prohibition on large assemblages and events, temporary school closures

Rescission of Executive Order 2020-5

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19 and to provide essential protections to vulnerable Michiganders and this state's health care system and other critical infrastructure, it is reasonable and necessary to impose limited and temporary restrictions on large events and assemblages of people.

Executive Order 2020-5 imposed such restrictions. This order changes the temporary restrictions imposed on events and assemblages by Executive Order 2020-5, in light of the most recent guidance from the Centers for Disease Control and Prevention. This order does not change the scope of temporary restrictions imposed by Executive Order 2020-5 as to the closure of elementary school buildings and secondary school buildings. When the new restrictions set forth in this order take effect, Executive Order 2020-5 is rescinded.

While this order continues to permit certain assemblages and events, these assemblages and events should only occur as necessary and in adherence with the measures needed to mitigate the potential transmission of COVID-19, including social distancing, proper hand hygiene and respiratory etiquette, and using electronic communication platforms in lieu of in-person interaction as feasible.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning on March 17, 2020 at 9:00 am, and continuing through April 5, 2020 at 5:00 pm, all assemblages of more than 50 people in a single indoor shared space and all events of more than 50 people are prohibited in this state. A single indoor shared space includes but is not limited to a room, hall, cafeteria, auditorium, theater, or gallery. The prohibition on assemblages set forth in this section does not apply to:

   (a) health care facilities;

   (b) workplaces or portions thereof not open to the public;

   (c) the state legislature; and

   (d) assemblages for the purpose of mass transit, the purchase of groceries or consumer goods, or the performance of agricultural or construction work.

   The prohibition set forth in this section does not abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

2. Beginning on March 16, 2020, all elementary school buildings and secondary school buildings in this state must close to students for educational purposes through April 5, 2020. This requirement includes all public, nonpublic, and boarding schools in the state. This requirement does not apply to residential facilities at schools and childcare providers at schools.

3. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order shall constitute a misdemeanor.

4. On March 17, 2020 at 9:00 am, Executive Order 2020-5 is rescinded.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 16, 2020

Time: 6:07 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

SECRETARY OF SENATE
2020 MAR 17 AM10:47

FILED WITH SECRETARY OF STATE
ON 3/17/20 AT 10:22 A.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT J

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT J

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-21

Temporary requirement to suspend activities that are not necessary to sustain or protect life

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. Older adults and those with chronic health conditions are at particular risk, and there is an increased risk of rapid spread of COVID-19 among persons in close proximity to one another. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.

2. Subject to the exceptions in section 7, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.

3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

   (a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9.

   (b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

   Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm.

5. Businesses and operations that employ critical infrastructure workers may continue in-person operations, subject to the following conditions:

   (a) Consistent with sections 8 and 9, businesses and operations must determine which of their workers are critical infrastructure workers and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm. Businesses and operations need not designate:

(1) Workers in health care and public health.

(2) Workers who perform necessary government activities, as described in section 6.

(3) Workers and volunteers described in section 9(d).

(b) In-person activities that are not necessary to sustain or protect life must be suspended until normal operations resume.

(c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons. Those practices and measures include, but are not limited to:

(1) Restricting the number of workers present on premises to no more than is strictly necessary to perform the business's or operation's critical infrastructure functions.

(2) Promoting remote work to the fullest extent possible.

(3) Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible, including for customers who are standing in line.

(4) Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

(5) Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person who is known or suspected to have COVID-19.

(6) Any other social distancing practices and mitigation measures recommended by the Centers for Disease Control.

6. All in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to supporting those businesses and operations that are necessary to sustain or protect life, are suspended.

(a) For purposes of this order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders.

(b) Such activities also include, but are not limited to, public transit, trash pick-up and disposal, activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor recreation.

(c) For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b). Workers performing such activities need not be designated.

(d) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 5(c).

7. Exceptions.

(a) Individuals may leave their home or place of residence, and travel as necessary:

(1) To engage in outdoor activity, including walking, hiking, running, cycling, or any other recreational activity consistent with remaining at least six feet from people from outside the individual's household.

(2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) may leave their home for work without a designation.)

(3) To conduct minimum basic operations, as described in section 4(b), after being designated to perform such work by their employers.

(4) To perform necessary government activities, as described in section 6.

