DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs

612 W. University
Rochester, MI. 48307
(248) 601-4499
serskine@erskinelaw.com

*** * * EXPEDITED CONSIDERATION REQUESTED * * ***

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs move this Court for a Preliminary Injunction. Specifically, Plaintiffs seek an order enjoining Defendants from either directly or indirectly:

1. Enforcing against the Plaintiffs Executive Order 2020-17;
2. Enforcing against the Plaintiffs Executive Order 2020-96 or any similar subsequent Stay Home, Stay Safe order promulgated by Governor Whitmer; and
3. Enforcing against the Plaintiffs the emergency order issued on April 2, 2020 by Robert Gordon, the Director of the Michigan Department of Health and Human Services.

The basis for this motion is set forth in the attached memorandum in support, and

in the Complaint.

Expedited consideration of this motion is necessary because the relief requested may well be rendered moot before the motion is briefed under the usual briefing schedule. *See* W.D. Mich. LCivR 7.1(e). Defendants' Executive Orders prohibit the vast majority of the business and activities provided by the Plaintiffs. If the motion is briefed and heard in accordance with the ordinary briefing schedule, these Plaintiffs may be forced to permanently close their operations

which have already been shuttered since March 16, 2020, thereby suffering irreparable harm that will be unable to remedy through injunctive relief.

Further, the Executive Orders prohibit these Plaintiffs from providing important services to any of their members. Each of these Plaintiffs has members who struggle with obesity, hypertension and diabetes, all co-morbidities that greatly increase the severity of those who contract COVID-19, including an increased chance of death. Each of these Plaintiffs has other members who are struggling with depression, anxiety, and stress, all of which can become debilitating to otherwise healthy people. If the motion is briefed and heard in accordance with the ordinary briefing schedule, members' physical and mental health may deteriorate in the interim, causing potentially dangerous conditions and unnecessary suffering that requires medical care. This motion should be heard and decided on an expedited basis in order to permit these Plaintiffs to provide their members with beneficial fitness services pending final resolution of this matter.

In compliance with W.D. L.R. 7.1(d), Plaintiffs sought concurrence with the relief requested herein by sending a detailed email correspondence to all defense counsel of record, explaining the legal basis of this motion and the relief sought, on June 5, 2020. To date, Defendants' counsel have not responded.

Dated: June 8, 2020

Respectfully submitted,

/s/ Scott M. Erskine

SCOTT M. ERSKINE (P54714)
CARLY VAN THOMME (P59706)
ERSKINE LAW, PC
Attorneys for Plaintiffs
612 West University Drive
Rochester, Michigan 48307
(248) 601-4497
serskine@erskinelaw.com

PROOF OF SERVICE

I hereby certify that on June 8, 2020, I presented the foregoing paper to the Clerk of the Court for filing and uploading to the ECF system, which will send notification of such filing to the attorneys of record listed herein and I hereby certify that I have mailed by US Postal Service the document to the involved non participants.

s/ Scott M. Erskine
SCOTT M. ERSKINE (P54714)
CARLY VAN THOMME (P59706)
ERSKINE LAW, PC
Attorneys for Plaintiffs
612 West University Drive
Rochester, Michigan 48307
(248) 601-4497
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

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Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University
Rochester, MI. 48307
(248) 601-4499
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

Joseph T. Froehlich (P71887)
Christopher M. Allen (P75329)
Joshua O. Booth (P53847)
John G. Fedynsky (P65232)
Andrew J. Jurgensen (P81123)
Assistant Attorney General
Michigan Department of Attorney General
Attorneys for Defendants
525 West Ottawa Street
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
froehlichj1@michigan.gov
allenc28@michigan.gov
Boothj2@michigan.gov
fedynskyj@michigan.gov
jurgensenA2@michigan.gov

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I. INTRODUCTION

In early March 2020, this state was faced with a threat that caused unease and uncertainty on a scale that has not been witnessed in many years. The COVID-19 pandemic, which had moved quickly through Asia and Europe, had arrived in Michigan. There is no question that Michigan, like the rest of the country, was ill-prepared to meet the rising demands for hospital supplies and hospital beds for the sick, or that the novel coronavirus was spreading rapidly. Michigan's Governor, with the support of the state legislature, acted swiftly in declaring a state of emergency in order to, in the Governor's words, "flatten the curve."

However, after initially ordering fitness centers and a few other industries shuttered on March 16, 2020, and after shutting down the entire state economy for months (far past when the curve had been flattened) a short time later, the initial response to the pandemic by our state has continued. Now those damaging, unconstitutional actions must finally be addressed, and it is up to the judiciary to act. "While the law may take periodic naps during a pandemic, [the courts] will not let it sleep through one." *Maryville Baptist Church, Inc., v. Beshear*, 957 F.3d 610; 2020 U.S. App. LEXIS' 2020 Fed. App. 0136P (6th Cir.) Decided May 2, 2020 (Docket No. 205427)

II. STATEMENT OF FACTS

A. The Plaintiffs Are Fitness Centers, Each of Whom Is Prevented by the Defendants' Executive Orders from Providing Preventative Physical and Mental Health

Plaintiffs in this case are 22 individual companies that own and operate businesses, some in multiple locations, in the fitness industry, and the League of Independent Fitness Facilities and Trainers, Inc. ("LIFFT"), which is a trade organization with over 150 fitness centers across the

state as members. It is estimated that statewide, 1.5 million Michiganders belong to a health clubs, and many of these are members of Plaintiffs' businesses.

The fitness industry as a whole, and Plaintiffs in particular, have been severely impacted in the twelve weeks since Governor Whitmer's order closing the entire industry on March 16, 2020. Some of the Plaintiffs in this lawsuit may never reopen due to their inability to get any meaningful financial assistance to cover the complete loss of revenue. While revenue for most Plaintiffs has fallen by 80% or more, rent payments, utility payments, and many other vendor payments have continued. Some Plaintiffs were able to apply for and received grants and aid under the Federal CARES Act, but those funds dried up weeks ago and needed to be spent over an eight-week period. All Plaintiffs (those who received federal money and those who were not eligible or otherwise could not get funding), are now once again in a position of not being able to keep the lights on in their facilities without draining personal savings accounts, borrowing from friends or relatives, or otherwise going into steep debt in order to try to survive what has turned out to be the whim of the Governor as to when they can reopen. If Plaintiffs' businesses remain shuttered, many—if not most of them—will stay closed forever.

One of the many reasons that Plaintiffs want to reopen their businesses is to help the public in general (and their members specifically) in their ability to fight COVID-19. It is well documented that obesity, diabetes and hypertension are some of the highest risk factors that lead to a poorer outcome for Michiganders who contract COVID-19.1 Physical exercise, both

[1] Centers for Disease Control and Prevention – Coronavirus Disease 2019 (COVID-19) "*Groups at Higher Risk for Severe Illness*" (Content source: National Center for Immunization and Respiratory Diseases (NCIRD) - Division of Viral Diseases) available at: https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last reviewed May 14, 2020).

cardiovascular exercise and strength training, help improve the immune systems of those with at-risk factors associated with COVID-19.

Further, Plaintiffs are in a unique position to help those who have not contracted and may never contract COVID-19, but who are nonetheless struggling during these challenging times. Physical exercise has been proven to help people with their mental and emotional health. Researchers have found that exercise helps with both depression and anxiety, two mental conditions that people across Michigan are struggling with in the face of Defendants' lock down orders, social distancing, job loss, and coping with unwell family members. [2] Then too, a simple Google search will show that there have been ***no reported outbreaks at fitness centers*** throughout the United States. Yet in Michigan, the fitness industry has been deliberately closed by the Governor under threat of criminal prosecution, longer than any other industry.

If permitted to reopen, there is no question that Plaintiffs will take all necessary precautions to prevent the transmission of COVID-19. In fact, two of the three letters sent to the Governor by the fitness industry (and attached to Plaintiffs' Complaint and First Amended Complaint) outlined potential plans for safely reopening with many restrictions. One such letter was sent by Plaintiff LIFFT (**Exhibit 1**, letter from LIFFT). Signed by Tina Kinsley, MD, the President of LIFFT, the letter detailed at least 12 such guidelines. Among them were that all workouts will be conducted with stringent social distancing in place, dependent on the square footage of the space; all

[2] Wendy Suzuki, *The Brain-Changing Benefits of Exercise*, TED Conferences, LLC, November 2017, available at: https://www.ted.com/talks/wendy_suzuki_the_brain_changing_benefits_of_exercise?language=en; *See also* Sarah Gingell, Ph.D., *How Your Mental Health Reaps Benefits of Exercise*, Psychology Today, posted March 22, 2018, available at: https://www.psychologytoday.com/us/blog/what-works-and-why/201803/how-your-mental-health-reaps-the-benefits-exercise.

equipment, flooring and surfaces would be constantly cleaned with a disinfectant cleaner; employees will wear masks and, in some cases, face shields; members will have access to disinfecting materials to wipe down their workout areas before and after exercise; members will complete health assessment checks before working out; classes will be staggered if the facility is a class-based gym so that there would not be overlap between members; and finally, since many gym members check in before working out (unlike in many other industries), the fitness industry would keep records to assist with contact tracing in the event that a member tested positive.

B. Governor Whitmer Issues Executive Orders Declaring a State of Emergency

On March 11, 2020, Governor Whitmer issued Executive Order 2020-04, which proclaimed a state of emergency under both the Emergency Management Act ("EMA"), Mich. Comp. Laws § 30.403, and the Emergency Powers of the Governor Act of 1945 ("EPGA"), Mich. Comp. Laws § 10.31. (**Exhibit 2**). The order identified the COVID-19 pandemic as the basis for her declaration of a state of emergency under both statutory regimes.

On April 1, 2020, Governor Whitmer issued Executive Order 2020-33, which replaced Executive Order 2020-04, declared a state of emergency pursuant to the EPGA, and proclaimed a state of disaster and a state of emergency under the EMA. (**Exhibit 3**). These declarations were based on the same circumstances—that is, the dangers posed by the virus that causes COVID-19—that formed the basis of Executive Order 2020-04.

On April 1, 2020, Governor Whitmer also requested that the Michigan Legislature extend the state of emergency by an additional 70 days, as contemplated by the EMA (until June 11, 2020). On April 7, 2020, the Michigan Senate and Michigan House of Representatives denied Governor Whitmer's request to extend the state of emergency for an additional 70 days (until June

11, 2020). Instead, the Michigan Legislature extended the state of emergency declared by Governor Whitmer until April 30, 2020, but not beyond.

C. Governor Whitmer Issues Several Executive Orders, ALL Prohibiting Business Operations of Gyms Where Even One Gym Member is in the Entire Studio

Meanwhile, Governor Whitmer issued many additional Executive Orders, invoking emergency powers that the Governor claims flow from the state of emergency declared under Executive Orders 2020-04 and 2020-33. As of June 2, 2020, Governor Whitmer has issued 111 Executive Orders related to the COVID-19 pandemic, creating and changing substantive state law and regulations that impact and burden wide swaths of the economy.

D. Governor Whitmer Issues Several Orders Prohibiting Most In-Person Business Operations, Including the Operations of Gyms With Only One Member

On March 16, 2020, a mere five days after issuing Executive Order 2020-4 declaring a State of Emergency, Governor Whitmer issued Executive Order 2020-9, titled "Temporary Restrictions on Places of Public Accommodation" (**Exhibit 4**), her first of many Executive Orders closing gyms. After her initial Executive Order closing gyms and along with her myriad of other Executive Orders, Governor Whitmer issued *three more iterations* of Executive Orders to prohibit the uses of public accommodation, specifically Executive Orders 2020-20, 2020-43, and 2020-69 (**Exhibits 5, 6, and 7**). These Executive Orders all applied to and made certain that gyms could not reopen. Further, amongst the "Frequently Asked Questions" on the state's coronavirus webpage, the Governor's office answered the following question four times in response to Executive Orders 2020-09, 2020-20, 2020-43, and 2020-69:[3]

[3] *See* Michigan.gov, *Frequently Asked COVID-19 Questions*, available at: https://www.michigan.gov/coronavirus/0,9753,7-406-98810---,00.html?page=1&limit=100&filterCategories=&searchQuery= (last visited on June 5, 2020).

> Q**:** Can gyms that offer service by private appointment remain open?
>
> A: All gyms are included in the definition of public accommodation under this Executive Order and are closed to ingress, egress, use, and occupancy by members of the public, including for private appointments.

In other words, even the largest gyms cannot operate a single personal training program for one trainer and one member, regardless of how many feet the two stood apart.

The Governor also issued six iterations of "Stay Home, Stay Safe" orders, specifically Executive Orders 2020-21, 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, and 2020-96. (**Exhibits 8, 9, 10, 11, 12, 13 and 14**). These Executive Orders were all titled "Temporary Requirement to Suspend Certain Activities That Are Not Necessary to Sustain or Protect Life." Each of the orders imposed sweeping limitations on Michigan citizens' ability to travel and prohibited countless numbers of employees in Michigan from reporting to work, including gym employees. Under all of the Stay Home, Stay Safe orders, a willful violation of the Executive Orders was a criminal misdemeanor.

E. The Governor Lifts (Almost) All Restrictions

On June 1, 2020, Governor Whitmer rescinded both Executive Order 2020-69 (the latest iteration of the Temporary Restrictions on Places of Public Accommodation Orders) and 2020-96 (the latest iteration of the Orders styled Temporary Requirement to Suspend Certain Activities That Are Not Necessary to Sustain or Protect Life) and issued Executive Order 2020-110, titled "Temporary Restriction on Certain Events, Gatherings and Businesses." (**Exhibit 15**) Among other things, the Order rescinds the travel restrictions on Michigan residents, allows for outdoor gatherings of up to 100 people, allows indoor gatherings of up to 10 people, and allows restaurants, bars, and most other industries to open in some capacity. However, amongst the very few businesses still shuttered under her latest Order are indoor gyms (which, by definition, pertains to virtually all gyms). The Order even allows outdoor workouts and allows children to return to

summer day camps. However, it is still a misdemeanor for a gym to hold any fitness classes—no matter how socially distanced—in their brick and mortar locations.

F. The Governor Lifts Even More Restrictions on June 5, 2020

On June 5, 2020, Governor Whitmer lifted even more restrictions in Michigan, but is still inexplicably keeping gyms closed throughout most of state, and still makes it a crime for most gyms to reopen. Governor Whitmer's latest Executive Order 2020-115 (**Exhibit 16**) allows gyms and other still-shuttered businesses to open on June 10, 2020 in the Upper Peninsula and a small portion of the northern part of the Lower Peninsula. On June 15, 2020, the Governor will allow hair salons, nail salons, tattoo parlors, massage therapists, and other "personal touch" businesses to finally re-open. Gyms must remain closed.

G. Governor Whitmer's Executive Orders Cause Enormous Confusion

1. Governor's Orders Cause Confusion

Almost immediately after her first stay-home order (Executive Order 2020-21) was issued, the Attorney General and the Governor were inundated with requests for clarification of the order. On March 24, 2020, Governor Whitmer observed, "We knew that there would be confusion, there always is."[4]

On March 25, the Attorney General's office admitted, "I think it's a difficult executive order to really wrap your arms around."[5] The Attorney General's office explained that its process

[4] Mikenzie Frost, *Gov. Whitmer says she understands confusion surrounding stay-at-home, urging patience*, WWMT, Mar. 24, 2020, available at https://wwmt.com/news/state/gov-whitmer-says-she-understands-confusion-surrounding-stay-at-home-urging-patience (last visited June 4, 2020).

[5] Malachi Barrett, *Michigan Attorney General asks local law enforcement to handle violations of coronavirus stay home order*, MLive, Mar. 25, 2020, available at https://www.mlive.com/public-interest/2020/03/michigan-attorney-general-asks-local-law-enforcement-to-handle-violations-of-coronavirus-stay-home-order.html (last visited June 4, 2020).

of clarifying the meaning of the order occurred on an ad hoc, case-by-case basis: "Every instance we get a call asking about whether or not businesses essential is being first reviewed by our office and then shared with the governor's office so that we can begin to get some clarity around the executive order." Despite the admitted confusion created by the orders, the Attorney General's office reiterated that violating the order could result in criminal penalties and forced closure of a business by law enforcement. [6][7] In fact, the 111 Executive Orders related to COVID-19 are so confusing that they are virtually impossible to understand. There are currently, as of June 5, 2020, a total of ***979*** **"Frequently Asked Questions"** regarding the various orders.[8]

Neither Governor Whitmer nor her spokeswoman appeared to know what the Executive Orders say on June 4, 2020. The Detroit News reported that the Governor appeared to be violating her own social distancing rules at a protest march in Detroit and asked for a comment from the Governor's office about her marching "shoulder to shoulder" with protesters, some of whom were not wearing masks. (**Exhibit 17**). Tiffany Brown, responding to the Detroit News, claimed that the Governor was not violating Executive Order 2020-110, stating that "[n]othing in this order shall be taken to abridge protections guaranteed by the state or federal constitution." (**Exhibit 17**). However, in the "Frequently Asked Questions" section of the Executive Order, it states as follows:

> **Q:** Does Executive Order 2020-110 prohibit persons from engaging in outdoor activities that are protected by the First Amendment to the United States Constitution?

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[6] Virginia Gordan, *Local police to handle reports of violations of Gov. Whitmer's stay-at-home order*, Michigan Radio, Mar. 25, 2020, available at https://www.michiganradio.org/post/local-police-handle-reports-violations-gov-whitmers-stay-home-order (last visited June 4, 2020).

[7] As noted in the Plaintiffs' complaint, Defendant Gordon also issued an emergency order on April 2, 2020 (the "HHS order). The validity of the HHS order also relies upon the validity of the Governor's emergency declarations.

[8] *See* Michigan.gov, *Frequently Asked COVID-19 Questions*, available at: https://www.michigan.gov/coronavirus/0,9753,7-406-98810---,00.html?page=1&limit=25&filterCategories=&searchQuery= (last visited June 5, 2020).

> **A:** No. Persons may engage in expressive activities protected by the First Amendment within the State of Michigan, **but 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 person's household**.[9]

Subsequent to the protest march, Governor Whitmer admitted that she was not able to social distance at the protest.[10] Further, there are photos of her kneeling shoulder to shoulder with people who were not wearing any masks at all.[11] Therefore, if our Governor is signing Executive Orders that she is not following (or "cannot follow"), and her staff does not know how the Governor's Orders are applied, there is a very high likelihood of confusion for the 10,000,000 other residents of Michigan. In fact, pursuant to Executive Order 2020-110, the conduct of the Governor is a misdemeanor if it was a "willful violation."

2. The Governor's Executive Orders are Arbitrary

The Governor's Executive Orders that permit some industries to reopen, on top of being vague and confusing, are entirely arbitrary. People have been allowed to patronize recreational marijuana dispensaries, liquor stores, and purchase lotto tickets the entire time that Michigan state

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[9] *See* Michigan.gov, *Executive Order 2020-110 FAQs*, available at: https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-530654--,00.html (last viewed June 4, 2020).

[10] *See* Justin P. Hicks, *Gov. Whitmer responds to lack of social distancing at protests against police brutality*, MLive, June 5, 2020, available at: https://www.mlive.com/public-interest/2020/06/gov-whitmer-responds-to-lack-of-social-distancing-at-protests-against-police-brutality.html (last updated June 5, 2020).

[11] *See* Craig Mauger and James David Dickenson, *With little social distancing, Whitmer marches with protesters*, The Detroit News, June 4, 2020, available at: https://www.detroitnews.com/story/news/local/michigan/2020/06/04/whitmer-appears-break-social-distance-rules-highland-park-march/3146244001/ (last updated on June 4, 2020; last visited on June 7, 2020).

has been under a state of emergency.[12] People can also gather in groups of 10 indoors, as long as they socially distance. Accordingly, 10 friends can now get together in someone's living room and perform the same workout together that they would do at a professional gym, as long as they are six feet apart. But still, under Executive Order 2020-115, gyms are closed.[13] People can visit a strip club, have their teeth bleached, get Botox, lip injections, and even liposuction (all previously considered "non-essential" and which are not conducive to any social distancing of any kind). But they cannot go to a gym. Starting June 15, 2020, Michigan residents can get their hair cut, their nails manicured, get a tattoo, and even get a massage. Again, none of these industries can operate with any kind of social distancing. People can gather in groups of 100 outdoors, visit a bicycle repair shop, and buy clothes at a mall. People may now go swimming at their favorite public or private pool, practice recreational team sports, and kids can attend camp. But gyms, whose owners are experts at knowing how to sterilize and open their businesses safely, cannot perform the same business services that ordinary citizens are allowed to do with others at home. Gyms cannot even sell clothing or other health items, even though the rest of the economy is open.

The Governor was also critical of "choirs" at a recent news conference as a potential cause of an outbreak. Nonetheless, under her current Executive Order, choirs can resume in churches, up to 100 people can gather outdoors for a choir practice, and up to 10 people can gather indoors for a choir practice. Meanwhile, it is a crime for those same people to leave choir practice and go to a gym. They can go to a bar, go out to eat at a restaurant, go clothes and shoe shopping, and go

[12] Liquor sales and lottery ticket sales also happen to also be an enormous source of revenue for the state.

[13] Although the Governor's Orders 2020-110 and 2020-115 allow for "outdoor" workouts, Michigan's weather, as well as the costs and fees for park permits render the "permission" entirely useless. Further, Plaintiffs submit that the Governor cannot unilaterally change their business models under the United States Constitution.

golfing while riding in a golf cart next to another person, but it is still a crime for a gym owner to open his or her facility to help citizens improve their physical and mental health.

The Governor claims that she is following "data and science" to make her reopening decisions. However, at a recent press conference on June 1, 2020, the Governor stated as follows: "In the early days, I often would observe because some of the best science was saying COVID-19 can stay active and can be picked up from a stainless-steel surface for days. That was the original science. That's what they were saying. Now that seems less certain."[14] The reason for that admission was simple. The Center for Disease Control has updated their research results and no longer believes that touching surfaces is nearly as dangerous as it initially reported in March 2020.[15] However, despite her admission that the data and science has changed since her initial closure of gyms, she refuses to reopen them in the bulk of the lower peninsula, leaving tens of thousands of people out of work, and keeping over a million of Michigan citizens from one of the most important pieces of overall physical and emotional health.

The Governor's rationale is that by keeping gyms closed, she is keeping people safer. That is a fallacy. There is no data or science to support this proposition, particularly when she has reopened nearly all of the other industries that she initially considered an immediate danger to the public health. The data that the Governor believed to be true about the virus easily spreading on surfaces has largely been debunked. The staggering death tolls that experts predicted in March

[14] *Michigan Governor Gretchen Whitmer Press Conference Transcript June 1*, available at: https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-june-1 (last visited June 8, 2020).

[15] *See* Julia Ries, *CDC Gives New Recommendations to Safely Reopen Amid COVID-19*, Healthline, May 21, 2020 (fact checked by Jennifer Chesak) available at: https://www.healthline.com/health-news/new-cdc-guidelines-say-covid-19-unlikely-to-spread-via-contaminated-surfaces#Restaurants-and-bars.

have not come even close to reality. There is no data or science backing her position that keeping gyms shuttered longer than strip clubs, bars, restaurants, massage studios, tattoo parlors, dentists, marijuana dispensaries, or aestheticians, is keeping Michigan residents safe. In fact, the opposite is true: Michigan's mental and physical health is declining by the day. The only scientific certainty is that the Michigan residents are becoming more susceptible to severe complications of COVD-19 and are becoming more depressed, anxious, and stressed. Economically, she has put an entire industry in such financial peril that many gyms and fitness centers will never recover.

III. ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claims

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008). Each of these factors is met here.

To satisfy the first prong of the preliminary-injunction analysis, the Plaintiffs must only demonstrate that the legal issues they raise are substantial enough to constitute "fair ground[s] for litigation and thus [require] more deliberate investigation." Roth v. Bank of Commonwealth, 583 F.2d 527, 537 (6th Cir. 1978). "It will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for mere deliberate investigation." Brandeis Machinery & Supply Corp. and State Equipment Co. v. Barber-Geene Co., 503 F.2d 503, 505 (6th Cir. 1974). The Plaintiffs' claims meet this standard.

1. The Executive Orders are Unconstitutional

The concurrence of individual constitutional rights amid the declared COVID-19 pandemic has certainly prompted a national issue.[16] The federal government and all fifty States have declared states of emergency. However, while most states are opening or have opened their economies, Michigan has been inexplicably slow at doing so.

Constitutional rights do not wholly evaporate in times of emergency. *See Jacobson v. Massachusetts*, 197 U.S. 11, 29; 25 S. Ct. 358; 49 L. Ed. 643 (1905). Indeed, the law has long been settled that all essential liberties remain protected at all times, even during the gravest of emergencies. *Bell v. Burson*, 402 U.S. 535, 542; 91 S. Ct. 1586; 29 L. Ed. 2d 90 (1971); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65; 83 S. Ct. 554; 9 L. Ed. 2d 644 (1963). While States may implicate police powers to take swift action necessary to protect public health and safety, those powers are not limitless, and are subject to judicial review. *See Jacobson*, 197 U.S. at 31, 38-39; *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1179 (11th Cir. 2020) (‘*while constitutional rights have limits, so does a state’s power to issue executive orders limiting such rights in times of emergency’*).

Generally, courts apply a deferential standard of review when reviewing a State’s implication of its police powers to preserve public health during a declared state of emergency. *See, e.g., Jacobson*, 197 U.S. at 28. “[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those

[16] *See*, *e.g.*, Presidential Proclamation of Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15337 Issued March 13, 2020) available at: https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ (last visited June 5, 2020).

objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution." *Id.* at 31. In *Jacobson*, the Court explained that State action may improperly deviate from having a "real or substantial relation" to the public health if it is "exercised in particular circumstances and in references to particular persons . . . in an arbitrary, unreasonable manner." *Id*. at 28. For example (and as more thoroughly explored in Plaintiffs' Equal Protection argument), rules that now allow outdoor social gatherings and fitness classes of up to 100 people while maintaining a 6-foot distance, but not indoor fitness classes of any size under any circumstances, is a red flag that the Governor's Executive Orders are improperly arbitrary and bears "no real or substantial relation" to its proffered public health end.

A public health crisis state of emergency does not entitle the Governor to cast away constitutional rights and protections full throttle with arbitrary and discriminatory Executive Orders. As further outlined below, the Governor's issuance of such patently arbitrary orders under the contrived guise of "mitigating the spread of COVID-19, protecting the public health, and providing essential protections to vulnerable Michiganders" is undoubtedly an improper constraint on Plaintiffs' (and countless others) protected Constitutional rights. (*See Meyer v. Nebraska*, 262 U.S. 390, 399-400; 43 S. Ct. 625; 67 L. Ed. 1042 (1923); *see also* **Exhibits 2 through 16**).

2. Governor Whitmer's Lockdown Orders Have Wholly Deprived Plaintiffs of Their Constitutional Rights to Procedural Due Process

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State can "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1, cl. 3. Procedural due process imposes constraints on governmental decisions that deprive individuals of "liberty" or "property" interests within the meaning of the Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332; 96 S. Ct. 893; 47 L. Ed. 2d 18,

31 (1976). Accordingly, a procedural due process claim is achieved upon showing: (1) a life, liberty, or property interest requiring protection under the Due Process Clause; (2) a deprivation of that interest; (3) without adequate process. *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006) (citation omitted).

a. Plaintiffs Possess Liberty and Property Interests that are Entitled to the Constitutional Protections of Due Process.

To begin with, liberty interests categorically include "the right of the individual to contract, to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the ordinary pursuit of happiness by free men." *Women's Med Prof'l Corp*, 438 F.3d at 611 (citing *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 572; 92 S. Ct. 2701; 33 L. Ed. 2d 548 (1972) (therein quoting *Meyer v. Nebraska*, 262 U.S. 390, 399; 43 S. Ct. 625; 67 L. Ed. 1042 (1923)). Property interests are those that one has already acquired in specific benefits. *Board of Regents*, 408 U.S. at 576.

Fundamentally, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Women's Med Prof'l Corp*, 438 F.3d at 611 (citing *Board of Regents*, 408 U.S. at 577). Meanwhile, the Constitution protects one's liberty to choose his or her career or occupation. *Women's Med Prof'l Corp*, 438 F.3d at 612. Consequently, "[l]iberty and property interests are intricately related in our system of political economy, a system based on free choice of careers and occupations, private property, and the right to compete." *Id*. (citing *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983). In taking all the above-mentioned case law together, the Court in *Women's Med Prof'l Corp* unequivocally held that **the continued operation of an existing business is an interest that is afforded due process protections**. *Id*. at 611.

Here, all Plaintiffs are established businesses that were fully operational prior to the Governor's Lockdown Orders. Thus, Plaintiffs clearly have property interests in the businesses themselves, as well as liberty interests in the right to intrastate travel and the freedom to engage in the operation of their businesses. Accordingly, the first element of Plaintiffs' procedural due process claim is met.

b. The Governor's Lockdown Orders Have Deprived and Continue to Improperly Deprive Plaintiffs of Their Protected Liberty and Property Interests.

Notably, neither liberty nor property interests may be obstructed by a legislative action that is under the guise of protecting the public interest yet is "arbitrary *or* without reasonable relation to some purpose within the competency of the State to effect." *Meyer*, 262 U.S. at 399-400 (emphasis added). The Sixth Circuit in *Women's Med Prof'l Corp* recognized that, while there is merit to the contention that there is no unfettered freedom to engage in a business that may be properly regulated under a state's general police power, such contention does not resolve the issue of whether one's clear liberty to engage in that business was *properly constrained* under the state's police power. *Id*. (citing *Sanderson v. Village of Greenhills*, 726 F.2d 284, 285 (6th Cir. 1984). It therefore follows that, regardless of the validity of the Governor's police powers and resulting Shutdown Orders in times of emergency, the Governor cannot improperly deprive Plaintiffs of their liberty and property interests without due process.

Undoubtedly, Plaintiffs here have been – and continue to indefinitely be – deprived of their protected liberty and property interests under the improper restraints of the Shutdown Orders. Beginning March 16, 2020, the Governor's Orders abruptly forced the immediate closure of "places of public accommodation," including gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas. (**Exhibits 2 through**

16). All Plaintiffs immediately closed, ceased all operations, and to date, remain closed under threat of significant criminal penalties and civil fines.

Meanwhile, without any rationalization, the Governor simultaneously exempted a list of designated "essential" places of public accommodation from the Shutdown Orders, while continuing to restrict all "non-essential personal care services . . . that require individuals to be within six feet of each other;" non-essential "[p]lace[s] of public accommodation;" and "[p]lace[s] of public amusement." (**Exhibits 2 through 16**). Yet, many of the businesses deemed essential that have remained open, as well as non-essential businesses that have since reopened or are in the process of reopening, are either businesses that are open to the general public and/or unable to maintain the prescribed social distancing (or "enhanced social distancing") protocol by the very nature of the business's engagement. This is true even as actual (not hypothetical) outbreaks of COVID-19 occurred, in places such as state-wide grocery store chains.

In contrast to many of the businesses that have been or are currently permitted to operate, Plaintiffs operate member-based fitness facilities; they do not receive the influx of "walk-in" and anonymous business that retailers, restaurants or other allowed businesses rely on for profit. Plaintiffs are completely capable of implementing and adhering to not only the CDC social distancing protocols, but also additional preventative measures that were clearly outlined in at least three letters to the Governor (Exhibits 2 - 4 to Plaintiffs' Complaint). Simply put, the Shutdown Orders arbitrarily and improperly deprive Plaintiffs of their rights and freedoms to engage in their business operations, while allowing others to open and attempt to rise from the ashes of this State's current economy. Accordingly, the second element of Plaintiffs' procedural due process claim is met.

c. The Governor's Shutdown Orders are Completely Want of Any Process at All, While Improperly Depriving Plaintiffs of Their Protected Liberty and Property Interests.

The fundamental requirement of procedural due process is the opportunity to be heard "at a meaningful time and in a meaningful manner," so as to allow vindication of the protected interests that are being improperly restricted. *Mathews v Eldridge*, 424 U.S. at 319; *Board of Regents*, 408 U.S. at 577. A due process violation is not established when the deprivation of a constitutionally interest occurs; rather, the deprivation occurs when the State fails to provide due process of law. *Zinermon v. Burch*, 494 U.S. 113, 125; 110 S Ct 975; 108 L Ed 2d 100, 114 (1990) (citation omitted). Procedural due process is not meant to protect persons from the deprivation itself, but from the mistaken or unjustified deprivation of the protected liberty and property interests. *Id*. at 125-26. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. *Id*. at 126.

The United States Supreme Court has long established that due process is a flexible concept that calls for varying procedural protections according to the demands of the particular situation. *Id*. at 127; *Morrissey* v. *Brewer,* 408 U.S. 471, 481; 33 L. Ed. 2d 484; 92 S. Ct. 2593 (1972). Additionally, **where the State must act swiftly, or where it would be impractical to provide a pre-deprivation process, due process may be satisfied, so long as the State provides a post-deprivation process**. *See, e.g*., *Women's Med. Prof'l Corp*. 438 F.3d at 613; *see also Zinermon* v. *Burch,* 494 U.S. at 128 (collecting cases); *Gilbert v. Homar*, 520 U.S. 924, 930; 117 S. Ct. 1807; 138 L. Ed. 2d 120, 127 (1997); *United States* v. *James Daniel Good Real Property,* 510 U.S. 43, 53, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993) (additional citations omitted).

Recently, the Supreme Court of Pennsylvania (Middle District) ruled on a similarly-situated case involving Fourteenth Amendment procedural due process and equal protection claims brought by four businesses and one individual who had been forced to close their businesses under the state Governor's police powers, amid the current COVID-19 concerns. *Friends of Devito v. Wolf*, ___A3d___; 2020 Pa. LEXIS 1987 (Apr. 13, 2020) (**Exhibit 18**). In *Devito*, the petitioners operated businesses, which the State classified as "non-life-sustaining." *Id.* at *1, 12-15. Petitioners asserted claims that the Governor lacked statutory authority to issue the Executive Order, and that the forced closure of their businesses infringed upon their Constitutional rights. Of particular import is the court's holding regarding the procedural due process claims.

In *Devito*, the petitioners claimed that the Executive Order, which listed and distinguished the permissible operation of "life-sustaining" businesses from the impermissible operation of "non-life-sustaining" businesses, took effect without providing petitioners with pre-deprivation notice and an opportunity to be heard with respect to their classification as non-life-sustaining businesses. *Id*. at *52. Meanwhile, the Governor announced and provided a waiver application process, which afforded businesses the (post-deprivation) opportunity to challenge the Governor's placement of their business on the non-life-sustaining list. *Id*. at *57. Still, petitioners argued that any waiver process provided by the State "must accord applicants procedural due process prior to final determinations, including, *e.g*., the right to know the applicable standards to be applied, to present and/or cross-examine witnesses, and to the availability of an appeal from an adverse result." *Id*.

The court acknowledged that, **even in times of emergency, petitioners were absolutely entitled to procedural due process protections**. *Id*. at *55-56. The court's holding hinged on whether petitioners' liberty and property interests were afforded adequate process via the post-

deprivation waiver process. *See id., generally* at *52-63. In its analysis, the court applied the three-part balancing test established in *Mathews v. Eldridge* to consider (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. *Mathews*, 424 U.S. at 334-35.

Ultimately, the court held that, given the circumstances of an ongoing disaster emergency, a full evidentiary proceeding was not a viable post-deprivation procedural process, whereas the waiver process was indeed adequate. *Devito* at *61. The court found that the waiver process functioned as a review process, in providing businesses an opportunity to challenge – and the Governor's office to reconsider – the propriety of the non-life-sustaining categorization. *Id.* at *57. The court concluded that the Governor's efforts to correct mis-categorizations of certain businesses is an entirely proper focus of procedural due process. *Id.* at *57-58.

Significantly, however, what glaringly distinguishes *Devito* from the instant case is that neither Governor Whitmer, Director Gordon, nor any of the Shutdown Orders at issue have attempted to provide *any* procedural due process safeguards at all. Likewise, absolutely no mechanism of any kind has been announced or provided for post-deprivation review. Thus, this Court cannot even consider whether process was adequate under a *Matthews* three-part balancing test because there is no process available at all. Thus, by utterly failing to provide any pre- or post-deprivation review of the orders and rules shuttering Plaintiffs' business, Plaintiffs are suffering substantial losses of liberty and property. Accordingly, the third and final element of Plaintiffs' procedural due process claim is met.

3. Governor Whitmer's Arbitrary and Irrational Executive Orders Have Violated and Continue to Violate Plaintiffs' Equal Protection Rights

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no State can "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. Accordingly, State action that regulates economic activity in a discriminatory manner violates the Equal Protection Clause unless the State can show a "rational relationship between the disparity of treatment," along with some "legitimate governmental purpose." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67; (2001). Under no circumstances can a State "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 446; 105 S. Ct. 3249; 87 L. Ed. 2d 313, 324 (1985) (citation omitted); *see also United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 535-38 (1973) (holding that the classification at issue was not only 'imprecise,' but was utterly want of any rational basis).

The Supreme Court's decision in *City of Cleburne* exemplifies how such arbitrariness or irrationality may be identified. In *Cleburne*, the Supreme Court struck down a zoning ordinance that required a special use permit for a home for individuals with disabilities ("Featherstone Home"), but did not require the same special use permit "for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged . . ., private clubs or fraternal orders and other specified uses." *City of Cleburne*, 473 U.S. at 447.

The Court acknowledged that, while individuals with intellectual disabilities may have unique needs, such difference is patently irrelevant unless the Featherstone Home and its occupants would threaten legitimate city interests in a way that other permitted uses such as boarding houses, fraternity or sorority houses, etc. would not. *Id*. at 448. In conclusion, the Court found that the

record did not reveal "any rational basis for believing that the Featherstone Home would pose any special threat to the city's legitimate interests." *Id*.

In this case, while responding to a health crisis is a legitimate governmental purpose, such purpose does not rationalize any and all state action. To be sure, if a statute is purportedly enacted "to protect the public health, the public morals or the public safety" has no "real or substantial relation" to such efforts; or is a "plain, palpable" violation of equal protection principles; or is so "arbitrary and oppressive," it is the duty of the courts to so adjudge, "to prevent wrong and oppression." *Jacobson* 197 US at 31 & 38 (citations omitted); *see also In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020) (recently-decided case ruling on issues concerning State police power in relation to Constitutional rights and protections amid COVID-19).

To begin with, the services Plaintiffs provide to their members are vital, life-sustaining, and life-improving. Yet, the Governor's Shutdown Orders arbitrarily prevent Plaintiffs from offering these beneficial services to their members, despite such services being in need now more than ever, in a time of public health crisis. Notably, there is no data-supported justification in any of the Executive Orders whatsoever to designate Plaintiffs' businesses as being any less essential than those businesses that were initially allowed to stay open under social distancing guidelines, and certainly not less essential than those "personal touch" businesses that were allowed to open in the most recent order, beginning on June 15.

In fact, Plaintiffs submit that gyms are *more* essential than liquor stores, recreational marijuana dispensaries and places that sell lotto tickets (all businesses that have remained open through the entire pandemic), as well as strip clubs, bars, massage parlors, tattoo parlors, aestheticians, and nail salons, which will be permitted to reopen as of June 15. Certainly, with the well-known health benefits of gyms, they certainly are more valuable than many types of

businesses already open. However, the Governor has not yet even meaningfully engaged the fitness industry with respect to reopening (even though she already reopened gyms in Regions 6 and 8). Rather, the Governor has merely provided a website [17] to answer nearly 1,000 and counting "frequently asked questions" to clarify concerns related to the scope of the Lockdown Orders – a clear indication that the Lockdown Orders are arbitrary, vague and void for depriving its citizens of Constitutional rights and protections. When a regulation imposes criminal penalties, vagueness concerns are enhanced. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982).[18]

The Governor's Shutdown Orders have deprived and continue to deprive Plaintiffs of the equal protection of the laws under the United States Constitution. Plaintiffs have identified what are unmistakably arbitrary and discriminatory distinctions among similarly situated businesses (and even those that cannot maintain social distancing by the very nature of the business) in the State of Michigan. Because the Governor's Shutdown Orders are arbitrary and oppressive, and because they continue to restrict Plaintiffs' businesses in an arbitrary and irrational manner, judicial action is necessary to strike down the restrictions, to prevent the wrong and oppression.

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[17] *See* Michigan.gov, *Frequently Asked COVID-19 Questions*, available at: https://www.michigan.gov/coronavirus/0,9753,7-406-98810---,00.html?page=1&limit=100&filterCategories=&searchQuery= (last visited on June 5, 2020)

[18] Plaintiffs anticipate that Defendants will point to the Governor's recent fitness "workgroup," which is scheduled to meet ***for the first time*** the week of June 8. On information and belief, this "workgroup" is led by Mr. Randall Harrison, an investigator of the Wage and Hour Division in Michigan's Department of Labor and Economic Opportunity. The "workgroup" is also too little, too late, and it is hard to see it as anything but a red herring, considering that it only comes after the instant lawsuit was filed, two months after the first of at least three very comprehensive plans were sent to the Governor's office for the safe reopening of gyms, ***and that gyms in Regions 6 and 8 have already been opened***.

4. Governor Whitmer's Lockdown Orders Have Violated Plaintiffs' Interstate Commerce Rights

a. The Dormant Commerce Clause Prohibits State Interference with Interstate Commerce.

The "dormant" Commerce Clause[19] restricts state regulation of the flow of interstate commerce. *Huish Detergents, Inc. v Warren Co.*, 214 F3d 707, 712 (6th Cir. 2000), citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987). A state's regulation of interstate commerce is prohibited under the dormant Commerce Clause if it imposes a burden on interstate commerce that is "'clearly excessive in relation to the putative local benefits'" even in the absence of discrimination against out-of-state business interests in favor of in-state business interests. *Huish Detergents, Inc. v Warren Co.*, 214 F3d at 713, citing *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 390 (1994)(quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)).

If a state's regulation interferes with interstate commerce in a manner that violates the dormant Commerce Clause, the regulation is invalid whether the challenging Plaintiffs are domiciled in-state or out-of-state. *See Comptroller of the Treasury v Wynne*, 575 US 542 (2015); *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 336 (2008); *Granholm v. Heald*, 544 U.S. 460, 469 (2005).

[19] The Commerce Clause (U.S. Const. art. I, § 8, cl. 3) states that Congress has the power to regulate commerce among the states. The Supreme Court has interpreted this to restrict states' ability to regulate interstate commerce, and this interpretation has become known as the "dormant" Commerce Clause.

b. The Orders Violate the Dormant Commerce Clause because the Burden They Impose is Excessive in Relation to the Putative Benefits and/or because they have no Rational Basis.