(5) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including procedures that, in accordance with a duly implemented nonessential procedures postponement plan, have not been postponed).

(6) To obtain necessary services or supplies for themselves, their family or household members, and their vehicles. *Individuals must secure such services or supplies via delivery to the maximum extent possible.* As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences.

(7) To care for a family member or a family member's pet in another household.

(8) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.

(9) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.

(10) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.

(11) To work or volunteer for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(b) Individuals may also travel:

(1) To return to a home or place of residence from outside this state.

(2) To leave this state for a home or residence elsewhere.

(3) To travel between two residences in this state.

(4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available here). Such workers include some workers in each of the following sectors:

(a) Health care and public health.

(b) Law enforcement, public safety, and first responders.

(c) Food and agriculture.

(d) Energy.

(e) Water and wastewater.

(f) Transportation and logistics.

(g) Public works.

(h) Communications and information technology, including news media.

(i) Other community-based government operations and essential functions.

(j) Critical manufacturing.

(k) Hazardous materials.

(l) Financial services.

(m) Chemical supply chains and safety.

(n) Defense industrial base.

9. For purposes of this order, critical infrastructure workers also include:

(a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers as defined in this order. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of critical infrastructure workers.

(b) Workers at designated suppliers and distribution centers, as described below.

(1) A business or operation that employs critical infrastructure workers may designate suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the work of its critical infrastructure workers.

(2) Such suppliers, distribution centers, or service providers may designate workers as critical infrastructure workers *only* to the extent those workers are necessary to enable, support, or facilitate the work of the original operation's or business's critical infrastructure workers.

(3) Designated suppliers, distribution centers, and service providers may in turn designate additional suppliers, distribution centers, and service providers whose continued operation is necessary to enable, support, or facilitate the work of their critical infrastructure workers.

(4) Such additional suppliers, distribution centers, and service providers may designate workers as critical infrastructure workers *only* to the extent that those workers are necessary to enable, support, or facilitate the work of the critical infrastructure workers at the supplier, distribution center, or service provider that has designated them.

(5) Businesses, operations, suppliers, distribution centers, and service providers must make all designations in writing to the entities they are designating, whether by electronic message, public website, or other appropriate means. Such designations may be made orally until March 31, 2020 at 11:59 pm.

(6) Businesses, operations, suppliers, distribution centers, and service providers that abuse their designation authority shall be subject to sanctions to the fullest extent of the law.

(c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.

(d) Workers and volunteers for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

10. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, a place of religious worship, when used for religious worship, is not subject to penalty under section 14.

11. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

12. This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

13. The governor will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, she will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health-care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

14. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 23, 2020

Time: 10:39 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 3/23/2020 AT 11:51 AM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT K

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT K

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-110

Temporary restrictions on certain events, gatherings, and businesses

Rescission of Executive Orders 2020-69 and 2020-96

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

Those executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v Whitmer*. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings are being challenged on appeal.

On May 22, 2020, I issued Executive Order 2020-99, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it was reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, and 2020-96, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day continues to drop. Although the virus remains aggressive and persistent—on May 31, 2020, Michigan reported 57,397 confirmed cases and 5,491 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We are now in the process of gradually resuming in-person work and activities. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

With this order, I find it reasonable and necessary to move the state to Stage 4 of the Michigan Safe Start Plan. As a result, Michiganders are no longer required to stay home. Instead, certain businesses will remain closed and specific activities that present a

heightened risk of infection will remain prohibited. Any work that is capable of being performed remotely must be performed remotely.

Under this order, retailers will be allowed to resume operations on June 4. Restaurants and bars may reopen fully on June 8. Swimming pools and day camps for kids will also be permitted to reopen on the same day. Those businesses and activities will be subject to safety guidance to mitigate the risk of infection. Other businesses and activities that necessarily involve close contact and shared surfaces, including gyms, hair salons, indoor theaters, tattoo parlors, casinos, and similar establishments, will remain closed for the time being.

Michiganders must continue to wear face coverings when in enclosed public spaces and should continue to take all reasonable precautions to protect themselves, their co-workers, their loved ones, and their communities. Indoor social gatherings and events of more than 10 people are prohibited. Outdoor social gatherings and events are permitted so long as people maintain six feet of distance from one another and the assemblage consists of no more than 100 people.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. For purposes of this order, Michigan comprises eight separate regions.