As detailed in the above Statement of Facts and preceding arguments, as well as in the First Amended Complaint (**PageID.134-150**), the EOs place an excessive burden on the fitness industry, including but not limited to Plaintiffs. Specifically, the Shutdown Orders have forced gyms in Michigan to remain closed since March 16, 2020. (**PageID.121-127**). This has resulted in a devastating loss of revenue, as well as the permanent closure of a number of fitness facilities—and as long as the Shutdown Orders continue to obstruct business operations, that number will continue to increase. (**PageID.137, 182**). The extreme burden on this entire industry in Michigan is plain to see.

Though COVID-19 exists across the nation (and though Michigan ranked only 18th in the country with respect to active cases as of May 31, 2020), gyms in at least 43 other states are open for business while Michigan's are not. (**PageID.97, 134-135**). Notably, gyms are open in Michigan's three bordering states of Indiana, Ohio, and Wisconsin. Meanwhile, the latest Shutdown Orders have allowed a wide variety of other Michigan businesses to reopen—including manufacturing, restaurants, bars, retail and, as of June 15, all "personal touch" businesses. (**PageID.176**). There is no scientific data and no sound reasoning for allowing these other businesses to reopen while forcing gyms to remain closed.[20] To the contrary, the very purpose of gyms is to prevent illness and improve the health of its clientele. (**PageID.139-140**).

Defendants will argue that this extreme burden is justified in order to control the spread of COVID-19. However, the goal of the Shutdown Orders from the outset was to "flatten the curve."

[20] Plaintiffs in this case cannot prove a negative, which is that there is no data or science that identify fitness studios as the source of an outbreak anywhere in the United States.

The data demonstrates, and the Governor admitted on April 27, 2020, the "flattening" occurred many weeks ago.[21] Thus, the "putative local benefits" of the imposed Shutdown Orders when weighed against the burden on Michigan gyms are spurious at best—and more likely altogether nonexistent in light of all of the public and private places in which Michigan residents currently are able to interact.

Here, Plaintiffs businesses engage in interstate commerce in that they have a number of visiting clients from out-of-state. (**PageID.142-150**). Moreover, they have been unable to take delivery of any purchased equipment and supplies from out-of-state businesses during the time that they have been closed. Thus, there is an interstate commerce component to the Shutdown Orders' impact on gyms.

Plaintiffs do not contend that the Shutdown Orders discriminate against their out-of-state clients; indeed, neither Michigan residents nor non-residents can go to gyms under the Shutdown Orders. Rather, Plaintiffs are likely to succeed on the merits of their dormant Commerce Clause claim because ***the Shutdown Orders impose a clearly excessive burden on gyms in relation to any possible benefit of their continued closure at this juncture***. *Huish Detergents, Inc. v Warren Co.*, 214 F3d at 713; *Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. at 390; *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

Put another way, to the extent that the Shutdown Orders require gyms in Michigan to remain closed, they are invalid because they lack any rational basis. As the Seventh Circuit has described:

[21] *Michigan Governor Gretchen Whitmer Press Conference Transcript April 27*, available at https://www.rev.com/blog/transcripts/michigan-governor-gretchen-whitmer-press-conference-transcript-april-27 ("[A]nd so we've flattened it…" at 45:53) (last visited June 8, 2020).

> [E]ven in the absence of discrimination, a burden on interstate commerce that had no rational justification would be invalid. An example is the Illinois mudguard law invalidated in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959). The law required all trucks in the state, thus including those traveling interstate, to be equipped with curved mudguards that the district court had found not only conferred "no" safety benefits over straight ones but actually created "hazards previously unknown." Id. at 525. ***The law impeded interstate commerce--though maybe local commerce just as much--and because it lacked a rational basis it was invalid despite the lack of proof of a disparate impact.***

Cavel Int'l, Inc v Madigan, 500 F3d 551, 556 (7th Cir. 2007) (internal citations omitted) (emphasis added) (**Exhibit 19**). *See also Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

There can be no serious dispute that the continued closure of gyms is excessively burdensome, lacks any rational justification, and violates the dormant Commerce Clause. Accordingly, Plaintiffs have a high likelihood of success on the merits of Count I of the First Amended Complaint.

B. The Plaintiffs Will Suffer Irreparable Harm

The Plaintiffs will suffer immeasurable and irreparable harm if the executive orders are enforced against them. Irreparable harm is "the kind of injury for which monetary damages are difficult to calculate." *Certified Restoration Dry Cleaining Network, LLC v. Tenke Corp.*, 511 F.3d 535, 550 (6th Cir. 2007). Irreparable harm exists where a plaintiff's business is threatened with insolvency or its financial viability is threatened. *See Performance Unlimited, Inc. v. Questar Publishers Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995). Entity-destroying losses differ from mere damages and constitute irreparable harm. *See, e.g.*, *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of New York, Inc.,* 749 F.2d 124, 125 (2d Circ. 1984).

The Plaintiffs will suffer irreparable injury from loss of customers, goodwill, and future business. Further, the harm today to the Plaintiffs grows daily for two reasons. First, Governor has had this specific industry shut down longer than nearly any industry in the State when there has not been one single reported outbreak in the United States at a fitness center either *before* the "Stay Home" orders began or *after* over 40 states have allowed the reopening of gyms. Second, our Governor's refusal to reengage the fitness industry into the state economy, when nearly all other businesses are open, sends the false message that the fitness industry is unsafe to reopen, which will certainly further damage the industry as a whole (and these Plaintiffs specifically).

The Sixth Circuit has held that a moving party will suffer irreparable harm if it loses customers, goodwill, or future business. *See Mich. Bell Telephone Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001); *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. Cir. 1992). Mr. Gulick will suffer irreparable harm in the form of the deprivation of his constitutional rights. *See Maryville Baptist Church, Inc. v. Beshear*, ___ F.3d ___, 2020 WL 2111316, at *4 (6th Cir. May 2, 2020); *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).

C. The Public Interest and the Balance of Equities Favor Preliminary Injunctive Relief

The remaining factors also weigh in favor of a preliminary injunction. First, the balance of harms favors the Plaintiffs. The fitness center Plaintiffs have been unable to see their members for over 12 weeks, causing unprecedented disruptions to their members' physical and mental health. Many of the fitness studio Plaintiffs have had to lay off all or some of their staff, have little to no income, and yet still need to keep paying rent and utilities on their facilities. These layoffs and enormous financial losses are impacting the fitness industry's ability to effectively respond to the very comorbidities that have caused complications with COVID-19 itself. Permitting the fitness industry to reengage with its members does not pose a significant risk of exacerbating the

transmission of COVID-19, as there have been no known outbreaks at fitness facilities across the United States. Further, the fitness industry is well-qualified to take steps to ensure sanitation and appropriate protocol with respect to member interaction and safety. The fitness industry has described in detail how they will do so.

These concerns dovetail with the general public interest. "[I]t is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). The wider public interest also favors a limited injunction in this case, due to the significant mental and physical health benefits of fitness and the work performed by Plaintiffs in the health and wellness industry. Thus, the remaining factors also dictate that an injunction is appropriate in this case.

IV. CONCLUSION

A preliminary injunction should be entered, enjoining the Defendants from applying EO 2020-110, EO 2020-115, and the HHS order to preclude the Plaintiffs' activities.

Dated: June 8, 2020

Respectfully submitted,

/s/ Scott M. Erskine

SCOTT M. ERSKINE (P54714)
CARLY VAN THOMME (P59706)
ERSKINE LAW, PC
Attorneys for Plaintiffs
612 West University Drive
Rochester, Michigan 48307
(248) 601-4497
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

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Dated: June 8, 2020

Respectfully submitted,

/s/ Scott M. Erskine
SCOTT M. ERSKINE (P54714)
CARLY VAN THOMME (P59706)
ERSKINE LAW, PC
Attorneys for Plaintiffs
612 West University Drive
Rochester, Michigan 48307
(248) 601-4497
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

PROOF OF SERVICE

I hereby certify that on June 8, 2020, I presented the foregoing paper to the Clerk of the Court for filing and uploading to the ECF system, which will send notification of such filing to the attorneys of record listed herein and I hereby certify that I have mailed by US Postal Service the document to the involved non participants.

s/ Scott M. Erskine
SCOTT M. ERSKINE (P54714)
CARLY VAN THOMME (P59706)
ERSKINE LAW, PC
Attorneys for Plaintiffs
612 West University Drive
Rochester, Michigan 48307
(248) 601-4497
serskine@erskinelaw.com
cvanthomme@erskinelaw.com

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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.,
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FUSION FITNESS 24/7 LLC,
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MOTOR CITY CF - ST. CLAIR SHORES, LLC,
NASCOT ENTERPRISES, LLC,
PRISON CITY PHYSIQUE LLC,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 1

Fax

1 of 4

Fax +1 (517) 335-6863

To: Governor Gretchen Whitmer

From: LIFFT, inc

Subject: Safe Reopening Of Small Fitness

Phone: +1 (707) 330-8318

Email: info@LIFFT.org

Date May 15, 2020 **Pages:** 4

☐ Urgent ☐ Please Reply ☐ For Review ☐ Please Comment

Comments:

LIFFT, INC

Gov Gretchen Whitmer
P.O. Box 30013
Lansing, Michigan 48909

14 May 2020

Dear Gov Gretchen Whitmer,

LIFFT is a coalition of small, independently owned gyms and personal trainers who have organized to form a collective voice. We, as well as our members, have been greatly impacted by the extended stay at home executive orders crafted in response to the current COVID 19 pandemic affecting our state.

The health and welfare of our members and communities is dramatically worsening due to the lack of access to our facilities and services. Mental health struggles, alcohol and substance abuse, suicidal ideation and suicide attempts, and domestic violence are all on the rise, due at least in a significant part to lack of access to outlets that allow for decompression for those struggling with them.

Physical fitness, as well, directly impacts some of the most significant risk factors for worsened morbidity and mortality from COVID 19. Obesity, diabetes, and hypertension are all associated with a worse prognosis in this disease; our services help individuals mitigate their risk factors and improve their overall health and wellness.

Our members respect science and infectious disease. A proposal to safely open our facilities at a reduced occupancy initially has been crafted following CDC and OSHA guidance and is included for your review as follows:

As Michigan small business owners who own and run independent fitness facilities of less than 250 members/10000 sq feet, we propose the following safe reopening policies:

LIFFT LEAGUE OF INDEPENDENT FITNESS FACILITIES & TRAINERS

PHONE 707.330.8318
EMAIL info@lifft.org
WEBSITE www.lifft.org

1. Reclassification of small fitness facilities as defined above as appropriate for phase 4 opening. Facilities typically provide a minimum of 28 sq ft for each person using a facility and access to numbers of patrons is limited to this number. During phase 4, facilities would operate at 25% of normal capacity, or 100 sq feet allotted per member. Facilities will provide their own specific strategies to ensure this number is not exceeded and will detail them in their own site-specific plans. At phase 5, we will move to 50% of capacity maximum, and at phase 6, full capacity of facility can resume.

2. Prominent signage will be placed for patrons to perform "self-health checks" before entering the facility. An electronic document can be sent easily to members as well containing the health screening questionnaire with recommendations to quarantine for 14 days if a member were to answer yes to any of the following in the health inventory assessment. E.g: Have you or anyone in your household experienced a temperature above 99.5 (oral), developed a sustained headache, cough, feeling generally unwell, congestion, sore throat, allergy symptoms that don't respond to antihistamines, abdominal pain/vomiting/diarrhea, sudden onset of loss of smell and/or taste, or purple painful spots on toes or fingers. Additionally, all employees of the facilities will perform the same health inventory and perform self-temperature checks. If they are deemed to be possible COVID19 infection, they will leave the premises and quarantine at home. They may return to facility 7 days after fever resolves if present, or when symptom free for 7 days if fever absent, or after a total of 14 days after they entered quarantine has elapsed.

3. Patrons and employees will wash hands prior to entering training area and again before leaving facility. Adequate supplies of appropriate handwashing agents will be provided by facility.

4. Patrons will maintain a minimum of 6 ft of distance between each other while training. No equipment is to be shared, including bars, squat racks, deadlift platforms, and benches. There will be no community chalk; patrons must supply their own for their personal use only.

5. Patrons will wear a mask that covers both their nose and mouth while they are in the facility. This is to prevent droplet exposure in an environment where people are breathing more heavily under physical stress. If a patron is unable to mask, they will not be permitted to train in the facility until such time as masks are no longer deemed advisable by the CDC or local government.

6. Shirts and shoes will be worn at all times.

7. Classes and training will be "staged", i.e, there will be no overlap between members' reserved time slots. All members from prior time slot must leave before those who have reserved the next time slot may enter.

8. Patrons will be reminded by signage to not touch face, mouth, or eyes while in facility.

LIFFT LEAGUE OF INDEPENDENT FITNESS FACILITIES & TRAINERS

PHONE 707.330.8318
FAX Enter fax
EMAIL info@lifft.org
WEBSITE www.lifft.org

9. Drinking fountains will remain off during the pandemic. Patrons must bring their own water bottles from home.

10. Patrons must wipe off equipment with a disinfectant solution that will be amply available throughout the facility. They must wipe off equipment with the solution before and after use.

11. The facility will be swept and mopped nightly, including bathrooms. All frequently used objects and surfaces will be disinfected at the end of each day, as well as throughout the day by facility staff and patrons.

12. If a patron is found to have COVID19, or develops symptoms suggestive of COVID 19 within 48 hours of being at the facility, they must notify the facility immediately. At that time, the facility will be closed for a thorough cleaning and disinfecting of all surfaces before it will be reopened to members. Additionally, facility will notify all members in the facility when the patron with presumed COVID19 was present so that they may quarantine according to current guidelines and prevent community spread.

CDC guidelines for safe reopening are listed below and have been covered in full in our proposal.

https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html

- social distancing (specifically, staying 6 feet away from others when you must go into a shared space)
- frequently washing hands or use alcohol-based (at least 60% alcohol) hand sanitizer when soap and water are not available
- wearing cloth face coverings
- avoiding touching eyes, nose, and mouth
- staying home when sick
- cleaning and disinfecting frequently touched objects and surfaces

Thank you for your kind consideration.

Sincerely,

Tina Kinsley, MD
President, LIFFT

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Attorneys for Plaintiffs
612 W. University

Exhibit 2

Executive Order 2020-04 - Declaration of State of Emergency

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.

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES AND TRAINERS, INC.,
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Attorneys for Plaintiffs
612 W. University

Exhibit 3

Executive Order 2020-33 (COVID-19)

EXECUTIVE ORDER

No. 2020-33

Expanded emergency and disaster declaration

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This new disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus has spread across Michigan. To date, the state has 9,334 confirmed cases of COVID-19 and 337 people have died of the disease. Many thousands more are infected but have not been tested. Hospitals in Oakland, Macomb, Wayne, and Washtenaw counties are reporting that they are full or nearly full to capacity. Ventilators and personal protective equipment are in short supply and high demand. Michigan needs more medical personnel than are currently available to care for COVID-19 patients. Dormitories and a convention center are being converted to temporary field hospitals.

The best way to slow the spread of COVID-19 is for people to stay home and keep their distance from others. To that end, and pursuant to the recommendations of public health experts, I have restricted access to places of public accommodation and school buildings in Executive Orders 2020-20 and 2020-11, respectively. And in Executive Order 2020-21, I have limited gatherings and travel, and have required all workers who are not necessary to sustain or protect life to remain at home.

Social distancing, though necessary to combat COVID-19, has harsh economic consequences. Almost overnight, businesses and government agencies have had to dramatically adjust how they work. Where working from home is not possible, businesses have closed or significantly restricted their normal operations. Michiganders are losing their jobs in record numbers: over the past two weeks alone, nearly a half-million of them submitted claims for unemployment insurance. That is more claims than were filed in the entirety of the prior calendar year.

The economic damage—already severe—will compound with time. On March 19, 2020, economists at the University of Michigan forecasted that as many as 1 in 10 Michiganders could be unemployed by the fall and that economic sectors that feature substantial social interaction could contract by as much as 50%. As a result, many families in Michigan will struggle to pay their bills or even put food on the table.

My administration has already taken aggressive measures to mitigate the economic harms of this pandemic. In Executive Order 2020-18, we placed strict rules on businesses to prevent price gouging. In Executive Order 2020-19, we put a temporary hold on evictions for families that cannot make their rent. And in Executive Order 2020-24, we expanded eligibility for unemployment benefits.

Nonetheless, the COVID-19 pandemic has disrupted and will continue to disrupt our economy, our homes, and our educational, civic, social, and religious institutions. School closures have made it harder to educate our children and have increased strain on parents, many of whom continue to work from home. The closure of museums and theaters will limit people's ability to enrich themselves through the arts. And curtailing gatherings has left many seeking new ways to connect with their community during these challenging times.

The health, economic, and social harms of the COVID-19 pandemic are widespread and severe, and they demand we do more.

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(3)-(4), provides that "[t]he governor shall, by executive order or proclamation, declare a state of emergency" and/or a "state of disaster" upon finding that an emergency and/or disaster has occurred or is threatening to occur.

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 . . . 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 and a state of disaster are both 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 and the state of disaster will terminate when emergency and disaster conditions no longer exist and appropriate programs have been implemented to recover from any effects of the statewide emergency and disaster, consistent with the legal authorities upon which this declaration is based and any limits imposed by those authorities, including section 3 of the Emergency Management Act, 1976 PA 390, as amended, MCL 30.403.

4. Executive Order 2020-4 is rescinded and replaced. All previous orders that rested on Executive Order 2020-4 now rest on this order.

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

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES AND TRAINERS, INC.,
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PRISON CITY PHYSIQUE LLC,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 4

Executive Order 2020-09 (COVID-19)

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.

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES AND TRAINERS, INC.,
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PRISON CITY PHYSIQUE LLC,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
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Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 5

Executive Order 2020-20 (COVID-19)

EXECUTIVE ORDER

No. 2020-20

Temporary restrictions on the use of places of public accommodation

Rescission of Executive Order 2020-9

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.

Executive Order 2020-9 imposed such restrictions. This order changes those restrictions by clarifying their application to facilities offering non-essential personal care services. When the restrictions in this order take effect, Executive Order 2020-9 is rescinded.

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 22, 2020 at 9:00 am, and continuing until April 13, 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 facilities offering non-essential personal care services;

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. "Non-essential personal care services" includes but is not limited to hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services that require individuals to be within six feet of each other. This does not include services necessary for medical treatment as determined by a licensed medical provider.

b. "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.

c. "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.

7. On March 22, 2020 at 9:00 am, Executive Order 2020-9 is rescinded.

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

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES AND TRAINERS, INC.,
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M FITNESS CLUB, LLC,
MH & AB LLC,
MOTOR CITY CF - ST. CLAIR SHORES, LLC,
NASCOT ENTERPRISES, LLC,
PRISON CITY PHYSIQUE LLC,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 6

Executive Order 2020-43 (COVID-19)

EXECUTIVE ORDER

No. 2020-43

Temporary restrictions on the use of places of public accommodation

Rescission of Executive Order 2020-20

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 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

In the three weeks that followed, the virus spread across Michigan, bringing deaths in the hundreds, confirmed cases in the 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.

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.

Executive Order 2020-20 imposed such restrictions, which were then supplemented by the restrictions on in-person work, travel, and gatherings imposed by Executive Order 2020-42. Because these restrictions on places of public accommodation remain reasonable and necessary to suppress the spread of COVID-19 and protect the public health and safety of this state and its residents, this order extends their duration to April 30, 2020, to match the duration of the further restrictions imposed by Executive Order 2020-42. With this order, Executive Order 2020-20 is rescinded.

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

1. Effective immediately and continuing until April 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 facilities offering non-essential personal care services;

   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 must 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. "Non-essential personal care services" includes but is not limited to hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services that require individuals to be within six feet of each other. This does not include services necessary for medical treatment as determined by a licensed medical provider.

   b. "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.

   c. "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. The restrictions and requirements imposed by this order supplement, and must not be construed to diminish or relax in any way, the restrictions and requirements imposed by Executive Order 2020-42 or any executive order that may follow from it.

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

8. Executive Order 2020-20 is rescinded.

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

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 7

Executive Order 2020-69 (COVID-19)

EXECUTIVE ORDER

No. 2020-69

Temporary restrictions on the use of places of public accommodation

Rescission of Executive Order 2020-43

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, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, 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.

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.

Executive Order 2020-20 imposed such restrictions, which were then supplemented by the restrictions on in-person work, travel, and gatherings imposed by Executive Order 2020-42. Executive Orders 2020-20 and 2020-42 were then replaced by Executive Orders 2020-43 and 2020-59, respectively. Because these restrictions on places of public accommodation remain reasonable and necessary to suppress the spread of COVID-19 and protect the public health and safety of this state and its residents, this order extends their duration to May 28, 2020. With this order, Executive Order 2020-43 is rescinded.

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

1. Effective immediately and continuing until May 28, 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 facilities offering non-essential personal care services;

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 must 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. "Non-essential personal care services" includes but is not limited to hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services that require individuals to be within six feet of each other. This does not include services necessary for medical treatment as determined by a licensed medical provider.

b. "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.

c. "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. The restrictions and requirements imposed by this order supplement, and must not be construed to diminish or relax in any way, the restrictions and requirements imposed by Executive Order 2020-59 or any executive order that may follow from it.