   (a) Region 1 includes the following counties: Monroe, Washtenaw, Livingston, Genesee, Lapeer, Saint Clair, Oakland, Macomb, and Wayne.

   (b) Region 2 includes the following counties: Mason, Lake, Osceola, Clare, Oceana, Newaygo, Mecosta, Isabella, Muskegon, Montcalm, Ottawa, Kent, and Ionia.

   (c) Region 3 includes the following counties: Allegan, Barry, Van Buren, Kalamazoo, Calhoun, Berrien, Cass, Saint Joseph, and Branch.

   (d) Region 4 includes the following counties: Oscoda, Alcona, Ogemaw, Iosco, Gladwin, Arenac, Midland, Bay, Saginaw, Tuscola, Sanilac, and Huron.

   (e) Region 5 includes the following counties: Gratiot, Clinton, Shiawassee, Eaton, and Ingham.

   (f) Region 6 includes the following counties: Manistee, Wexford, Missaukee, Roscommon, Benzie, Grand Traverse, Kalkaska, Crawford, Leelanau, Antrim, Otsego, Montmorency, Alpena, Charlevoix, Cheboygan, Presque Isle, and Emmet.

   (g) Region 7 includes the following counties: Hillsdale, Lenawee, and Jackson.

   (h) Region 8 includes the following counties: Gogebic, Ontonagon, Houghton, Keweenaw, Iron, Baraga, Dickinson, Marquette, Menominee, Delta, Alger, Schoolcraft, Luce, Mackinac, and Chippewa.

2. Any work that is capable of being performed remotely (i.e., without the worker leaving his or her home or place of residence) must be performed remotely.

3. Any business or operation that requires its employees to leave their home or place of residence for work is subject to the rules on workplace safeguards in Executive Order 2020-97 or any order that may follow from it.

4. Any individual who leaves his or her home or place of residence must:

   (a) Follow social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

   (b) Wear a face covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space, unless the individual is unable medically to tolerate a face covering.

      (1) An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes. An individual may also remove a face covering to eat or drink when seated at a restaurant or bar.

      (2) Businesses and building owners, and those authorized to act on their behalf, are permitted to deny entry or access to any individual who refuses to comply with the rule in this subsection (b). Businesses and building owners will not be subject to a claim that they have violated the covenant of quiet enjoyment, to a claim of frustration of purpose, or to similar claims for denying entry or access to a person who refuses to comply with this subsection (b).

      (3) Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public.

      (4) The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.

5. Indoor social gatherings and events among persons not part of a single household are permitted, but may not exceed 10 people.

6. Outdoor social gatherings and events among persons not part of a single household are permitted, but only to the extent that:

   (a) The gathering or event does not exceed 100 people, and

   (b) People not part of the same household maintain six feet of distance from one another.

7. Unless otherwise prohibited by local regulation, outdoor parks and recreational facilities may be open, provided that they make any reasonable modifications necessary to enable employees and patrons not part of the same household to maintain six feet of distance from one another, and provided that areas in which social distancing cannot be maintained be closed, subject to guidance issued by the Department of Health and Human Services.

8. Unless otherwise prohibited by local regulation, public swimming pools, as defined by MCL 333.12521(d), may open as of June 8, 2020, provided that they are outdoors and limit capacity to 50% of the bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code, and subject to guidance issued by the Department of Health and Human Services. Indoor public swimming pools must remain closed.

9. Day camps for children, as defined by Rule 400.11101(i) of the Michigan Administrative Code, may open as of June 8, 2020, subject to guidance issued by the Department of Licensing and Regulatory Affairs. Residential, travel, and troop camps within the meaning of Rule 400.11101(n), (p), or (q) of the Michigan Administrative Code must remain closed for the time being.

10. Unless otherwise prohibited by local regulation, libraries and museums may open as of June 8, 2020, subject to the rules governing retail stores described in Executive Order 2020-97 or any order that may follow from it.

11. Stores that were closed under Executive Order 2020-96 (or that were open only by appointment under the same order) must remain closed to the public (or open only by appointment) until June 4 at 12:01 am. Such stores may then resume normal operations, subject to local regulation and to the capacity constraints and workplace standards described in Executive Order 2020-97 or any order that may follow from it.

12. Subject to the exceptions in section 14, the following places are closed to ingress, egress, use, and occupancy by members of the public:

    (a) Indoor theaters, cinemas, and performance venues.

    (b) Indoor gymnasiums, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and the like.

    (c) Facilities offering non-essential personal care services, including hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services that involve close contact of persons.

    (d) Casinos licensed by the Michigan Gaming Control Board, racetracks licensed by the Michigan Gaming Control Board, and Millionaire Parties licensed by the Michigan Gaming Control Board.

(e) Indoor services or facilities, or outdoor services or facilities involving close contact of persons, for amusement or other recreational or entertainment purposes, such as amusement parks, arcades, bingo halls, bowling alleys, indoor climbing facilities, indoor dance areas, skating rinks, trampoline parks, and other similar recreational or entertainment facilities.

13. Unless otherwise prohibited by local regulation, restaurants, food courts, cafes, coffeehouses, bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and like places may be open to the public as follows:

(a) For delivery service, window service, walk-up service, drive-through service, or drive-up service, and may permit up to five members of the public at one time for the purpose of picking up their food or beverage orders, so long as those individuals are at least six feet apart from one another while on premises.

(b) In Regions 1, 2, 3, 4, 5, and 7, beginning at 12:01 am on June 8, 2020, for outdoor and indoor seating, subject to the capacity constraints and workplace standards described in Executive Order 2020-97 or any order that may follow from it.

(c) In Regions 6 and 8, for outdoor and indoor seating, subject to the capacity constraints and workplace standards described in Executive Order 2020-97 or any order that may follow from it.

14. The restrictions imposed by sections 12 and 13 of this order do not apply to any of the following:

(a) Outdoor fitness classes, athletic practices, training sessions, or games, provided that coaches, spectators, and participants not from the same household maintain six feet of distance from one another at all times during such activities, and that equipment and supplies are shared to the minimum extent possible and are subject to frequent and thorough disinfection and cleaning.

(b) Services necessary for medical treatment as determined by a licensed medical provider.

(c) Health care facilities, residential care facilities, congregate care facilities, and juvenile justice facilities.

(d) Crisis shelters or similar institutions.

(e) Food courts inside the secured zones of airports.

(f) Employees, contractors, vendors, or suppliers who enter, use, or occupy the places described in section 12 of this order in their professional capacity.

15. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority. Similarly, nothing in this order shall be taken to abridge

protections guaranteed by the state or federal constitution under these emergency circumstances.

16. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 19 of this order for allowing religious worship at such place. No individual is subject to penalty under section 19 of this order for engaging in religious worship at a place of religious worship, or for violating the face covering requirement of section 4(b) of this order.

17. Executive Orders 2020-69 and 2020-96 are rescinded. Except as specified, nothing in this order supersedes any other executive order. This order takes effect immediately unless otherwise specified.

18. In determining whether to maintain, intensify, or relax the restrictions in this order, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

19. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: June 1, 2020

Time: 2:27 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., BASELINE FITNESS LLC, BUILDING YOUR TEMPLE LLC, BYT FITNESS 247 LLC, CLAWSON FITNESS, LLC, CLINTON FITNESS, INC., D-LUX KARATE UNIVERSITY, LLC, FENTON ATHLETIC CLUB, INC., FENTON KARATE, LLC, FUSION FITNESS 24/7 LLC, H3 FITNESS LLC, I FITNESS PERSONAL TRAINING, INC., JKP FITNESS, LLC, JPF ENTERPRISES, LLC, M FITNESS CLUB, LLC, MH & AB LLC, MOTOR CITY CF – ST. CLAIR SHORES, LLC, NASCOT ENTERPRISES, LLC, PRISON CITY PHYSIQUE, LLC, FMP FITNESS INC., STRENGTH BEYOND LLC, 24/7 BOOTCAMP AND BOXING, INC., and 4 SEASONS GYM, LLC,

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT E. GORDON,

Defendants.