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

8. Executive Order 2020-43 is rescinded.

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

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 8

Executive Order 2020-21 (COVID-19)

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 greatest 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 V 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 performing 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 prescriptions 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 relevant distribution center, or service provider that has designated them.

      5. Businesses, operators, 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, operators, 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 at-risk 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.

RELATED CONTENT

Executive Order 2020-114 (COVID-19) (June 5, 2020)
Executive Order 2020-113 (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)

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 9

Executive Order 2020-42 (COVID-19)

EXECUTIVE ORDER 2020-42 FAQs

EXECUTIVE ORDER

No. 2020-42

Temporary requirement to suspend activities that

are not necessary to sustain or protect life

Rescission of Executive Order 2020-21

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 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

In the three weeks that followed, the virus spread across Michigan, bringing deaths in the hundreds, confirmed cases in the 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.

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. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. The order limited gatherings and travel, and required workers who are not necessary to sustain or protect life to stay home.

The measures put in place by Executive Order 2020-21 have been effective, but this virus is both aggressive and persistent: on April 8, 2020, Michigan reported 20,346 confirmed cases of COVID-19 and 959 deaths from it. To win this fight, and to protect the health and safety of our state and each other, we must be just as aggressive and persistent. Though we have all made sacrifices, we must be steadfast. Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-21, clarify them, and extend their duration to April 30, 2020. This order takes effect on April 9, 2020 at 11:59 pm. When this order takes effect, Executive Order 2020-21 is rescinded.

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 of this order, 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 ("CDC"), 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 of this order.

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. Workers need not carry copies of their designations when they leave the home or place of residence for work.

    Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 10 of this order.

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 of this order, 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. Workers need not carry copies of their designations when they leave the home or place of residence for work. 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 of this order.

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

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, as described in section 10 of this order. Stores that are open to the public must also adhere to the rules described in section 11 of this order.

6. All in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to support 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 (including recycling and composting), 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 activity permitted under this order.

c. For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b) of this order. 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 10 of this order.

7. Exceptions.

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

        1. To engage in outdoor physical activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor physical activity includes walking, hiking, running, cycling, kayaking, canoeing, or other similar physical activity, as well as any comparable activity for those with limited mobility.

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) of this order may leave their home for work without being designated.)

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

4. To perform necessary government activities, as described in section 6 of this order.

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, their pets, and their vehicles.

A. 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. Individuals may also leave the home to drop off a vehicle to the extent permitted under section 9(i) of this order.

B. Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.

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 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.

12. To attend a funeral, provided that no more than 10 people are in attendance at the funeral.

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. Between two residences in this state, through April 10, 2020. After that date, travel between two residences is not permitted.

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

c. All other travel is prohibited, including all travel to vacation rentals.

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). This order does *not* adopt any subsequent guidance document released by this same agency.

Consistent with the March 19, 2020 guidance document, critical infrastructure 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.

- Financial services.

m. Chemical supply chains and safety.

- 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 workers required to perform in-person work as permitted under this order. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.

b. Workers at suppliers, distribution centers, or service providers, as described below.

1. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

2. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subprovision (1) of this subsection may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

3. Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

4. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection 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 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.

f. Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.

g. Workers at laundromats, coin laundries, and dry cleaners.

h. Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.

i. Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.

10. Businesses, operations, and government agencies that continue in-person work must adhere to sound social distancing practices and measures, which include but are not limited to:

a. Developing a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available here. Such plan must be available at company headquarters or the worksite.

b. Restricting the number of workers present on premises to no more than is strictly necessary to perform the business's, operation's, or government agency's critical infrastructure functions or its minimum basic operations.

c. Promoting remote work to the fullest extent possible.

d. Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible.

e. 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.

f. Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.

g. Any other social distancing practices and mitigation measures recommended by the CDC.

11. Any store that remains open for in-person sales under section 5 or 9(f) of this order must:

a. Establish lines to regulate entry in accordance with subsections (c) and (d) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.

b. Consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.

c. For stores of less than 50,000 square feet of customer floor space, limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.

d. For stores of more than 50,000 square feet:

1. Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space. The amount of customer floor space must be calculated to exclude store areas that are closed under subprovision (2) of this subsection.

2. Close areas of the store—by cordoning them off, placing signs in aisles, posting prominent signs, removing goods from shelves, or other appropriate means—that are dedicated to the following classes of goods:

A. Carpet or flooring.

B. Furniture.

C. Garden centers and plant nurseries.

D. Paint.

3. By April 13, 2020, refrain from the advertising or promotion of goods that are not groceries, medical supplies, or items that are necessary to maintain the safety, sanitation, and basic operation of residences.

4. Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.

e. The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in subsections (c) and (d) of this section as necessary to protect the public health.

12. No one shall advertise or rent a short-term vacation property except as necessary to assist in housing a health care professional or volunteer aiding in the response to the COVID-19 crisis.

13. 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 17 of this order.

14. 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.

15. This order takes effect on April 9, 2020 at 11:59 pm and continues through April 30, 2020 at 11:59 pm. When this order takes effect, Executive Order 2020-21 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.

16. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, 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.

17. 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.

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DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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.,
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RMP FITNESS INC.,
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Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 10

Executive Order 2020-59 (COVID-19).

EXECUTIVE ORDER

No. 2020-59

Temporary requirement to suspend activities that are necessary to sustain or protect life

Rescission of Executive Order 2020-42

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 the existence 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 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

In the three weeks that followed, the virus spread across Michigan, bringing deaths in the hundreds, confirmed cases in the 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.

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." 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 control of existing law." 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 protect the public health infrastructure necessary to combat 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. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe, and then extended that order through April 30, 2020, with Executive Order 2020-42. The orders limited gatherings and travel, prohibited certain work, and required most necessary workers to take certain precautions.

The measures put in place by Executive Orders 2020-21 and 2020-42 have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on April 23, 2020, Michigan reported 35,291 confirmed cases and 2,977 deaths, the second- and third-highest case and death totals, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. But in doing so, we must move with deep caution and prudence, recognizing that the risk of new infections continues to inflict pain on our state and how quickly our progress in suppressing it can be undone. Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-42, amend their scope, and extend their duration by 15 days, with a few changes modified earlier. With this order, Executive Order 2020-42 is rescinded.

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 of this order, 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 ("CDC"), except when necessary to conduct or participate in the activities or operations listed in section 7 to the extent feasible under the circumstances.

   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, to conduct minimum basic operations, or to perform a resumed activity within the meaning of section 8.

   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 of this order.
   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. Workers need not carry copies of their designations when they leave the home or place of residence for work.

      Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 11 of this order.
   c. Workers who perform resumed activities are defined in section 10 of this order.
4. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:
   a. Consistent with sections 8, 9, and 10 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work. 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 of this order.
      3. Workers and volunteers described in section 9(d) of this order.
   b. In-person activities that are not necessary to sustain or protect life but to perform a resumed activity must be suspended.
   c. Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in section 11 of this order. Stores that are open for in-person sales must also adhere to the rules described in section 12 of this order.
   d. Any business or operation that employs workers who perform resumed activities under section 10(a) of this order, but does not perform critical infrastructure work, may sell any goods through remote sales via delivery or at the curbside. Consistent with section 7(e), however, must otherwise remain closed to the public.
5. All in-person government activities are prohibited except as listed in this order. Each department or agency director must identify those workers necessary to conduct or participate in critical government services and must designate a sufficient number of employees to perform those services. Every department or agency director must work to ensure that, to the extent possible, employees perform critical government services remotely rather than in person. Each department or agency director must establish a method to track which employees have been designated to perform critical government services.
6. Public schools are closed for in-person instruction for the remainder of the school year. Teachers and school administrators must continue to provide instruction remotely. Extracurricular sports and activities are suspended.
7. Except as otherwise provided in this order, all travel, including to a second home or recreational property, is prohibited. Individuals who must travel for essential activities or to perform critical infrastructure work may do so. Examples of essential activities include:
   a. Travel to engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
   b. 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 4(a) of this order, may have their employers do so if they wish to.)
   c. To conduct minimum basic operations, as described in section 4(b) of this order, after being designated to perform such work by their employers.
   d. To perform resumed activities, as described in section 10 of this order, after being designated to perform such work by their employers.
   e. To perform necessary government activities, as described in section 6 of this order.
   f. To perform tasks that are necessary to their health and safety or 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 serious health issue affecting their health and safety. They may leave their residence or family member (including in-person procedures or veterinary services that, in accordance with a duly implemented non-essential procedures or veterinary services postponement plan, have not been postponed).
   g. To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
      a. 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 or motor vehicles.
      b. Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 9(i) of this order, or to have a motor vehicle or bicycle repaired or serviced.
      c. Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
   h. To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
   i. To care for a family member or a family member's pet in another household.
   j. To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
   k. To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
   l. To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child-placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
   m. To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
   n. To work or volunteer for businesses or operations (including both 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 pets and animals in need.
   o. To attend a funeral, provided that no more than 10 people are in attendance.
   p. To attend a meeting of an addiction recovery support aid society, provided that no more than 10 people are in attendance.
8. Individuals may also travel:
   a. To return to a home or place of residence from outside this state.
   b. To leave this state for a home or residence elsewhere.
   c. Between two residences in this state, including moving to a new residence.
   d. As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.
9. All other travel is prohibited, including all travel to vacation rentals.
10. 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). This order does not adopt any subsequent guidance document released by this same agency.

    Consistent with the March 19, 2020 guidance document, critical infrastructure 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.
11. 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, workers who conduct minimum basic operations, workers who perform resumed government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
    b. Workers at suppliers, distribution centers, or service providers, as described below.
       1. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
       2. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subsection (1) of this subsection may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
       3. Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
       4. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection 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 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.
    f. Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
    g. Workers at laundromats, coin laundries, and dry cleaners.
    h. Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
    i. Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.
12. For purposes of this order, workers who perform resumed activities are defined as follows:
    a. Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
    b. Workers who perform bicycle maintenance or repair.
    c. Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.
    d. Maintenance workers and groundskeepers who are necessary to maintain the safety and sanitation of places of outdoor recreation not otherwise closed under Executive Order 2020-43 or any order that may follow it, provided that the places and their workers do not provide any food, equipment, supplies, or services to patrons and subject to the enhanced social-distancing rules described in section 11(h) of this order.
    e. Workers for moving or storage operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.
13. Businesses, operations, and government agencies that remain open for in-person work must adhere to sound social distancing practices and measures, which include but are not limited to:
    a. Developing a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available here. Such plan must be available at company headquarters or the worksite.
    b. Restricting the number of workers present on premises to no more than is strictly necessary to perform the in-person work permitted under this order.
    c. Promoting remote work to the fullest extent possible.
    d. Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible.
    e. 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.
    f. Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.
    g. Any other social distancing practices and mitigation measures recommended by the CDC.
14. For businesses and operations whose in-person work is permitted under sections 10(c) through 10(e) of this order, the following additional measures must also be taken:
    a. Barring gatherings of any size in which people cannot maintain six feet of distance from one another.
    b. Limiting in-person interaction with clients and patrons to the maximum extent possible, and barring any such interaction in which people cannot maintain six feet of distance from one another.
    c. Providing personal protective equipment such as gloves, goggles, face shields, and face masks as appropriate for the activity being performed.
    d. Adopting protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning of tools, equipment, and frequently touched surfaces.
15. Any store that remains open for in-store sales under section 9(f) or section 10(c) of this order:
    a. Must establish and staff a single entry or queue for customers to enter the store, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.
    b. Must adhere to the following restrictions:
       1. For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.
       2. For stores of more than 50,000 square feet:
          a. Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
          b. Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.
          3. The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect public health.
    c. May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.
    d. Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.
16. To assist with a short-term vacation property owner's temporary need to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.
17. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.
18. Effective on April 26, 2020 at 11:59 pm:
    a. Any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in a store or providing public space.
    b. All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
    c. Supplies of cloth 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.
    d. 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 persons who wear a mask under this order.
19. 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, activity, or movement. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place. No religious worship service is subject to penalty under section 20 of this order.
20. 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.
21. This order takes effect immediately, unless otherwise specified in this order, and continues through May 15, 2020 at 11:59 pm. Executive Order 2020-42 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal documents shall be taken to refer to this order.
22. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, 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.
23. 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.

Signed: Gretchen Whitmer, Governor
Date: April 24, 2020
Time: 11:00 am

Related Documents
Executive Order 2020-59

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 11

Executive Order 2020-70 (COVID-19)

EXECUTIVE ORDER

No. 2020-70

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

Rescission of Executive Order 2020-59

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, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

In the weeks that followed, 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.

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, 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. 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 and 2020-59, 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 Executive Orders 2020-21, 2020-42, and 2020-59 have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on April 30, 2020, Michigan reported 41,379 confirmed cases and 3,789 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. 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.

Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-59 and amend their scope. With Executive Order 2020-59, I ordered that certain previously suspended work and activities could resume, based on an evaluation of public health metrics and an assessment of the statewide risks and benefits. That evaluation remains ongoing, and based upon it, I find that we will soon be positioned to allow another segment of previously suspended work to resume. This work is permitted to resume on May 7, 2020, and includes construction, real-estate activities, and work that is traditionally and primarily performed outdoors. This work, like the resumed activities allowed under Executive Order 2020-59, will be subject to stringent precautionary measures. This partial and incremental reopening will allow my public health team to evaluate the effects of allowing these activities to resume, to assess the capacity of the health care system to respond adequately to any increases in infections, and to prepare for any increase in patients presenting to a health-care facility or provider. With this order, Executive Order 2020-59 is rescinded. This order will remain in effect until May 15, 2020.

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 of this order, 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 ("CDC"), 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, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.
    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 of this order.
    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. Workers need not carry copies of their designations when they leave the home or place of residence for work.

        Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 11 of this order.

    c. Workers who perform resumed activities are defined in section 10 of this order.
5. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:
    a. Consistent with sections 8, 9, and 10 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities 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. Workers need not carry copies of their designations when they leave the home or place of residence for work. 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 of this order.
        3. Workers and volunteers described in section 9(d) of this order.
    b. In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.
    c. Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in section 11 of this order. Stores that are open for in-person sales must also adhere to the rules described in section 12 of this order.
    d. Any business or operation that employs workers who perform resumed activities under section 10(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.
6. All in-person government activities at whatever level (state, county, or local) are suspended unless:
    a. They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 8 and 9 of this order.
    b. They are performed by workers who are permitted to resume work under section 10 of this order.
    c. They are necessary to support the activities of workers described in sections 8, 9, and 10 of this order, or to enable transactions that support businesses or operations that employ such workers.
    d. They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.
    e. For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b) of this order. Workers performing such activities need not be designated.
    f. 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 11 of this order.
7. Exceptions.
    a. Individuals may leave their home or place of residence, and travel as necessary:
        1. To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
        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) of this order may leave their home for work without being designated.)

3. To conduct minimum basic operations, as described in section 4(b) of this order, after being designated to perform such work by their employers.
4. To perform resumed activities, as described in section 10 of this order, after being designated to perform such work by their employers.
5. To perform necessary government activities, as described in section 6 of this order.
6. 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 in-person procedures or veterinary services that, in accordance with a duly implemented non-essential procedure or veterinary services postponement plan, have not been postponed).
7. To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
    A. 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 or motor vehicles.
    B. Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 9(i) of this order, or to have a motor vehicle or bicycle repaired or maintained.
    C. Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
8. To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
9. To care for a family member or a family member's pet in another household.
10. To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
11. To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
12. To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
13. To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
14. To work or volunteer for businesses or operations (including both 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.
15. To attend a funeral, provided that no more than 10 people are in attendance.
16. To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
17. To view a real-estate listing by appointment, as permitted under section 10(h) of this order.

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. Between two residences in this state, including moving to a new residence.
    4. As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

c. All other travel is prohibited, including all travel to vacation rentals.

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). This order does *not* adopt any subsequent guidance document released by this same agency.

    Consistent with the March 19, 2020 guidance document, critical infrastructure 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, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
   b. Workers at suppliers, distribution centers, or service providers, as described below.
      1. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
      2. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subprovision (1) of this subsection may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
      3. Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
      4. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection 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 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.
   f. Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
   g. Workers at laundromats, coin laundries, and dry cleaners.
   h. Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
   i. Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.

10. For purposes of this order, workers who perform resumed activities are defined as follows:
   a. Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
   b. Workers who perform bicycle maintenance or repair.
   c. Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.
   d. Maintenance workers and groundskeepers who are necessary to maintain the safety and sanitation of places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it, provided that the places and their workers do not provide goods, equipment, supplies, or services to individuals, and subject to the enhanced social-distancing rules described in section 11(h) of this order.
   e. Workers for moving or storage operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.
   f. Effective at 12:01 am on May 7, 2020, and subject to the enhanced social-distancing rules described in section 11(h) of this order, workers who perform work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and similar workers.
   g. Effective at 12:01 am on May 7, 2020, workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers), subject to the enhanced social-distancing rules described in section 11(i) of this order.
   h. Effective at 12:01 am on May 7, 2020, workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:

1. Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time. No in-person open houses are permitted.
2. Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.

i. Effective at 12:01 am on May 7, 2020, workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.

11. Businesses, operations, and government agencies that remain open for in-person work must, at a minimum:
    a. Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available **here**. Such plan must be available at company headquarters or the worksite.
    b. Restrict the number of workers present on premises to no more than is strictly necessary to perform the in-person work permitted under this order.
    c. Promote remote work to the fullest extent possible.
    d. Keep workers and patrons who are on premises at least six feet from one another to the maximum extent possible.
    e. Increase 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.
    f. Adopt policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.
    g. Adopt any other social distancing practices and mitigation measures recommended by the CDC.
    h. Businesses or operations whose in-person work is permitted under sections 10(c) through 10(f) of this order must also:
        1. Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.
        2. Limit in-person interaction with clients and patrons to the maximum extent possible, and barring any such interaction in which people cannot maintain six feet of distance from one another.
        3. Provide personal protective equipment such as gloves, goggles, face shields, and face masks as appropriate for the activity being performed.
        4. Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning of tools, equipment, and frequently touched surfaces.
    i. Businesses or operations in the construction industry must also:
        1. Adhere to all of the provisions in subsection (h) of this section.
        2. Designate a site-specific supervisor to monitor and oversee the implementation of COVID-19 control strategies developed under subsection (a) of this section. The supervisor must remain on-site at all times during activities. An on-site worker may be designated to perform the supervisory role.
        3. Conduct a daily entry screening protocol for workers and visitors entering the worksite, including a questionnaire covering symptoms and exposure to people with possible COVID-19, together with, if possible, a temperature screening.
        4. Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in subprovision (3) of this subsection, or in the alternative issue stickers or other indicators to workers to show that they received a screening before entering the worksite that day.
        5. Require face shields or masks to be worn when workers cannot consistently maintain six feet of separation from other workers.
        6. Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled masks.
        7. Encourage or require the use of work gloves, as appropriate, to prevent skin contact with contaminated surfaces.
        8. Identify choke points and high-risk areas where workers must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.
        9. Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by workers.
        10. Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among workers at the worksite.
        11. Restrict unnecessary movement between project sites.
        12. Create protocols for minimizing personal contact upon delivery of materials to the worksite.

12. Any store that remains open for in-store sales under section 9(f) or section 10(c) of this order:
    a. Must establish lines to regulate entry in accordance with subsection (b) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.
    b. Must adhere to the following restrictions:
        1. For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.

2. For stores of more than 50,000 square feet, must:
   A. Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
   B. Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.
3. The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.

c. May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.

d. Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.

13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.
14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.
15. Rules governing face coverings.
    a. Any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.
    b. All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
    c. 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.
    d. 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.
16. 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, neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place. No individual is subject to penalty under section 20 of this order for violating section 15(a) of this order.
17. 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.
18. This order takes effect immediately, unless otherwise specified in this order, and continues through May 15, 2020 at 11:59 pm. Executive Order 2020-59 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.
19. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, 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.
20. 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: May 1, 2020
Time: 2:49 pm

Related Documents
EO 2020-70 MI Safe Start

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DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 12

Executive Order 2020-77 (COVID-19)

EXECUTIVE ORDER

No. 2020-77

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

Rescission of Executive Order 2020-70

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, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, 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.

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, 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. 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, and 2020-70, 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 Executive Orders 2020-21, 2020-42, 2020-59, and 2020-70 have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on May 6, 2020, Michigan reported 45,054 confirmed cases and 4,250 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. 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.

Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-70 and amend their scope. With Executive Order 2020-70, I ordered that certain previously suspended work and activities could resume, based on an evaluation of public health metrics and an assessment of the statewide risks and benefits. That evaluation remains ongoing, and based upon it, I find that we will soon be positioned to allow another segment of previously suspended work to resume: manufacturing work. This work, like the resumed activities allowed under Executive Order 2020-70, will be subject to stringent precautionary measures. This partial and incremental reopening will allow my public health team to evaluate the effects of allowing these activities to resume, to assess the capacity of the health care system to respond adequately to any increases in infections, and to prepare for any increase in patients presenting to a health-care facility or provider. With this order, Executive Order 2020-70 is rescinded. This order will remain in effect until May 28, 2020.

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 of this order, 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 ("CDC"), 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, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.
    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 of this order.
    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. Workers need not carry copies of their designations when they leave the home or place of residence for work.
    Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 11 of this order.
    c. Workers who perform resumed activities are defined in section 10 of this order.
5. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:
    a. Consistent with sections 8, 9, and 10 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities 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. Workers need not carry copies of their designations when they leave the home or place of residence for work. 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 of this order.
        3. Workers and volunteers described in section 9(d) of this order.
    b. In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.
    c. Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in section 11 of this order. Stores that are open for in-person sales must also adhere to the rules described in section 12 of this order.
    d. Any business or operation that employs workers who perform resumed activities under section 10(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.
6. All in-person government activities at whatever level (state, county, or local) are suspended unless:
    a. They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 8 and 9 of this order.
    b. They are performed by workers who are permitted to resume work under section 10 of this order.
    c. They are necessary to support the activities of workers described in sections 8, 9, and 10 of this order, or to enable transactions that support businesses or operations that employ such workers.
    d. They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.
    e. For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b) of this order. Workers performing such activities need not be designated.
    f. 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 11 of this order.
7. Exceptions.
    a. Individuals may leave their home or place of residence, and travel as necessary:
        1. To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
        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) of this order may leave their home for work without being designated.)
        3. To conduct minimum basic operations, as described in section 4(b) of this order, after being designated to perform such work by their employers.
        4. To perform resumed activities, as described in section 10 of this order, after being designated to perform such work by their employers.
        5. To perform necessary government activities, as described in section 6 of this order.
        6. 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 in-person procedures or veterinary services that, in accordance with a duly implemented non-essential procedure or veterinary services postponement plan, have not been postponed).
        7. To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
            a. 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 or motor vehicles.
            b. Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 9(i) of this order, or to have a motor vehicle or bicycle repaired or maintained.
            c. Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
        8. To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
        9. To care for a family member or a family member's pet in another household.
        10. To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
        11. To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
        12. To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
        13. To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
        14. To work or volunteer for businesses or operations (including both 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.
        15. To attend a funeral, provided that no more than 10 people are in attendance.
        16. To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
        17. To view a real-estate listing by appointment, as permitted under section 10(g) of this order.
        18. To participate in training, credentialing, or licensing activities permitted under section 10(i) of this order.
    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. Between two residences in this state, including moving to a new residence.
        4. As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.
    c. All other travel is prohibited, including all travel to vacation rentals.
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**). This order does *not* adopt any subsequent guidance document released by this same agency.

    Consistent with the March 19, 2020 guidance document, critical infrastructure 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, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
    b. Workers at suppliers, distribution centers, or service providers, as described below.
        1. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
        2. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subprovision (1) of this subsection may designate their workers as critical infrastructure workers provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
        3. Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
        4. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection 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 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.
    f. Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
    g. Workers at laundromats, coin laundries, and dry cleaners.
    h. Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
    i. Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.
10. For purposes of this order, workers who perform resumed activities are defined as follows:
    a. Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
    b. Workers who perform bicycle maintenance or repair.
    c. Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations, subject to the enhanced social-distancing rules described in section 11(i) of this order.
    d. Workers for moving or storage operations, subject to the enhanced social-distancing rules described in section 11(i) of this order.
    e. Subject to the enhanced social-distancing rules described in section 11(i) of this order, workers who perform work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and outdoor workers at places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it.
    f. Workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers), subject to the workplace safeguards described in section 11(j) of this order.
    g. Workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:
        1. Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time. No in-person open houses are permitted.
        2. Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.
    h. Workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.
    i. Workers necessary to train, credential, and license first responders (e.g., police officers, fire fighters, paramedics) and health-care workers, including certified nursing assistants, provided that as much instruction as possible is provided remotely.
    j. Workers necessary to perform start-up activities at manufacturing facilities, including activities necessary to prepare the facilities to follow the workplace safeguards described in section 11(k) of this order.
    k. Effective at 12:01 am on May 11, 2020, workers necessary to perform manufacturing activities, subject to the workplace safeguards described in section 11(k) of this order. Manufacturing work may not commence under this subsection until the facility at which the work will be performed has been prepared to follow the workplace safeguards described in section 11(k) of this order.
    l. Consistent with section 9(b) of this order, workers at suppliers, distribution centers, or service providers whose in-person presence is necessary to enable, support, or facilitate another business's or operation's resumed activities, including workers at suppliers, distribution centers, or service providers along the supply chain whose in-person presence is necessary enable, support, or facilitate the necessary work of another supplier, distribution center, or service provider in enabling, supporting, or facilitating another business's or operation's resumed activities. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.
11. Businesses, operations, and government agencies that remain open for in-person work must, at a minimum:
    a. Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available **here**. Such plan must be available at company headquarters or the worksite.
    b. Restrict the number of workers present on premises to no more than is strictly necessary to perform the in-person work permitted under this order.
    c. Promote remote work to the fullest extent possible.
    d. Keep workers and patrons who are on premises at least six feet from one another to the maximum extent possible.
    e. Require masks to be worn when workers cannot consistently maintain six feet of separation from other individuals in the workplace, and consider face shields when workers cannot consistently maintain three feet of separation from other individuals in the workplace.
    f. Increase 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.
    g. Adopt policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.
    h. Adopt any other social distancing practices and mitigation measures recommended by the CDC.
    i. Businesses or operations whose in-person work is permitted under sections 10(c) through 10(e) of this order must also:
        1. Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.
        2. Limit in-person interaction with clients and patrons to the maximum extent possible, and bar any such interaction in which people cannot maintain six feet of distance from one another.
        3. Provide personal protective equipment such as gloves, goggles, face shields, and face masks as appropriate for the activity being performed.
        4. Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning and disinfection of tools, equipment, and frequently touched surfaces.
    j. Businesses or operations in the construction industry must also:
        1. Adhere to all of the provisions in subsection (i) of this section.
        2. Designate a site-specific supervisor to monitor and oversee the implementation of COVID-19 control strategies developed under subsection (a) of this section. The supervisor must remain on-site at all times during activities. An on-site worker may be designated to perform the supervisory role.
        3. Conduct a daily entry screening protocol for workers, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.
        4. Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in subprovision (3) of this subsection, or in the alternative issue stickers or other indicators to workers to show that they received a screening before entering the worksite that day.
        5. Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled masks.
        6. Encourage or require the use of work gloves, as appropriate, to prevent skin contact with contaminated surfaces.
        7. Identify choke points and high-risk areas where workers must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.
        8. Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by workers.
        9. Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among workers at the worksite.
        10. Restrict unnecessary movement between project sites.
        11. Create protocols for minimizing personal contact upon delivery of materials to the worksite.
    k. Manufacturing facilities must also:
        1. Conduct a daily entry screening protocol for workers, contractors, suppliers, and any other individuals entering the facility, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with temperature screening as soon as no-touch thermometers can be obtained.
        2. Create dedicated entry point(s) at every worksite for daily screening as provided in subprovision (1) of this subsection, and ensure physical barriers are in place to prevent anyone from bypassing the screening.
        3. Suspend all non-essential in-person visits, including tours.
        4. Train workers on, at a minimum:
            A. Routes by which the virus causing COVID-19 is transmitted from person to person.
            B. Distance that the virus can travel in the air, as well as the time it remains viable in the air and on environmental surfaces.
            C. Symptoms of COVID-19.
            D. Steps the worker must take to notify the business or operation of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19.
            E. Measures that the facility is taking to prevent worker exposure to the virus, as described in the COVID-19 preparedness and response plan required under section 11(a) of this order.
            F. Rules that the worker must follow in order to prevent exposure to and spread of the virus.
            G. The use of personal protective equipment, including the proper steps for putting it on and taking it off.
        5. Reduce congestion in common spaces wherever practicable by, for example, closing salad bars and buffets within cafeterias and kitchens, requiring individuals to sit at least six feet from one another, placing markings on the floor to allow social distancing while standing in line, offering boxed food via delivery or pick-up points, and reducing cash payments.
        6. Implement rotational shift schedules where possible (e.g., increasing the number of shifts, alternating days or weeks) to reduce the number of workers in the facility at the same time.
        7. Stagger start times and meal times.
        8. Install temporary physical barriers, where practicable, between work stations and cafeteria tables.
        9. Create protocols for minimizing personal contact upon delivery of materials to the facility.
        10. Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible.
        11. Frequently and thoroughly clean and disinfect high-touch surfaces, paying special attention to parts, products, and shared equipment (e.g., tools, machinery, vehicles).
        12. Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by workers, and discontinue use of hand dryers.
        13. Notify plant leaders and potentially exposed individuals upon identification of a positive case of COVID-19 in the facility, as well as maintain a central log for symptomatic workers or workers who received a positive test for COVID-19.
        14. Send potentially exposed individuals home upon identification of a positive case of COVID-19 in the facility.
        15. Encourage workers to self-report to plant leaders as soon as possible after developing symptoms of COVID-19.
        16. Shut areas of the manufacturing facility for cleaning and disinfection, as necessary, if a worker goes home because he or she is displaying symptoms of COVID-19.
12. Any store that remains open for in-store sales under section 9(f) or section 10(c) of this order:
    a. Must establish lines to regulate entry in accordance with subsection (b) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.
    b. Must adhere to the following restrictions:
        1. For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.
        2. For stores of more than 50,000 square feet, must:
            A. Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
            B. Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.
        3. The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.
    c. May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.
    d. Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.
13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.
14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.
15. Rules governing face coverings.
    a. Except as provided in subsection (b) of this section, any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.
    b. An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes.
    c. All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
    d. 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.
    e. 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.
16. 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, neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place. No individual is subject to penalty under section 20 of this order for engaging in or traveling to engage in religious worship at a place of religious worship, or for violating section 15(a) of this order.
17. 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.
18. This order takes effect immediately, unless otherwise specified in this order, and continues through May 28, 2020 at 11:59 pm. Executive Order 2020-70 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.
19. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, 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.
20. 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: May 7, 2020
Time: 3:00 pm

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 13

Executive Order 2020-92 (COVID-19)

EXECUTIVE ORDER

No. 2020-92

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

Rescission of Executive Orders 2020-77 and 2020-90

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, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, 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.

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, 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. 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, and 2020-77, 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 Executive Orders 2020-21, 2020-42, 2020-59, 2020-70, and 2020-77 have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on May 17, 2020, Michigan reported 51,142 confirmed cases and 4,891 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. 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.

Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-77. The order is being reissued to omit worker safeguards that were included in prior versions of this order but which have now been adopted in Executive Order 2020-91, a standalone order on worker protection. It has also been amended to allow, in two regions, social gatherings of up to 10 people and to permit the reopening of retail stores, offices, and restaurants and bars with limited seating. Finally, the order incorporates and replaces Executive Order 2020-90, which allowed research laboratories to resume activities.

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. 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.

3. Subject to the exceptions in section 8 of this order, 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.

4. 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 ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

5. 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, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.

   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 9 and 10 of this order.

   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. Workers need not carry copies of their designations when they leave the home or place of residence for work.

      Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in Executive Order 2020-91 and any orders that follow or replace it.

   c. Workers who perform resumed activities are defined in section 11 of this order.

6. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:

   a. Consistent with sections 9, 10, and 11 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities 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. Workers need not carry copies of their designations when they leave the home or place of residence for work. 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 7 of this order.

      3. Workers and volunteers described in section 10(d) of this order.

   b. In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.

   c. Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in Executive Order 2020-91 and any orders that follow or replace it.

   d. Any business or operation that employs workers who perform resumed activities under section 11(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.

7. All in-person government activities at whatever level (state, county, or local) are suspended unless:

   a. They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 9 and 10 of this order.

   b. They are performed by workers who are permitted to resume work under section 11 of this order.

   c. They are necessary to support the activities of workers described in sections 9, 10, and 11 of this order, or to enable transactions that support businesses or operations that employ such workers.

   d. They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.

   e. For purposes of this order, necessary government activities include minimum basic operations, as described in 5(b) of this order.

Workers performing such activities need not be designated.

f. 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 Executive Order 2020-91 and any orders that follow or replace it.

8. Exceptions.

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

      1. To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
      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 6(a) of this order may leave their home for work without being designated.)
      3. To conduct minimum basic operations, as described in section 5(b) of this order, after being designated to perform such work by their employers.
      4. To perform resumed activities, as described in section 11 of this order, after being designated to perform such work by their employers.
      5. To perform necessary government activities, as described in section 7 of this order.
      6. 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 in-person procedures or veterinary services that, in accordance with a duly implemented non-essential procedure or veterinary services postponement plan, have not been postponed).
      7. To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.

         A. 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 or motor vehicles.

         B. Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 10(i) of this order, or to have a motor vehicle or bicycle repaired or maintained.

         C. Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
      8. To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
      9. To care for a family member or a family member's pet in another household.
      10. To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
      11. To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
      12. To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
      13. To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
      14. To work or volunteer for businesses or operations (including both 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.
      15. To attend a funeral, provided that no more than 10 people are in attendance.
      16. To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
      17. To view a real-estate listing by appointment, as permitted under section 11(g) of this order.
      18. To participate in training, credentialing, or licensing activities permitted under section 11(i) of this order.
      19. For individuals in Regions 6 or 8, to go to a restaurant or a retail store or to attend a social gathering of up to 10 people.

   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. Between two residences in this state, including moving to a new residence.
      4. As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

   c. All other travel is prohibited, including all travel to vacation rentals.

9. 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). This order does *not* adopt any subsequent guidance document released by this same agency.

   Consistent with the March 19, 2020 guidance document, critical infrastructure 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.

10. 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, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
    b. Workers at suppliers, distribution centers, or service providers, as described below.
        1. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
        2. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in sub-provision (1) of this subsection may designate their workers as critical infrastructure workers provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
        3. Consistent with the scope of work permitted under sub-provision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
        4. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection 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 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.
    f. Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
    g. Workers at laundromats, coin laundries, and dry cleaners.
    h. Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
    i. Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.
11. For purposes of this order, workers who perform resumed activities are defined as follows:
    a. Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
    b. Workers who perform bicycle maintenance or repair.
    c. Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations.
    d. Workers for moving or storage operations.

e. Workers who perform work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and outdoor workers at places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it.

f. Workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers).

g. Workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:

   1. Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time. No in-person open houses are permitted.

   2. Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.

h. Workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.

i. Workers necessary to train, credential, and license first responders (e.g., police officers, fire fighters, paramedics) and health-care workers, including certified nursing assistants, provided that as much instruction as possible is provided remotely.

j. Workers necessary to perform manufacturing activities. Manufacturing work may not commence under this subsection until the facility at which the work will be performed has been prepared to follow the workplace safeguards described in section 4 of Executive Order 2020-91 and any orders that follow or replace it.

k. Workers necessary to conduct research activities in a laboratory setting.

l. For Regions 6 and 8, beginning at 12:01 am on May 22, workers necessary to perform retail activities. For purposes of this order, retail activities are defined to exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that follow or replace it.

m. For Regions 6 and 8, beginning at 12:01 am on May 22, workers who work in an office setting, but only to the extent that such work is not capable of being performed remotely.

n. For Regions 6 and 8, beginning at 12:01 am on May 22, workers in restaurants or bars, subject to the capacity constraints and workplace standards described in Executive Order 2020-91. Nothing in this subsection should be taken to abridge or otherwise modify the existing power of a local government to impose further restrictions on restaurants or bars.

o. Workers necessary to prepare a workplace to follow the workplace standards described in Executive Order 2020-91.

p. Consistent with section 10(b) of this order, workers at suppliers, distribution centers, or service providers whose in-person presence is necessary to enable, support, or facilitate another business's or operation's resumed activities, including workers at suppliers, distribution centers, or service providers along the supply chain whose in-person presence is necessary to enable, support, or facilitate the necessary work of another supplier, distribution center, or service provider in enabling, supporting, or facilitating another business's or operation's resumed activities. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.

12. Any store that is open for in-store sales under section 10(f) or section 11(c) of this executive order:

    a. May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.

    b. Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.

13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.

14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.

15. Rules governing face coverings.

    a. Except as provided in subsection (b) of this section, any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.

    b. An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes or while seated at a restaurant or bar.

    c. All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.

    d. 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.

    e. 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.

16. 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, neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place. No individual is subject to penalty under section 20 of this order for engaging in or traveling to engage in religious worship at a place of religious worship, or for violating section 15(a) of this order.

17. 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.

18. This order takes effect immediately, unless otherwise specified in this order, and continues through May 28, 2020 at 11:59 pm. Executive Orders 2020-77 and 2020-90 are rescinded. All references to those orders in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.
19. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, 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.
20. 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: May 18, 2020
Time: 1:15 pm

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DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 14

Executive Order 2020-96 (COVID-19) (May 21, 2020)

EXECUTIVE ORDER

No. 2020-96

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

Rescission of Executive Orders 2020-17, 2020-34, and 2020-92

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, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, 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.

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, 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. 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, and 2020-92, 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 has started to drop. Although the virus remains aggressive and persistent—on May 20, 2020, Michigan reported 53,009 confirmed cases and 5,060 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. 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 reaffirm the measures set forth in Executive Order 2020-92, while also allowing gatherings of no more than ten people statewide, effective immediately, and permitting retailers and motor vehicle dealerships to see customers by appointment, beginning on May 26, 2020. In addition, because our health-care capacity has improved with respect to personal protective equipment, available beds, personnel, ventilators, and necessary supplies, I find it reasonable to rescind Executive Orders 2020-17 and 2020-34, which required health-care and veterinary facilities to implement plans to postpone some medical and dental procedures. Those rescissions will take effect on May 29.

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. 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.
3. Subject to the exceptions in section 8 of this order, 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.
4. 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 ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.
5. 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, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.
   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 9 and 10 of this order.
   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. Workers need not carry copies of their designations when they leave the home or place of residence for work.
   Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in Executive Order 2020-97 and any orders that may follow from it.
   c. Workers who perform resumed activities are defined in section 11 of this order.
6. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:
   a. Consistent with sections 9, 10, and 11 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities 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. Workers need not carry copies of their designations when they leave the home or place of residence for work. 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 7 of this order.
      3. Workers and volunteers described in section 10(d) of this order.
   b. In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.
   c. Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in Executive Order 2020-97 and any orders that may follow from it.
   d. Any business or operation that employs workers who perform resumed activities under section 11(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.
7. All in-person government activities at whatever level (state, county, or local) are suspended unless:
   a. They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 9 and 10 of this order.
   b. They are performed by workers who are permitted to resume work under section 11 of this order.
   c. They are necessary to support the activities of workers described in sections 9, 10, and 11 of this order, or to enable transactions that support businesses or operations that employ such workers.
   d. They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.
   e. For purposes of this order, necessary government activities include minimum basic operations, as described in 5(b) of this order. Workers performing such activities need not be designated.
   f. 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 Executive Order 2020-97 and any orders that may follow from it.
8. Exceptions.
   a. Individuals may leave their home or place of residence, and travel as necessary:
      1. To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
      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 6(a) of this order may leave their home for work without being designated.)
      3. To conduct minimum basic operations, as described in section 5(b) of this order, after being designated to perform such work by their employers.
4. To perform resumed activities, as described in section 11 of this order, after being designated to perform such work by their employers.
5. To perform necessary government activities, as described in section 7 of this order.
6. 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 for themselves or a household or family member.
7. To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
   A. 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 or motor vehicles.
   B. Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 10(i) of this order, or to go to a motor vehicle dealership showroom by appointment, as permitted under section 11(p) of this order.
   C. Individuals may leave the home to have a bicycle repaired or maintained.
   D. Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
8. To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
9. To care for a family member or a family member's pet in another household.
10. To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
11. To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
12. To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
13. To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
14. To work or volunteer for businesses or operations (including both 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.
15. To attend a funeral, provided that no more than 10 people are in attendance.
16. To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
17. To view a real-estate listing by appointment, as permitted under section 11(g) of this order.
18. To participate in training, credentialing, or licensing activities permitted under section 11(i) of this order.
19. For individuals in Regions 6 or 8, to go to a restaurant or a retail store.
20. To go to a retail store by appointment, as permitted under section 11(q) of this order.
21. To attend a social gathering of no more than 10 people.

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. Between two residences in this state, including moving to a new residence.
   4. As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

c. All other travel is prohibited, including all travel to vacation rentals.

9. 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). This order does *not* adopt any subsequent guidance document released by this same agency.
   Consistent with the March 19, 2020 guidance document, critical infrastructure 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.
10. 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, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
   b. Workers at suppliers, distribution centers, or service providers, as described below.
      1. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
    2. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in sub-provision (1) of this subsection may designate their workers as critical infrastructure workers provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
    3. Consistent with the scope of work permitted under sub-provision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
    4. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection 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 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.
  f. Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
  g. Workers at laundromats, coin laundries, and dry cleaners.
  h. Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
  i. Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic until May 26, 2020 at 12:01 am.
11. For purposes of this order, workers who perform resumed activities are defined as follows:
  a. Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
  b. Workers who perform bicycle maintenance or repair.
  c. Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations.
  d. Workers for moving or storage operations.
  e. Workers who perform work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and outdoor workers at places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it.
  f. Workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers).
  g. Workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:
    1. Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time. No in-person open houses are permitted.
    2. Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.
  h. Workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.
  i. Workers necessary to train, credential, and license first responders (e.g., police officers, fire fighters, paramedics) and health-care workers, including certified nursing assistants, provided that as much instruction as possible is provided remotely.
  j. Workers necessary to perform manufacturing activities. Manufacturing work may not commence under this subsection until the facility at which the work will be performed has been prepared to follow the workplace safeguards described in section 4 of Executive Order 2020-97 and any orders that may follow from it.
  k. Workers necessary to conduct research activities in a laboratory setting.
  l. For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, workers necessary to perform retail activities. For purposes of this order, retail activities are defined:
    1. As the selling of goods and the rendering of services incidental to the sale of the goods (e.g., any packaging and processing to allow for or facilitate the sale and delivery of the goods).
    2. To exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that may follow from it.
  m. For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, workers who work in an office setting, but only to the extent that such work is not capable of being performed remotely.
  n. For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, workers in restaurants or bars, subject to the capacity constraints and workplace standards described in Executive Order 2020-97. Nothing in this subsection should be taken to abridge or otherwise modify the existing power of a local government to impose further restrictions on restaurants or bars. For restaurants and bars subject to this subsection, this subsection supersedes the limitations placed on those restaurants and bars by Executive Order 2020-69 and any order that may follow from it.
  o. Workers necessary to prepare a workplace to follow the workplace standards described in Executive Order 2020-97 and to otherwise ready the workplace for reopening.
  p. Beginning at 12:01 am on May 26, 2020, workers at motor vehicle dealerships, provided that showrooms are open only by appointment.

q. Beginning at 12:01 am on May 26, 2020, workers necessary to perform retail activities by appointment, provided that the store is limited to 10 customers at any one time. For purposes of this order, retail activities are defined:
    1. As the selling of goods and the rendering of services incidental to the sale of the goods (e.g., any packaging and processing to allow for or facilitate the sale and delivery of the goods).
    2. To exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that may follow from it.
r. Consistent with section 10(b) of this order, workers at suppliers, distribution centers, or service providers whose in-person presence is necessary to enable, support, or facilitate another business's or operation's resumed activities, including workers at suppliers, distribution centers, or service providers along the supply chain whose in-person presence is necessary to enable, support, or facilitate the necessary work of another supplier, distribution center, or service provider in enabling, supporting, or facilitating another business's or operation's resumed activities. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.