No. 20-cv-00458

HON. PAUL L. MALONEY

EXHIBIT L

Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Erskine Law, P.C.
Attorneys for Plaintiffs
612 W. University
Rochester, MI 48307

John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Joseph T. Froehlich (P71887)
Joshua O. Booth (P53847)
Christopher M. Allen (P75329)
Assistant Attorneys General

(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Attorneys for Defendants
Michigan Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
fedynskyj@michigan.gov
jurgensena2@michigan.gov
froehlichj1@michigan.gov
boothj2@michigan.gov
allenc28@michigan.gov

EXHIBIT L

Executive Order 2020-115 (COVID-19) (June 5, 2020)

EXECUTIVE ORDER

No. 2020-115

Temporary restrictions on certain events, gatherings, and businesses

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to

continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

Those executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v Whitmer*. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings are being challenged on appeal.

On May 22, 2020, I issued Executive Order 2020-99, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it was reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, and 2020-96, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day continues to drop. Although the virus remains aggressive and persistent—on June 4, 2020, Michigan reported 58,241 confirmed cases and 5,595 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We are now in the process of gradually resuming in-person work and activities. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

Regions 6 and 8 have significantly fewer new cases per million each day than other regions in the state and have not shown an increase in viral activity in response to earlier relaxations of my orders. Taking into account the public health data and the ongoing costs of continued restrictions, I find it reasonable and necessary to move Regions 6 and 8 to Stage 5 of the Michigan Safe Start Plan as of June 10. Gyms, hair salons, indoor theaters, tattoo parlors, and similar establishments will be permitted to reopen, subject to strict workplace safeguards. Indoor social gatherings and organized events of up to 50 people will be allowed, as will outdoor social gatherings and organized events of up to 250 people.

In addition, I find it reasonable and necessary to allow personal care services—including hair and nail salons—to reopen statewide as of June 15. This constitutes a partial step along the path of an orderly transition to Stage 5 for those parts of the state outside Regions 6 and 8.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. For purposes of this order, Michigan comprises eight separate regions.
    a. Region 1 includes the following counties: Monroe, Washtenaw, Livingston, Genesee, Lapeer, Saint Clair, Oakland, Macomb, and Wayne.

b. Region 2 includes the following counties: Mason, Lake, Osceola, Clare, Oceana, Newaygo, Mecosta, Isabella, Muskegon, Montcalm, Ottawa, Kent, and Ionia.

c. Region 3 includes the following counties: Allegan, Barry, Van Buren, Kalamazoo, Calhoun, Berrien, Cass, Saint Joseph, and Branch.

d. Region 4 includes the following counties: Oscoda, Alcona, Ogemaw, Iosco, Gladwin, Arenac, Midland, Bay, Saginaw, Tuscola, Sanilac, and Huron.

e. Region 5 includes the following counties: Gratiot, Clinton, Shiawassee, Eaton, and Ingham.

f. Region 6 includes the following counties: Manistee, Wexford, Missaukee, Roscommon, Benzie, Grand Traverse, Kalkaska, Crawford, Leelanau, Antrim, Otsego, Montmorency, Alpena, Charlevoix, Cheboygan, Presque Isle, and Emmet.

g. Region 7 includes the following counties: Hillsdale, Lenawee, and Jackson.

h. Region 8 includes the following counties: Gogebic, Ontonagon, Houghton, Keweenaw, Iron, Baraga, Dickinson, Marquette, Menominee, Delta, Alger, Schoolcraft, Luce, Mackinac, and Chippewa.

2. As of 12:01 am on June 15, 2020, subsection 12(c) of Executive Order 2020-110, which restricts the operation of facilities offering non-essential personal care services, is rescinded.

3. As of 12:01 am on June 10, 2020, individuals and businesses in Regions 6 and 8 are no longer subject to Executive Order 2020-110 and are instead subject to the rules described in this order.

4. Work that can be performed remotely (i.e., without the worker leaving his or her home or place of residence) should be performed remotely.

5. Any business or operation that requires its employees to leave their home or place of residence for work is subject to the rules on workplace safeguards in Executive Order 2020-114 or any order that may follow from it.

6. Any individual who leaves his or her home or place of residence must:

   a. Follow social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances

   b. Wear a face covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed

public space, unless the individual is unable medically to tolerate a face covering.

1. An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes. An individual may also remove a face covering to eat or drink when seated at a restaurant or bar.
2. Businesses and building owners, and those authorized to act on their behalf, are permitted to deny entry or access to any individual who refuses to comply with the rule in this subsection (b). Businesses and building owners will not be subject to a claim that they have violated the covenant of quiet enjoyment, to a claim of frustration of purpose, or to similar claims for denying entry or access to a person who refuses to comply with this subsection (b).
3. Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public
4. The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.