12. Any store that is open for in-store sales under section 10(f), section 11(c), or section 11(q) of this executive order:
    a. May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.
    b. Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.
13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.
14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.
15. Rules governing face coverings.
    a. Except as provided in subsection (b) of this section, any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.
    b. 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 while seated at a restaurant or bar.
    c. All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
    d. 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.
    e. 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.
16. Except as otherwise expressly stated in this order, 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, neither a place of religious worship nor its owner is subject to penalty under section 22 of this order for allowing religious worship at such place. No individual is subject to penalty under section 22 of this order for engaging in or traveling to engage in religious worship at a place of religious worship, or for violating section 15(a) of this order.
17. 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.
18. This order takes effect immediately, unless otherwise specified in this order, and continues through May 28, 2020 at 11:59 pm.
19. Executive Order 2020-17, which imposed temporary requirements regarding the postponement of non-essential medical and dental procedures, is rescinded as of May 28, 2020 at 11:59 pm. Executive Order 2020-34, which imposed temporary requirements regarding the postponement of veterinary services, is rescinded as of May 28, 2020 at 11:59 pm. Outpatient health-care facilities, including veterinary offices, are subject to the workplace safety rules described in Executive Order 2020-97.
20. Executive Orders 2020-92 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.
21. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, 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.
22. 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: May 21 2020

Time: 9:49 am

RELATED CONTENT

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

Executive Order 2020-115 (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)

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DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
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ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 15

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

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, to the extent that the governor may declare a state of emergency 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 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 tests, ventilators, and personal protective equipment, and 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 overall daily case number curve 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.

5. 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.

6. 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).

7. 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.

8. 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.

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

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 16

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 2020-114 (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)
Executive Order 2020-96 (COVID-19) (May 21, 2020) - Rescinded

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 17

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With little social distancing, Whitmer marches with protesters

Craig Mauger and James David Dickson, The Detroit News Published 4:14 p.m. ET June 4, 2020 | Updated 9:26 p.m. ET June 4, 2020

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Highland Park — Gov. Gretchen Whitmer, who's voiced concerns about other demonstrations potentially spreading COVID-19 in recent weeks, participated Thursday in a civil rights march in Highland Park with hundreds of people who did not follow social distancing rules.

Whitmer drew criticism after she stood shoulder to shoulder with some march participants, who included Detroit Mayor Mike Duggan. From the front line to last, the marchers started at Highland Park city hall and were a rolling quarter-mile of humanity traveling southbound on Woodward, with the skyline of downtown Detroit in the distance ahead, as a caravan of Detroit and Highland Park police vehicles escorted them while a helicopter buzzed overhead.

"Social distancing is critical to stop the spread of COVID-19 — unless you have a great photo op," state Rep. Lynn Afenoudlis, R-Grand Rapids Township, tweeted.

Whitmer spokeswoman Tiffany Brown denied the governor had violated her own executive order issued Monday that says people should remain six feet apart if participating in public gatherings.

Gov.Gretchen Whitmer, center, prays with clergy including Bishop Charles Ellis of Greater Grace Church, right, on the corner of Woodward and Warren during a rally in honor of George Floyd, Thursday, June 4, 2020. *(Photo: Clarence Tabb Jr., The Detroit News)*

Contrary to the administration's own guidance posted online, Brown said the unity march didn't violate her latest order because it states, "Nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution."

"That includes the right to peaceful protest," she said.

However, a page of frequently asked questions about the order on the governor's website specifically says, "Persons may engage in expressive activities protected by

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June 4, 2020, 7:25 p.m.

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June 4, 2020, 8:56 p.m.


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June 4, 2020, 6:57 p.m.

the First Amendment within the State of Michigan but 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 person's household."

Gov. Gretchen Whitmer elbow bumps with Marlo Franklin of SEIU before the start of a rally in Highland Park in honor of George Floyd on Thursday, June 4, 2020. *(Photo: Clarence Tabb Jr., The Detroit News)*

While many of the hundreds of participants on Thursday wore masks, including the governor, the six-feet distancing policy wasn't followed.

At the march that went through Highland Park and Detroit, Whitmer urged participants not to lose heart in the face of the COVID-19 pandemic and the death of George Floyd, and to work for change.

"Elections matter," Whitmer said during the march. "We cannot be defeated. We must move forward together. When we do that, we cannot be defeated."

Floyd's death, which occurred after a Minneapolis police officer held his knee on the man's neck for more than eight minutes, has sparked protests across the country, including the past seven days in Detroit.

Joining Whitmer was Lt. Gov. Garlin Gilchrist II, who told The Detroit News that police brutality is "one of the most important issues of our generation."

"We're talking about the fact that we need to reframe and restructure the relationship between law enforcement and the community, particularly between law enforcement in the black community. What we're saying is that not only do black lives matter but black futures matter and black potential matters," Gilchrist said.

Duggan echoed the call for unity, noting what he described as an unprecedented coming-together of Detroit's top business leaders, against racism, in Detroit City Council chambers.

"These are extraordinary times," the mayor said.

Detroit City Council President Brenda Jones said she came up to Detroit from Birmingham, Alabama, another flashpoint in the black struggle for civil rights, as Detroit was in the midst of the 1967 riot.

"We are coming together. We are uniting, and we are showing that it's not time for racism," Jones said. "It's not time for police brutality. It's time for change."

Jones said she is co-sponsoring a resolution, expected to be taken up next Tuesday by city council, encouraging Michigan to pass a law requiring implicit bias training for police. Whitmer had asked for the legislation Wednesday, and on Thursday the Senate approved the bill unanimously.

Jones pleaded for more peaceful rallies like Thursday morning's gatherings.

"Unfortunately, we have seen protests that have not been peaceful protests," she said. "Most of those people were not from the city of Detroit. So I say to them: If you do not want a peaceful protest, go back to your own backyard and protest, because here we are protesting peacefully."

Bishop Charles Ellis III, pastor of Greater Grace Temple, said the march would be replicated in several Michigan cities, including Saginaw and Kalamazoo, and hailed it as a return to the days when "the black church created the nonviolent civil rights movement in America."

Highland Park police, Detroit police, state police and the Wayne County Sheriff's Office all had a presence, representing law enforcement. Members of the Jewish and Chaldean communities also planned to partake in the protest, Ellis said.

Marchers young and old said they wanted to see changes in race relations and to have the needs of minorities addressed.


Trump plans to steer clear of memorial services for George Floyd
June 4, 2020, 5:26 p.m.


Lawmakers ask Whitmer to testify on COVID-19 response
June 4, 2020, 5:12 p.m.

"You have to deal with the root cause of racism that has existed for hundreds of years in the country," said Ron Johnson, 60, of Detroit. "Education, access to health care, jobs, opportunities. Those problems exist more in urban and poor areas."

Oten Wyatt IV, 16, of Detroit said he joined the march to be part of a movement for change.

"Put justice in place no matter who they are," Wyatt said. "A human is a human and they all deserve justice, no matter who they are and no matter their place in society."

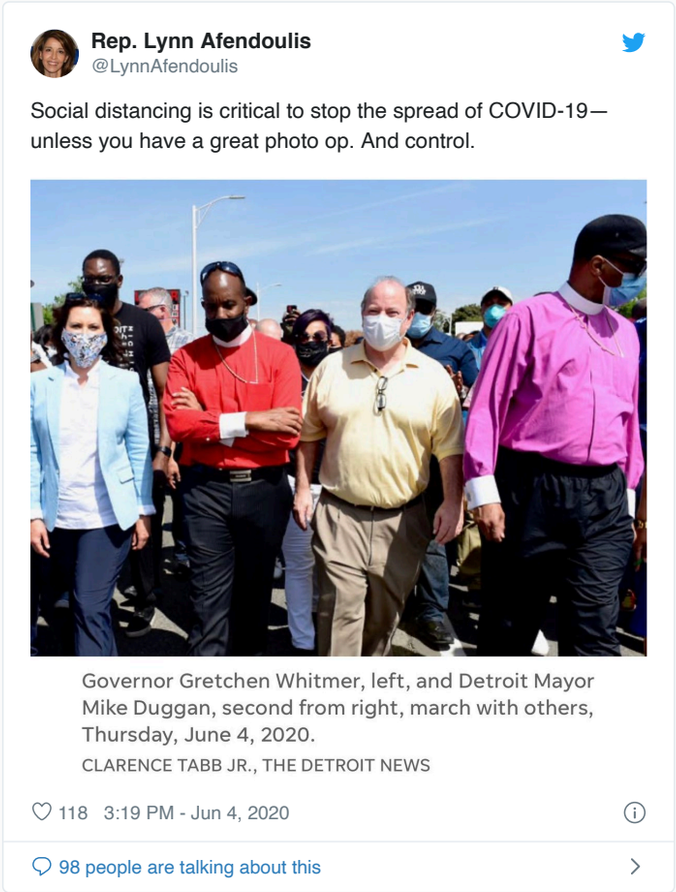
Q: Does Executive Order 2020-110 prohibit persons from engaging in outdoor activities that are protected by the First Amendment to the United States Constitution?

A: No. Persons may engage in expressive activities protected by the First Amendment within the State of Michigan, but must adhere to social distancing measures recommended by the Center's for Disease Control and Prevention, including remaining at least six feet from people from outside the person's household.

Guidance from Gov. Gretchen Whitmer's office says people should adhere to social distancing measures during First Amendment-protected activities. *(Photo: Screenshot)*

On Monday, Whitmer said she had a "high level" of concern about the protests, specifically participants not wearing masks, potentially spreading COVID-19.

In past weeks, the governor repeatedly criticized protests against her stay-at-home orders for potentially spreading the virus. During an appearance on "The View" on May 13 — 22 days ago — Whitmer said the protests at the time made it "much more precarious" for the state to continue reopening its economy.



"The fact of the matter is these protests, in a perverse way, make it likelier that we are going to have to stay in a stay-home posture," Whitmer said then. "The whole point of them, supposedly, is that they don't want to be doing that."

cmauger@detroitnews.com

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PRISON CITY PHYSIQUE LLC,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

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Attorneys for Plaintiffs
612 W. University

Friends of Devito v. Wolf

Supreme Court of Pennsylvania

April 13, 2020, Decided

No. 68 MM 2020

Reporter
2020 Pa. LEXIS 1987 *

FRIENDS OF DANNY DEVITO, KATHY GREGORY, B&J LAUNDRY, LLC, BLUEBERRY HILL PUBLIC GOLF COURSE & LOUNGE, AND CALEDONIA LAND COMPANY, Petitioners v. TOM WOLF, GOVERNOR, AND RACHEL LEVINE, SECRETARY OF PA DEPARTMENT OF HEALTH, Respondents

Subsequent History: Petition for certiorari filed at, 04/27/2020

Stay denied by *Friends of DeVito v. Wolf, 2020 U.S. LEXIS 2638 (U.S., May 6, 2020)*

Core Terms

Emergency, disaster, executive order, Pennsylvania, Petitioners', police power, Assembly, non-life-sustaining, spread, disease, regulation, life-sustaining, deprivation, mitigation, closure, https, distancing, powers, coronavirus, prevention, pandemic, procedural due process, due process, cases, public health, Supplemental, natural disaster, golf course, proclamations, constitutes

Case Summary

Overview

HOLDINGS: [1]-The Governor had the authority to issue an executive order compelling the closure of the physical operations of all non-life-sustaining business to reduce the spread of the novel coronavirus disease, as the pandemic qualified as a "natural disaster" under *35 Pa.C.S. § 7102*, thereby triggering the Governor's powers under *35 Pa.C.S. § 7301*; *[2]*-Petitioners had not shown that a regulatory taking occurred under *U.S. Const. amend. V* or *Pa. Const. art. I, § 10*, as the order resulted in only a temporary loss of the use of their business premises; [3]-The order did not violate the right to free speech or assembly under *U.S. Const. amend. XIV* and *Pa. Const. art. I, §§ 7* and *20* as it was tailored to meet the exigencies of the pandemic by restricting in-person gatherings to promote social distancing and did not prohibit alternative means of communication or virtual gathering.

Outcome
The court denied petitioners' claim for relief.

LexisNexis® Headnotes

Constitutional Law > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Governments > Courts > Creation & Organization

Constitutional Law > The Judiciary

HN1[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Pa. Const. art. V, § 2 provides, in part, that the Supreme

Court of Pennsylvania shall be the highest court of the Commonwealth and in the court shall be reposed the supreme judicial power of the Commonwealth, § 2(a), and further provides that the supreme court shall have such jurisdiction as shall be provided by law. § 2(c).

Governments > Courts > Authority to Adjudicate

HN2[] Courts, Authority to Adjudicate

The Pennsylvania Supreme Court's King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law. The supreme court may exercise King's Bench powers over matters where no dispute is pending in a lower court.

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

HN3[] State & Territorial Governments, Employees & Officials

The Governor derives broad authority from the Pennsylvania Constitution, as it vests him with supreme executive power and directs him to take care that the laws be faithfully executed. Pa. Const. art. IV, § 2. As the Commonwealth's chief executive officer, the Governor has primary responsibility for protecting the public safety and welfare of the people of Pennsylvania in times of actual or imminent disasters where public safety and welfare are threatened. 35 Pa.C.S. § 7301(a). As such, the Governor is vested with broad emergency management powers under the Emergency Management Services Code, 35 Pa.C.S. §§ 7101-79a31.

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

HN4[] State & Territorial Governments, Employees & Officials

The General Assembly imbedded in the Emergency Management Services Code, 35 Pa.C.S. §§ 7101-79a31, its purposes, which include to reduce vulnerability of people and communities of the Commonwealth to damage, injury and loss of life and property resulting from disasters; to prepare for prompt and efficient rescue, care and treatment of persons victimized or threatened by disaster; to clarify and strengthen the roles of the Governor, Commonwealth agencies and local government in prevention of, preparation for, response to and recovery from disasters; to authorize and provide for cooperation in disaster prevention, preparedness, response and recovery and to supplement, without in any way limiting, authority conferred by previous statutes of the Commonwealth. 35 Pa.C.S. §§ 7103(1), (2), (4), (5), (9). The Code further declares that it does not intend to limit, modify or abridge the authority of the Governor to proclaim martial law or exercise any other powers vested in him under the Constitution, statutes or common law of the Commonwealth. 35 Pa.C.S. § 7104(3).

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

HN5[] State & Territorial Governments, Employees & Officials

35 Pa.C.S. § 7301, entitled "General authority of Governor," clarifies the nature of the Governor's powers and responsibilities in disaster situations. First and foremost, the Governor is responsible for meeting the dangers to the Commonwealth and people presented by disasters. § 7301(a). He is further empowered to issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law. § 7301(b). The Governor may, by proclamation or executive order, declare a state of disaster emergency, § 7301(b), upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. § 7301(c). This state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or that emergency conditions no longer exist, but may not continue for longer than ninety days unless renewed by the Governor. § 7301(c). As a

counterbalance to the exercise of the broad powers granted to the Governor, the Emergency Management Services Code, 35 Pa.C.S. §§ 7101-79a31, provides that the General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. § 7301(c).

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

HN6[] State & Territorial Governments, Employees & Officials

Upon the declaration of a disaster emergency, the Emergency Management Services Code, 35 Pa.C.S. §§ 7101-79a31, vests with the Governor expansive emergency management powers, including to suspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would prevent, hinder or delay necessary action in coping with the emergency; to utilize all available resources of the Commonwealth and each political subdivision of the Commonwealth as reasonably necessary to cope with the disaster emergency; to transfer the direction, personnel or functions of Commonwealth agencies or units thereof for the purpose of performing or facilitating emergency services; to direct and compel the evacuation of all or part of the population from any stricken or threatened area within the Commonwealth if the action is necessary for the preservation of life or other disaster mitigation, response or recovery; to control ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein; and to suspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives and combustibles. 35 Pa.C.S. § 7301(f)(1), (2), (3), (7), (8).

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

Governments > Police Powers

HN7[] State & Territorial Governments, Employees & Officials

The broad powers granted to the Governor in the Emergency Management Services Code, 35 Pa.C.S. §§ 7101-79a31, are firmly grounded in the Commonwealth's police power. The Pennsylvania Supreme Court has defined the Commonwealth's police power as the power to promote the public health, morals or safety and the general well-being of the community. It has described the police power as the state's inherent power of a body politic to enact and enforce laws for the protection of the general welfare, and thus, it is both one of the most essential powers of the government and its least limitable power. The police power is fundamental because it enables civil society to respond in an appropriate and effective fashion to changing political, economic, and social circumstances, and thus to maintain its vitality and order. The police power of the state must therefore be as comprehensive as the demands of society require under the circumstances. Of necessity, then, the police power is a broad and flexible power.

Governments > Legislation > Interpretation

HN8[] Legislation, Interpretation

When consideration of arguments requires that the court engage in statutory interpretation, its duty is to give effect to the legislature's intent, and the best indication of legislative intent is the plain language of the statute. 1 Pa.C.S. § 1921(a).

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

HN9[] State & Territorial Governments, Employees & Officials

Upon finding that a disaster has occurred, the Governor is required to declare a disaster emergency, 35 Pa.C.S. § 7301(c).

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

HN10[] State & Territorial Governments, Employees & Officials

Upon the declaration of a disaster emergency, the Governor gains broad powers, including, inter alia, controlling the ingress and egress to and from a disaster area, the movement of person within the area and the occupancy of premises therein. 35 Pa.C.S. § 7301(f)(7).

Governments > Legislation > Interpretation

HN11[] Legislation, Interpretation

Under the statutory construction doctrine of ejusdem generis ("of the same kind or class"), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

Governments > Legislation > Interpretation

HN12[] Legislation, Interpretation

While ejusdem generis is a useful tool of statutory construction, such tools are used for the sole purpose of determining the intent of the General Assembly. Ejusdem generis must yield in any instance in which its effect would be to confine the operation of a statute within narrower limits that those intended by the General Assembly when it was enacted. The general words will not be restricted in meaning if upon a consideration of the context and the purpose of the particular statutory provisions as a whole it is clear that the general words were not used in the restrictive sense.

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

HN13[] State & Territorial Governments, Employees & Officials

By setting forth a general list of catastrophes and then including the language "other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life," it is clear that the General Assembly intended to expand the list of disaster circumstances that would provide the Governor with the necessary powers to respond to exigencies involving vulnerability and loss of life. There is nothing in the Emergency Management Services Code, 35 Pa.C.S. §§ 7101-79a31, to indicate that the General Assembly intended in any way to narrow the operation of the statute or the Governor's authority. To the contrary, the General Assembly's stated goals, as set forth in the Emergency Code, were to, inter alia, reduce vulnerability of people and communities of the Commonwealth to damage, injury and loss of life and property resulting from disasters, and to strengthen the Governor's role in prevention of, preparation for, response to and recovery from disasters. 35 Pa.C.S. § 7103(1), (4).

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

HN14[] State & Territorial Governments, Employees & Officials

The Emergency Management Services Code, 35 Pa.C.S. §§ 7101-79a31, provides that, upon the declaration of a disaster emergency, the Governor has expansive emergency management powers including to direct and compel the evacuation of all or part of the population from any stricken or threatened area within the Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery. 35 Pa.C.S. § 7301(f)(3).