7. Rules on Gatherings, Performances, and Events
   a. A social gathering or organized event among persons not part of the same household is permitted, but only to the extent that:
      1. Persons not part of the same household maintain six feet of distance from one another.
      2. If it is indoors, the gathering or event does not exceed 50 people.
      3. If it is outdoors, the gathering or event does not exceed 250 people.
   b. Notwithstanding the restrictions in subsection (a), an arcade, bowling alley, cinema, climbing facility, convention center, performance space, meeting hall, night club, sports arena, theater, or similar venue may, if it is indoors, be open to spectators or patrons, but only to the extent that it:
      1. Enables persons not part of the same household to maintain six feet of distance from one another at all times while in the venue.

2. Limits the number of people in the venue to 25% of its maximum capacity or to 250, whichever is smaller. For purposes of this order, each separate auditorium or screening room is a separate venue.

c. Notwithstanding the restrictions in subsection (a), a concert space, race track, sports arena, stadium, or similar venue may, if it is outdoors, be open to spectators or patrons, but only to the extent that it:

1. Enables persons not part of the same household to maintain six feet of distance from one another at all times while in the venue.

2. Limits the number of people in the venue to 25% of its maximum capacity or to 500, whichever is smaller.

d. Subsection (a) does not apply to the incidental gathering of persons in a shared space, including an airport, bus station, factory floor, restaurant, shopping mall, public pool, or workplace.

8. Unless otherwise prohibited by local regulation, outdoor parks and recreational facilities may be open, provided that they make any reasonable modifications necessary to enable employees and patrons not part of the same household to maintain six feet of distance from one another, and provided that areas in which social distancing cannot be maintained be closed, subject to guidance issued by the Department of Health and Human Services.

9. Unless otherwise prohibited by local regulation, public swimming pools, as defined by MCL 333.12521(d), may be open, subject to guidance issued by the Department of Health and Human Services, provided that:

a. If they are outdoors, they limit capacity to 50% of the bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.

b. If they are indoors, they limit capacity to 25% of the bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.

10. Residential, travel, and troop camps within the meaning of Rule 400.11101(n), (p), or (q) of the Michigan Administrative Code remain closed for the time being.

11. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority. Similarly, nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

12. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 15 of this order for allowing religious worship at such place. No individual is subject to penalty under section 15 of this order

for engaging in religious worship at a place of religious worship, or for violating the face covering requirement of section 6(b) of this order

13. Except as specified, nothing in this order supersedes any other executive order. This order takes effect immediately unless otherwise specified.
14. In determining whether to maintain, intensify, or relax the restrictions in this order, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.
15. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

GRETCHEN WHITMER
GOVERNOR

Date: June 5, 2020

Time: 10:32 am

RELATED CONTENT

Executive Order 2020-117 (COVID-19) (June 9, 2020)

Executive Order 2020-114 (COVID-19) (June 5, 2020)

Executive Order 2020-116 (COVID-19) (June 5, 2020)

Executive Order 2020-113 (COVID-19) (June 4, 2020)

Executive Order 2020-112 (COVID-19) (June 3, 2020)

Executive Order 2020-111 (COVID-19) (June 1, 2020)

Executive Order 2020-108 (May 29, 2020)

Executive Order 2020-109 (May 29, 2020)

Executive Order 2020-110 (COVID-19) (June 1, 2020)

Executive Order 2020-106 (COVID-19) (May 28, 2020)

Executive Order 2020-107 (May 29, 2020)

Executive Order 2020-99 (COVID-19) (May 22, 2020) - Declaration of State of Emergency

Executive Order 2020-100 (COVID-19) (May 22, 2020)

Executive Order 2020-101 (COVID-19) (May 22, 2020)

Executive Order 2020-102 (COVID-19) (May 22, 2020)

Executive Order 2020-103 (COVID-19) (May 22, 2020)

Executive Order 2020-104 (COVID-19) (May 26, 2020)

Executive Order 2020-105 (May 26, 2020) - Declaration of State of Emergency

Executive Order 2020-98 (May 22, 2020) - Declaration of State of Emergency

Executive Order 2020-95 (COVID-19) (May 21, 2020)