Governments > State & Territorial
Governments > Employees & Officials

Public Health & Welfare Law > Social Services > Emergency Services

HN15[] State & Territorial Governments, Employees & Officials

The Emergency Management Services Code, 35 Pa.C.S. §§ 7101-79a31, specifically recognizes that under its auspices, the Governor has the authority to issue executive orders and proclamations which shall have the full force of law. 35 Pa.C.S. § 7301(b). Moreover, the General Assembly, by and through its enactment of the Emergency Code, specifically and expressly authorizes the Governor to declare a disaster emergency and thereafter to control the ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein. § 7301(c), (f)(7). Inherent in that authorization is the Governor's ability to identify the areas where movement of persons must be abated and which premises will be restricted in order to mitigate the disaster. That the Governor utilizes business classifications to determine the appropriate areas and premises to be directly impacted by disaster mitigation is likewise inherent in the broad powers authorized by the General Assembly.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN16[] Procedural Due Process, Scope of Protection

An entity's entitlement to procedural due process cannot be determined in a static environment, since due process is not a technical conception with a fixed content unrelated to time, place and circumstance. Not all situations calling for procedural safeguards call for the same kind of procedure, and the amount of due process that is due in any particular circumstance is flexible and calls for such procedural protections as the particular situation demands.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN17[] Procedural Due Process, Scope of Protection

The amount of process that is due in any particular circumstance must be determined by application of the three-part balancing test first established in Mathews v. Eldridge. This balancing test considers three factors: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. Whether pre-deprivation notice is required largely depends upon the second Mathews factor. While there is a general preference that procedural safeguards apply in the pre-deprivation timeframe, the controlling inquiry in this regard is whether the state is in a position to provide for pre-deprivation process.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN18[] Procedural Due Process, Scope of Protection

The United States Supreme Court has held that at all times, even when the country is at war, essential liberties remain in effect. It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action. 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.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN19[] Procedural Due Process, Scope of Protection

The United States Supreme Court has acknowledged that a different level of process may be sufficient in times of emergency. Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and

safety is one of the oldest examples' of permissible summary action.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN20 **Procedural Due Process, Scope of Protection**

A plaintiff may not assert a procedural due process claim if he has not availed himself of an available grievance procedure. In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate. A state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them. A due process violation is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN21 **Procedural Due Process, Scope of Protection**

Procedural due process is geared toward protecting individuals from the mistaken deprivation of life, liberty or property. As the United States Supreme Court explained in Carey v. Piphus: Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that procedural due process rules are shaped by the risk of error inherent in the truthfinding process. Such rules minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN22 **Procedural Due Process, Scope of Protection**

Under the circumstances of an ongoing disaster emergency, a full evidentiary proceeding is not a viable post-deprivation procedural process.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN23 **Procedural Due Process, Scope of Protection**

A lack of transparency, while perhaps a sign of lack of good government practices, does not constitute a violation of procedural due process.

Administrative Law > Judicial Review > Reviewability

Governments > State & Territorial Governments > Employees & Officials

HN24 **Judicial Review, Reviewability**

Neither the Governor nor the Secretary of the Pennsylvania Department of Health is an administrative agency. *Pa. Const. art. V, § 9* does not confer a right of appeal from an executive decision of the Governor or the Secretary.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN25 **Equal Protection, Nature & Scope of Protection**

While the Equal Protection Clause assures that all similarly situated persons are treated alike, it does not obligate the government to treat all persons identically.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Time, Place & Manner Restrictions

HN26[] **Judicial & Legislative Restraints, Time, Place & Manner Restrictions**

Constitutional rights to free speech and assembly are not absolute, and states may place content-neutral time, place, and manner regulations on speech and assembly so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.

Judges: **[*1]** JUSTICE DONOHUE. Justices Baer, Todd and Wecht join the opinion. Chief Justice Saylor files a concurring and dissenting opinion in which Justices Dougherty and Mundy join.

Opinion by: DONOHUE

Opinion

JUSTICE DONOHUE

Petitioners are four Pennsylvania businesses and one individual seeking extraordinary relief from Governor Wolf's March 19, 2020 order (the "Executive Order") compelling the closure of the physical operations of all non-life-sustaining business to reduce the spread of the novel coronavirus disease ("COVID-19"). The businesses of the Petitioners were classified as non-life-sustaining.[1] In an Emergency Application for Extraordinary Relief (the "Emergency Application") filed on March 24, 2020, Petitioners raise a series of statutory and constitutional challenges to the Executive Order, contending that the Governor lacked any statutory authority to issue it and that, even if he did have such statutory authority, it violates various of their constitutional rights. Petitioners assert that the exercise of this Court's King's Bench jurisdiction is not only warranted but essential given the unprecedented scope and consequence of the Executive Order on businesses in the Commonwealth. Petitioners' Brief at **[*2]** 12-13. They request further that this Court issue an order vacating or striking down the Executive Order. Respondents, Governor Tom Wolf ("Governor") and Rachel Levine, the Secretary of the Pennsylvania Department of Health ("Secretary") (collectively, "Respondents") respond that the Petitioners rely on an unduly narrow interpretation of the Commonwealth's inherent police powers and a flawed reading of the specific statutory provisions that the General Assembly enacted to supplement that power. Respondents' Brief at 2. Respondents further argue that the Executive Order comports with all constitutional requirements. Respondents agree with Petitioners that the circumstances warrant the exercise of this Court's King's Bench jurisdiction and urge this Court to exercise that jurisdiction to decide the issues presented. Respondents' Brief at 7.

For the reasons discussed in this opinion, we hereby exercise our King's Bench jurisdiction. After consideration of the arguments of the parties, we conclude that Petitioners are not entitled to relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. COVID-19, and the Executive Proclamation and the Order of the Governor

A novel coronavirus began infecting **[*3]** humans in China in December 2019. As of March 11, 2020, the

[1] Respondents contend that any claims of Petitioners B&J Laundry and Caledonia Land Company are moot, as their businesses have been removed from the non-life-sustaining category. Respondents' Brief at 6 n.13. Petitioners respond that these claims are not moot, as this Court may consider moot issues of great importance when they are capable of repetition yet evade review. Petitioners' Brief at 48 n.17 (citing, *e.g.*, *Association of Pennsylvania State College and University Faculties v. PLBR, 607 Pa. 461, 8 A.3d 300, 305 (Pa. 2010)*). Excluding B&J Laundry and Caledonia Land Company, the claims of the remaining Petitioners adequately present the issues of public importance for which we grant King's Bench review. The claims of Petitioners B&J Laundry and Caledonia Land Company are thus considered moot and "Petitioners" will henceforth refer to DeVito Committee, Kathy Gregory and Blueberry Hill Public Golf Course & Lounge.

World Health Organization ("WHO") announced that the coronavirus, which had spread into at least 144 countries including the United States, had infected at least 118,000 people, and had killed more than 4,000 people, was officially a pandemic. WHO Director-General, "WHO Director-General's opening remarks at the media briefing on COVID-19," World Health Organization, https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020. In the midst of the emerging crisis, on March 6, 2020, Governor Wolf issued the following proclamation:

PROCLAMATION OF DISASTER EMERGENCY

WHEREAS, a novel coronavirus (now known as "COVID-19") emerged in Wuhan, China, began infecting humans in December 2019, and has since spread to 89 countries, including the United States; and

WHEREAS, the World Health Organization and the Centers for Disease Control and Prevention ("CDC") have declared COVID-19 a "public health emergency of international concern," and the U.S. Department of Health and Human Services ("HHS") Secretary has declared that COVID-19 creates a public health emergency; and WHEREAS, **[*4]** the Commonwealth of Pennsylvania ("Commonwealth") has been working in collaboration with the CDC, HHS, and local health agencies since December 2019 to monitor and plan for the containment and subsequent mitigation of COVID-19; and

WHEREAS, on February 1, 2020, the Commonwealth's Department of Health activated its Department Operations Center at the Pennsylvania Emergency Management Agency's headquarters to conduct public health and medical coordination for COVID-19 throughout the Commonwealth; and

WHEREAS, on March 4, 2020, the Director of the Pennsylvania Emergency Management Agency ordered the activation of its Commonwealth Response Coordination Center in support of the Department of Health's Department Operations Center, to maintain situational awareness and coordinate the response to any potential COVID-19 impacts across the Commonwealth; and

WHEREAS, as of March 6, 2020, there are 233 confirmed and/or presumed positive cases of COVID-19 in the United States, including 2 presumed positive cases in the Commonwealth; and

WHEREAS, while it is anticipated that a high percentage of those affected by COVID- 19 will experience mild influenza-like symptoms, COVID-19 is a disease capable of **[*5]** causing severe symptoms or loss of life, particularly to older populations and those individuals with pre- existing conditions; and

WHEREAS, it is critical to prepare for and respond to suspected or confirmed cases in the Commonwealth and to implement measures to mitigate the spread of COVID-19; and

WHEREAS, with 2 presumed positive cases in the Commonwealth as of March 6, 2020, the possible increased threat from COVID-19 constitutes a threat of imminent disaster to the health of the citizens of the Commonwealth; and

WHEREAS, this threat of imminent disaster and emergency has already caused schools to close, and will likely prompt additional local measures, including affected county and municipal governments to declare local disaster emergencies because of COVID-19; and

WHEREAS, this threat of imminent disaster and emergency situation throughout the Commonwealth is of such magnitude and severity as to render essential the Commonwealth's supplementation of emergency resources and mutual aid to the county and municipal governments of this Commonwealth and to require the activation of all applicable state, county, and municipal emergency response plans.

NOW THEREFORE, pursuant to the provisions **[*6]** of *Subsection 7301(c)* of the Emergency Management Services Code, *35 Pa. C.S. § 7101, et seq.*, I do hereby proclaim the existence of a disaster emergency throughout the Commonwealth.

Governor Wolf, "Proclamation of Disaster Emergency," (Mar. 6, 2020), Commonwealth of Pennsylvania Office of the Governor, https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf ("Governor's Proclamation").

Thereafter, on March 19, 2020, Governor Wolf issued the following Executive Order, closing all businesses deemed to be non-life-sustaining:

ORDER OF THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA REGARDING THE CLOSURE OF ALL BUSINESSES THAT ARE NOT LIFE SUSTAINING

WHEREAS, the World Health Organization and the Centers for Disease Control and Prevention ("CDC") have declared a novel coronavirus ("COVID-19") a "public health emergency of international concern," and the U.S. Department of Health and Human Services ("HHS") Secretary has declared that COVID-19 creates a public health emergency; and

WHEREAS, as of March 6, 2020, I proclaimed the existence of a disaster emergency throughout the Commonwealth pursuant to *35 Pa. C.S. § 7301(c)*; and

WHEREAS, I am charged with the responsibility to address dangers facing the **[*7]** Commonwealth of Pennsylvania that result from disasters. *35 Pa. C.S. § 7301(a)*; and

WHEREAS, in addition to general powers, during a disaster emergency I am authorized specifically to control ingress and egress to and from a disaster area and the movement of persons within it and the occupancy of premises therein; and suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, and combustibles. *35 Pa. C.S. § 7301(f)*; and

WHEREAS, in executing the extraordinary powers outlined above, I am further authorized during a disaster emergency to issue, amend and rescind executive orders, proclamations and regulations and those directives shall have the force and effect of law. *35 Pa. C.S. § 7301(b)*; and

WHEREAS, in addition to my authority, my Secretary of Health has the authority to determine and employ the most efficient and practical means for the prevention and suppression of disease. *71 P.S. § 532(a)*, *71 P.S. 1403(a)*; and

WHEREAS, these means include isolation, quarantine, and any other control measure needed. *35 P.S. § 521.5*.

NOW THEREFORE, pursuant to the authority vested in me and my Administration by the laws of the Commonwealth of Pennsylvania, I do hereby ORDER and PROCLAIM as follows:

Section 1: Prohibition on Operation of Businesses that are not Life Sustaining

All prior **[*8]** orders and guidance regarding business closures are hereby superseded.

No person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business regardless of whether the business is open to members of the public. This prohibition does not apply to virtual or telework operations (e.g., work from home), so long as social distancing and other mitigation measures are followed in such operations.

Life sustaining businesses may remain open, but they must follow, at a minimum, the social distancing practices and other mitigation measures defined by the Centers for Disease Control to protect workers and patrons.

A list of life sustaining businesses that may remain open is attached to and incorporated into this Order.

Enforcement actions will be taken against non-life sustaining businesses that are out of compliance effective March 21, 2020, at 12:01 a.m.

Section 2: Prohibition on Dine-In Facilities including Restaurants and Bars

All restaurants and bars previously have been ordered to close their dine in facilities to help stop the spread of COVID-19.

Businesses that offer carry-out, delivery, and drive-through food and beverage service may continue, so long as social **[*9]** distancing and other mitigation measures are employed to protect workers and patrons.

Enforcement actions will be taken against businesses that are out of compliance effective March 19, 2020, at 8 p.m.[2]

Section 3: Effective Date and Duration

This order is effective immediately and will remain in effect until further notice.

Governor Wolf, "Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure

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[2] The Governor later revised the enforcement date to Monday, March 23, at 8 a.m. *See* "Waiver Extension, Revised Timing Of Enforcement: Monday, March 23 at 8:00 AM", available at https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-ofenforcement-monday-march-23-at-800-am/.

of All Businesses that are not Life Sustaining," (Mar. 19, 2020) https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf ("Executive Order"). The original five page attached list of businesses deemed to be life-sustaining, or not, which as noted herein has been amended from time to time, may be found at https://www.governor.pa.gov/wpcontent/uploads/2020/03/20200319-Life-Sustaining-Business.pdf.

In compiling the list, the Governor used the North American Industry Classification System ("NAICS"), a code developed by the Office of Management and Budget and utilized by the U.S. Census Bureau to group similarly situated entities together for classification purposes, to serve as the basis for an initial list of business sectors. Respondents' **[*10]** Brief at 47 (citing U.S. Census Bureau, North American Industry Classification System, https://www.census.gov/eos/www/naics/ (last visited 4/8/2020)). The Governor explains that he used this classification system to "ensure[] that similarly situated entities would be treated the same." *Id.* The Governor and Department of Community and Economic Development ("DCED") then generally conformed its categorizations of certain sectors, and businesses therein, as life-sustaining versus non-life-sustaining business to make them consistent with an advisory issued by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA"). Gov. Tom Wolf, "Life Sustaining Business Frequently Asked Questions", DCED.PA.GOV, https://www.scribd.com/document/452553495/UPDATED-4-00pm-April-1-2020-Life-Sustaining-Business-FAQs (last visited Apr. 8, 2020) (citing CISA Advisory Version 1.1, as amended March 23, 2020). According to CISA, "[t]here are 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national **[*11]** economic security, national public health or safety, or any combination thereof." CISA, "Identifying Critical Infrastructure During COVID-19," https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19 (last visited Apr. 8, 2020). The Advisory includes within each of the sectors, operations that provide essential services to the identified sectors.

By its terms, the Executive Order compels the closure of all businesses in the state deemed to be non-life-sustaining to prevent the spread of COVID-19 by limiting person-to-person interactions through social distancing.[3] In issuing the Executive Order, the Governor invoked three statutory grounds for his and his administration's authority to do so: the Emergency Management Services Code (the "Emergency Code"), *35 Pa.C.S. § 7101-79a31*; *sections 532(a)* and *1403(a)* of the Administrative Code, *71 P.S. § 532*; *71 P.S. § 1403(a)*; and the Disease Prevention and Control Law (the "Disease Act"), *35 P.S. § 521.1-521.25*. The Governor, with the assistance of the DCED, determined which types of Pennsylvania businesses are "life-sustaining" and which are "non-life-sustaining." Those in the latter category were forced to shutter their physical operations[4] under threat of criminal prosecution. A waiver process has been established for businesses **[*12]** to request relief.[5] A successful request for waiver results in a business being re-categorized as life-sustaining or offering support to life-sustaining businesses.[6]

B. **The Parties**

Petitioner Friends of Danny DeVito ("DeVito Committee") is a Pennsylvania candidate committee with a physical business address in Carnegie (Allegheny County). It was formed to operate and administer the

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[3] "Social distancing is a public health practice that aims to prevent sick people from coming in contact with healthy people in order to reduce opportunities for disease transmission." OU Medicine, "Social Distancing and Stopping the Spread," https://www.oumedicine.com/coronavirus/protecting-your-health/social-distancing (last visited 4/9/2020). Social distancing is essential to limiting the death toll from COVID-19 because this pandemic spreads primarily through person to person contact, as many as 25% of those infected are asymptomatic, and the virus has an incubation period of up to fourteen days. The virus can remain on surfaces for days and can spread through the air within confined areas and structures. Respondents' Brief at 3-4 (citations omitted).

[4] The Executive Order does not preclude non-life-sustaining businesses from virtual operations, e.g., online internet activities or work-from-home arrangements.

[5] Richard E. Coe, "Pennsylvania Grants Waivers Allowing Non-'Life-Sustaining' Businesses to Resume Operations," (Apr. 1, 2020), https://www.natlawreview.com/article/pennsylvania-grants-waivers-allowing-non-life-sustaining-businesses-to-resume.

[6] Gov. Tom Wolf, "Life Sustaining Business Frequently Asked Questions", DCED.PA.GOV, https://www.scribd.com/document/452553495/UPDATED-4-00pm-April-1-2020-Life-Sustaining-Business-FAQs (last visited Apr. 8, 2020).

candidacy of Danny DeVito, a candidate for the 45th District of the Pennsylvania State House of Representatives. Emergency Application, ¶ 61. DeVito Committee complains that the district offices of the opponent for the 45th District seat in the upcoming election, the incumbent Representative Anita Kulik, are not subject to the Executive Order and, therefore, she retains access to her office, staff and office equipment. *Id.*, ¶ 62. DeVito Committee, however, does not have access to its office and, therefore, cannot conduct DeVito's campaign. *Id.*, ¶ 63. It argues that this "dissimilar and unequal treatment" of candidates infringes on candidate DeVito's right to equal protection. *Id.*, ¶ 62. If permitted to reopen the campaign office, it asserts that it "will incorporate COVID-19 prevention protocol" similar to those **[*13]** employed by agencies under the Governor's jurisdiction. *Id.*, ¶ 64.

Petitioner Kathy Gregory ("Gregory") is a licensed real estate agent with a physical business address in Bethlehem (Northampton County). *Id.*, ¶ 65. Gregory is licensed through Better Homes and Gardens R.E., a real estate brokerage franchise. *Id.*, ¶ 66. Pursuant to Pennsylvania law, she can only buy and sell real estate through her broker/franchisor. Her broker/franchisor has, however, closed the office and will not apply for a waiver, and thus she cannot apply for a waiver. *Id.*, ¶ 68-69. Gregory complains that, because the Executive Order put "Office of Real Estate Agents and Activities Related to Real Estate Agents" on the non-life-sustaining list, she cannot work at her office or from her home. *Id.*, ¶ 67. In contrast, she contends, many other professionals are permitted to work from virtual offices, and insurance agents and brokers, who are on the life-sustaining list, are permitted to continue their physical business operations. *Id.* She explains that many of her clients have sold their homes and need to depart by the end of June; thus, she needs to be able to find them replacement homes, which requires her to show **[*14]** clients potential properties. *Id.*, ¶ 71. If permitted to resume working, Gregory avers that she will implement the COVID-19 prevention and mitigation protocols put in place by the National Association of Realtors. *Id.*, ¶ 74.

Petitioner Blueberry Hill Public Golf Court & Lounge ("Blueberry Hill") operates a public golf course and restaurant (now take-out only) in Russell (Warren County). *Id.*, ¶ 83; Petitioners' Brief at 49. It avers that the Executive Order has resulted in financial harm to its business. Specifically, despite being closed for business, Blueberry Hill must expend significant sums to maintain the fairways and greens. Emergency Petition, ¶ 85. Without paying customers, Blueberry Hill does not have the income to conduct spring fertilization and pest control of the course, and it has had to lay off wait staff, cooks, and professional staff. *Id.* Blueberry Hill is unable to perform its obligations under contracts for the purchase of new or replacement equipment for the 2020 thirty-week golf season, which means it does not have the equipment necessary to perform required operations. *Id.* Because the golf course business is competitive and Blueberry Hill has been working on a **[*15]** slim budget for over a decade, the loss of business will compromise its ability to make its April 2020 payment on a promissory note. *Id.*, ¶¶ 87-89. Moreover, the loss of spring cash flow will undermine its efforts to save revenue for the winter months. *Id.*, ¶ 90. Citing the Governor's and Secretary's admonition and advice that Pennsylvanians need to be outside and breathe in fresh air, Blueberry Hill proposes to operate with COVID-19 prevention protocols in place, as are golf courses in Ohio. *Id.*, ¶¶ 91-92.

Respondents are the Governor of Pennsylvania, Tom Wolf and the Secretary of the Pennsylvania Department of Health, Rachel Levine.

C. Procedural History of the Case

This matter commenced on March 24, 2020, when Petitioners filed the Emergency Application in this Court, challenging the Executive Order which prohibited all businesses deemed non-life-sustaining from continued operation of their physical locations during the COVID-19 pandemic. The same day, the Prothonotary of this Court issued a letter advising Respondents that an answer to the Application was due on March 26, 2020, by 4:00 p.m.

After Respondents filed their answer, Petitioners filed an ancillary application for relief **[*16]** on March 26, 2020, asking this Court to allow briefing and oral argument on the Application. On March 27, 2020, this Court granted the request for briefing (but not oral argument) and set an expedited briefing schedule.

In compliance with this Court's briefing schedule, Petitioners filed their brief and reproduced record on March 31, 2020, and Respondents filed their brief on April 3, 2020. In the interim, Petitioners Gregory and Blueberry Hill each filed Supplemental Applications for Relief on April 2, 2020 (the "Supplemental Applications"), requesting that this Court enter an order directing the Governor to move them from the non-life-sustaining list to the life-sustaining list. Gregory argued that she should be permitted to resume her real estate

business in light of a "Memorandum on Identification of Essential Critical Infrastructure Workers During the COVID-19 Response" issued by CISA, which memorandum deemed as essential residential and real estate services. Supplemental Application of Gregory, 4/2/2020, ¶¶ 11, 12. Blueberry Hill argued that it should be permitted to resume its business based on the facts that three other states with "stay at home" orders have allowed golf courses **[*17]** to reopen, provided they do so with COVID-19 prevention and mitigation protocols, and Respondents have identified outdoor activities—subject to social distancing—as permissible under Pennsylvania's "stay-at-home" order. Supplemental Petition of Blueberry Hill, 4/2/2020, ¶¶ 10, 12, 13, 16. Respondents filed an answer to the Supplemental Applications on April 3, 2020. [68 MM 2020] - 13

Additionally, on April 3, 2020, and April 6, 2002, respectively, the Cities of Philadelphia and Pittsburgh filed amicus briefs on behalf of Respondents. In their amicus briefs, the Cities of Philadelphia and Pittsburgh both offer strong support for the Governor's Executive Order. The City of Philadelphia notes that given the size and density of its population, it is especially vulnerable to the rapid spread of the disease. It argues that by ordering non-life-sustaining businesses to close, it permits the City to enforce necessary social distancing restrictions. The alternative of attempting to enforce social distancing in all stores and businesses in Philadelphia would be both unsafe and impossible, as the City faces incredible barriers to maintaining sufficient personal protective equipment and manpower **[*18]** to safely monitor business owners' and residents' adherence to physical distancing and hygiene requirements. The City of Pittsburgh indicates that even though the southwest region of Pennsylvania has eighteen hospitals, the rapid spread of COVID-19 would likely lead to an overwhelming of the health care resources available to Pittsburghers and residents of the surrounding areas. It urges the Court to grant King's Bench jurisdiction and to act for the well-being of all of the citizenry in this time of risk and contagion.

On April 3, 2002, the Pennsylvania Association of Realtors ("PAR") filed an amicus brief on behalf of Gregory. PAR argues that it provides vital, life-sustaining services to millions of Pennsylvanians, and that the Governor has improperly prohibited the offering of these services to the public. PAR contends that while this decision was ostensibly made in conjunction with the guidance from CISA, the decision is in fact in contradiction of such guidance. According to PAR, the Governor's decision arbitrarily denies to millions of Pennsylvanians life-sustaining services that must be maintained even in time of public health crisis. PAR indicates that the undue delay in processing **[*19]** waiver requests has rendered the administrative process utterly ineffective. Further, the administration's position that it has the authority to create and destroy such administrative review process at any moment and at will, thereafter leaving tens of thousands of PAR members without any avenue of administrative or even judicial relief from the shutdown of their businesses, is contrary to the Pennsylvania Constitution and risks opening the floodgates to litigation in the Unified Judicial System.

On April 13, 2020, this Court granted leave to accept the filing of an amicus brief by the Home Builders Association of Bucks and Montgomery Counties and the Home Builders Association of Chester and Delaware Counties.

D. Summary of the Arguments of the Parties

In their Emergency Application, Petitioners contend that the Governor lacks any statutory authority to issue the Executive Order and further claim that it violates their constitutional rights under the United States and Pennsylvania Constitutions. Petitioners claim that the Executive Order places businesses throughout Pennsylvania at extreme risk of financial hardship and threatens the jobs of hundreds of thousands of our citizens. Petitioners' **[*20]** Brief at 12 ("The severe disruption of the economy has already and will continue to create enormous dislocation and financial strain on the government, businesses and workers; over 650,000 Pennsylvanians have applied for unemployment compensation benefits since the Governor proclaimed his Order[.]"). Petitioners further argue that the Executive Order is unnecessary, as their businesses may be operated to "employ COVID-19 prevention and mitigation practices in their physical offices." Emergency Application, ¶ 25.

Respondents reject Petitioners' statutory and constitutional arguments, positing that the Pennsylvania Constitution and the above-referenced statutory enactments charge the Executive Branch of the state government with combating public health emergencies and providing it with broad powers to do so.[7]

[7] In *Civil Rights Defense Firm v. Governor Tom Wolf, 63 MM 2020, 2020 Pa. LEXIS 1585* (per curiam order dated March

Respondents' Brief at 8. Respondents insist that strict application of social distancing practices is the only potentially effective means for reducing the spread of the disease and saving hundreds of thousands, if not millions, of Pennsylvania lives. *Id.* Closure of businesses is one such necessary practice to advance social distancing in order to prevent and suppress transmission. **[*21]** The selection of which businesses to close requires that a balance be struck: close too few businesses and the disease will spread uninterrupted, while closing too many will make it impossible for people to access life-sustaining goods and services. *Id.* Striking that balance, Respondents emphasize, constitutes a proper exercise of the Commonwealth's police powers and provides any due process required under the law, and even if some due process requirement is implicated, a waiver program has been established. *Id.* at 8-9.

II. JURISDICTION

HN1[↑] *Article V, Section 2 of the Pennsylvania Constitution* provides, in relevant part, that the Supreme Court "shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth," *Pa. Const. art. V, § 2(a)*, and further provides that the Supreme Court "shall have such jurisdiction as shall be provided by law." *Id.* at *2(c)*. The General Assembly has codified our King's Bench authority: "The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the **[*22]** justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722." *42 Pa.C.S. § 502*. This Court has observed that ***HN2***[↑] "our King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law." *Commonwealth v. Williams, 634 Pa. 290, 129 A.3d 1199, 1205-06 (Pa. 2015)*; *see also In re Bruno, 627 Pa. 505, 101 A.3d 635, 670 (Pa. 2014)*. We may "exercise King's Bench powers over matters where no dispute is pending in a lower court."[8] *Williams, 129 A.3d at 1206* (citing *In re Assignment of Avellino, 547 Pa. 385, 690 A.2d 1138, 1140 (Pa. 1997)*).

Both Petitioners and Respondents agree that the present action presents an issue of immense public concern and requires immediate judicial resolution. Petitioners' Brief at 13 ("As [Petitioners] challenge the Commonwealth's ability to address the pandemic, these matters present precisely the type of far reaching, public policy concerns that warrant this Court's use of its extraordinary powers."); Respondents' Brief at 7. The Respondents in fact urge this Court to exercise both our King's Bench and extraordinary jurisdiction. *Id.* We agree that this case presents issues of immediate and immense public importance impacting virtually all Pennsylvanians and thousands **[*23]** of Pennsylvania businesses, and that continued challenges to the Executive Order will cause further uncertainty. This Court hereby invokes its King's Bench powers to decide the statutory and constitutional challenges to the Executive Order presented in Petitioners' Emergency Application.

III. RESPONDENTS' STATUTORY AUTHORITY TO ISSUE THE EXECUTIVE ORDER

HN3[↑] The Governor derives broad authority from our Constitution, as it vests him with "supreme executive power" and directs him to "take care that the laws be faithfully executed." *Pa. Const. art IV, § 2*. As the Commonwealth's chief executive officer, the Governor has primary responsibility for protecting the public safety and welfare of the people of Pennsylvania in times of

22, 2020), this Court denied an Emergency Ex-Parte Application for Emergency Relief pursuant to this Court's King's Bench jurisdiction, which application was based, in part, on the same statutory authority for, and the constitutionality of, the Governor's Executive Order as advanced in the present Emergency Application. We do not agree with the Respondents' suggestion that our refusal to exercise our King's Bench authority in the former challenge has a dispositive impact on our consideration of the issues presented here. Respondents' Brief at n.15.

[8] An action similar to this Emergency Application is pending (but stayed) in the original jurisdiction of the Commonwealth Court. While generally presenting the same legal claims, there is not an identity of the petitioners in that case with those in this action. Petitioners briefly suggest that as an alternative to granting King's Bench jurisdiction here, we could exercise our extraordinary jurisdiction powers in *42 Pa.C.S. § 726* to assume jurisdiction of the Commonwealth Court action. Petitioners' Brief at 13-14. Under the circumstances, we grant King's Bench jurisdiction to decide the issue raised in the Emergency Application.

actual or imminent disasters where public safety and welfare are threatened. 35 Pa.C.S. § 7301(a). As such, the Governor is vested with broad emergency management powers under the Emergency Code. HN4[] The General Assembly imbedded in the Code its purposes, which include to "[r]educe vulnerability of people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters;" to "[p]repare for prompt and efficient rescue, care and treatment of persons victimized or threatened **[*24]** by disaster;" to "[c]larify and strengthen the roles of the Governor, Commonwealth agencies and local government in prevention of, preparation for, response to and recovery from disasters;" to "[a]uthorize and provide for cooperation in disaster prevention, preparedness, response and recovery" and to "[s]upplement, without in any way limiting, authority conferred by previous statutes of this Commonwealth ... ." 35 Pa.C.S. §§ 7103(1), (2), (4), (5), (9). The Code further declares that it does not intend to "[l]imit, modify or abridge the authority of the Governor to proclaim martial law or exercise any other powers vested in him under the Constitution, statutes or common law of this Commonwealth." 35 Pa.C.S. §7104(3).

HN5[] Section 7301, entitled "General authority of Governor," clarifies the nature of the Governor's powers and responsibilities in disaster situations. First and foremost, the Governor is "responsible for meeting the dangers to this Commonwealth and people presented by disasters." 35 Pa.C.S. § 7301(a). He is further empowered to "issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law." 35 Pa.C.S. § 7301(b). The Governor may, by proclamation or executive order, declare a state of disaster emergency, 35 Pa.C.S. § 3701(b), "upon finding **[*25]** that a disaster has occurred or that the occurrence or the threat of a disaster is imminent." 35 Pa.C.S. § 7301(c). This state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or that emergency conditions no Governor. *Id.* As a counterbalance to the exercise of the broad powers granted to the Governor, the Emergency Code provides that the General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. *Id.*longer exist, but may not continue for longer than ninety days[9] unless renewed by the

HN6[] Upon the declaration of a disaster emergency, the Emergency Code vests with the Governor expansive emergency management powers, including, inter alia, to "[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency;" to "[u]tilize all available resources of the Commonwealth Government and each political subdivision of this Commonwealth as reasonably **[*26]** necessary to cope with the disaster emergency;" to "[t]ransfer the direction, personnel or functions of Commonwealth agencies or units thereof for the purpose of performing or facilitating emergency services;" to "[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery;" to "[c]ontrol ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein;" and to "[s]uspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives and combustibles." 35 Pa.C.S. §§ 7301(f)(1),(2),(3),(7),(8).[10]

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[9] During the General Assembly's consideration of passage of the Emergency Code in 1977, it made only one significant change to the text of section 7301(c), namely to extend the duration of the period of the Governor's declared disaster emergency from thirty days to ninety days. The National Governors Association notes that ten states require that emergency declarations expire in less than thirty days, sixteen states do not permit emergency declarations to exceed 30 days, and just five states allow emergency declarations to last sixty days or more. *See* National Governors Association Center for Best Practices, The Governor's Guide to Homeland Security at 14 (2007), http://www.nga.org/files/live/sites/NGA/files/pdf/0703GOVGUIDEHS.PDF. As such, Pennsylvania's Governor has the authority to declare one of the longest emergency declarations of any governor in the United States. Patricia Sweeney, JD, MPH, RN, Ryan Joyce, JD, ***Gubernatorial Emergency Management Powers: Testing the Limits in Pennsylvania, 6 Pitt. J. Envtl Pub. Health L. 149, 177 (2012)***.

With this revision to section 7301(c), the Emergency Code passed by unanimous votes in both chambers of the General Assembly. H. Journal, 162nd Gen. Assemb., vol. 5, at 3662-63 (Pa. Nov. 14, 1978) (190-0). S. Journal, 162nd Gen. Assemb., vol. 2, at 1167 (Pa. Nov. 15, 1978) (47-0).

[10] As detailed in this Opinion, our analysis of the Emergency Code and our statutory construction of the provisions implicated by Petitioners leads us to conclude that it provides

HN7[] The broad powers granted to the Governor in the Emergency Code are firmly grounded in the Commonwealth's police power. *See generally* Rufo v. Board of License and Inspection Review, 192 A.3d 1113, 1120 (Pa. 2018). This Court has defined the Commonwealth's police power as the power "to promote the public health, morals or safety and the general well-being of the community." Pa. Restaurant & Lodging Ass'n v. City of Pittsburgh, 211 A.3d 810, 817 (Pa. 2019). In *Nat'l Wood Preservers, Inc. v. Dep't of Envt'l Protection, 489 Pa. 221, 414 A.2d 37, 42 (Pa. 1980)*, we described the police power as the state's "inherent power of a body politic to enact and enforce laws for the protection of the general welfare," and thus, it is **[*27]** both one of the "most essential powers of the government" and its "least limitable power." *Id. at 42-43*.

> The police power is fundamental because it enables "civil society" to respond in an appropriate and effective fashion to changing political, economic, and social circumstances, and thus to maintain its vitality and order. *See, e. g.,* Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887). The police power of the state [must therefore be] ... as comprehensive as the demands of society require under the circumstances. Comm. v. Barnes & Tucker II, 472 Pa. 115, 371 A.2d 461, 467 (Pa. 1977). Of necessity, then, the police power is a broad and flexible power. *See, e. g.,* Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954); Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926).

Id.; *see also* Grime v. Dep't of Instruction, 324 Pa. 371, 188 A. 337, 341 (Pa. 1936) ("[B]usiness can be regulated under the police power because of its relation to health").

Petitioners do not challenge that there are far-reaching powers granted to the Governor under the Emergency Code. Instead, Petitioners challenge the applicability of these powers in response to a viral illness like COVID-19, and further contend that even if there is any applicability, no power has been conferred that would permit Respondents to close their businesses. Petitioners' Brief at 21. HN8[] Because consideration of Petitioners' arguments require that we engage in statutory interpretation, we note that when doing so a court's duty is to give effect **[*28]** to the legislature's intent and that the best indication of legislative intent is the plain language of the statute. 1 Pa.C.S. § 1921(a); Roverano v. John Crane, Inc., 2020 Pa. LEXIS 1035, 2020 WL 808186, at *7 (Pa. Feb. 19, 2020); Matter of Private Sale of Prop. by Millcreek Twp. Sch. Dist., 646 Pa. 339, 185 A.3d 282, 290-91 (Pa. 2018).

The provisions of the Emergency Code apply to "disasters." The Emergency Code defines "disaster" as "[a] man-made disaster, natural disaster or war-caused disaster."[11] 35 Pa.C.S. § 7102. Of relevance here, "natural disaster" is defined as follows:

> Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion **or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life**.

Id. (emphasis added). HN9[] Upon finding that a disaster has occurred, the Governor is required to declare a disaster emergency, 35 Pa.C.S. § 7301(c), which the statute defines as:

> Those conditions which may by investigation made, be found, actually or likely, to:
>
> (1) affect seriously the safety, health or welfare of a substantial number of citizens of this Commonwealth or prelude the operation or use of essential public facilities;

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the authority for the Governor's issuance of the Executive Order. Thus, we will not discuss the parties' arguments based on the Administrative Code or the Disease Act. While we recognize the vital role played by the Secretary and her department in advising the Governor of the public health implications of COVID-19 and the most appropriate methods to suppress and contain it, we find ample support in the Emergency Code's direct authorization of the promulgation of the Executive Order without the necessity of an interpretation of the Department of Health's authority under the Disease Act or Administrative Code.

[11] The Emergency Code defines a "man-made disaster" as "[a]ny industrial, nuclear or transportation accident, explosion, conflagration, power failure, natural resource shortage or other condition, except enemy action, resulting from man-made causes, such as oil spills and other injurious environmental contamination, which threatens or causes substantial damage to property, human suffering, hardship or loss of life." 35 Pa. C.S. § 7102. A "war-caused disaster" is any "condition following an attack upon the United States resulting in substantial damage to property or injury to persons in the United States caused by use of bombs, missiles, shellfire, nuclear, radiological, chemical or biological means, or other weapons or overt paramilitary actions, or other conditions such as sabotage." *Id.*

(2) be of such magnitude or severity as to render essential State supplementation of county and local efforts or resources exerted or utilized in alleviating the danger, damage, **[*29]** suffering or hardship faced; and (3) have been caused by forces beyond the control of man, by reason of civil disorder, riot or disturbance, or by factors not foreseen and not known to exist when appropriation bills were enacted.

35 Pa.C.S. § 7102 (definitions). **HN10**[] Upon the declaration of a disaster emergency, the Governor gains broad powers, including, inter alia, controlling the "ingress and egress to and from a disaster area, the movement of person within the area and the occupancy of premises therein." 35 Pa.C.S. § 7301(f)(7).

Petitioners contend that the COVID-19 pandemic is not a natural disaster as defined by the Emergency Code. They raise an ambiguity in the statute, thus, they argue, triggering our resort to the principles of statutory construction. Petitioners argue that although the definition uses the phrase "and other catastrophes," because viral illness is not included in the list of applicable disasters, COVID-19 cannot be a natural disaster because it is not of the same type or kind as those on the list. Petitioners' Brief at 15. While implicitly acknowledging that a viral illness like COVID-19 might qualify under the definition's reference to "other catastrophes," Petitioners insist that the Court must apply **[*30]** the contextual canon of ejusdem generis ("of the same kind"), which prevents the expansion of a list of specific items to include other items not "of the same kind" as those expressly listed. *Id.* at 16-18. Respondents disagree, contending that the COVID-19 pandemic "unquestionably fits the definitions of 'disaster' and 'disaster emergency', and is precisely the circumstance that the General Assembly had in mind with it enacted the statute." Respondents' Brief at 15. Respondents contend that the term "other catastrophe'" is expansive and is not limited by the specifically enumerated items on the list. *Id.* at 15-16.

As of this writing, 24,199 of Pennsylvania's citizens have been confirmed by testing to have been infected with COVID-19; 524 have died. Department of Health, "COVID-19 Data for Pennsylvania," https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed 4/8/2020). COVID-19's spread is exponential as demonstrated by the fact that there were 851 confirmed cases on March 24, 2020, the date this Application was filed. *Id.* It is beyond dispute that the COVID-19 pandemic is unquestionably a catastrophe that "results in ... hardship, suffering or possible loss of life." The issue, **[*31]** then, is whether it nevertheless may not be classified as a "natural disaster" caused by unforeseen factors based upon the application of the doctrine of ejusdem generis. This Court has described the doctrine as follows:

> **HN11**[] Under the statutory construction doctrine of ejusdem generis ("of the same kind or class"), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals, 572 Pa. 240, 814 A.2d 180, 184 (Pa. 2002).

We agree with Respondents that the COVID-19 pandemic qualifies as a "natural disaster" under the Emergency Code for at least two reasons. First, the specific disasters in the definition of "natural disaster" themselves lack commonality, as while some are weather related (e.g., hurricane, tornado, storm), several others are not (tidal wave, earthquake, fire, explosion). To the contrary, the only commonality among the disparate types of specific disasters referenced is that they all involve "substantial damage to property, hardship, suffering or possible loss of life." In this respect, the COVID-19 pandemic is of the "same general nature or class as those specifically **[*32]** enumerated," and thus is included, rather than excluded, as a type of "natural disaster."

We further note that **HN12**[] while ejusdem generis is a useful tool of statutory construction, such tools are used for the sole purpose of determining the intent of the General Assembly. Ejusdem generis must yield in any instance in which its effect would be to confine the operation of a statute within narrower limits that those intended by the General Assembly when it was enacted. *See* Dep't of Assess. & Tax. v. Belcher, 315 Md. 111, 553 A.2d 691, 696 (Md. 1989) ("[T]he general words will not be restricted in meaning if upon a consideration of the context and the purpose of the particular statutory provisions as a whole it is clear that the general words were not used in the restrictive sense."). *See also* Danganon v. Guardian Protective Services, 645 Pa. 181, 179 A.3d 9 (Pa. 2018) (Consumer Protection Law which has "and includes" in definition of trade and commerce interpreted broadly along with liberal interpretation of CPL as remedial legislation). **HN13**[]

By setting forth a general list of catastrophes and then including the language "other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life," it is clear that the General Assembly intended to **expand** the list of disaster **[*33]** circumstances that would provide Respondents with the necessary powers to respond to exigencies involving vulnerability and loss of life. There is nothing in the Emergency Code to indicate that the General Assembly intended in any way to narrow the operation of the statute or the Governor's authority. To the contrary, the General Assembly's stated goals, as set forth in the Emergency Code, were to, inter alia, "[r]educe vulnerability of people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters," and to "strengthen" the Governor's role "in prevention of, preparation for, response to and recovery from disasters." *35 Pa.C.S. § 7103(1),(4)*. The COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions. Its presence in and movement through Pennsylvania triggered the Governor's authority under the Emergency Code.

Petitioners alternatively argue that even if the COVID-19 pandemic constitutes a "disaster" under the Emergency Code, the power granted to the Governor under *35 Pa.C.S. § 7301(f)(7)* to "[c]ontrol ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein" does **[*34]** not include any ability to close their businesses. Petitioners' Brief at 21. Petitioners contend that this provision only authorizes the Governor to act in a "disaster area," and there have been no disasters in the areas in which their businesses are located. *Id.* at 22. We find no merit in this argument. First, Respondents correctly note that COVID-19 cases have been reported in the counties in which Petitioners' businesses are located (Allegheny, Northampton and Warren Counties). Respondents' Brief at 24. In fact, COVID-19 cases have now been reported in all counties in the Commonwealth. Department of Health, "COVID-19 Data for Pennsylvania," https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed 4/8/2020). More fundamentally, Petitioners' argument ignores the nature of this virus and the manner in which it is transmitted. The virus spreads primarily through person-to-person contact, has an incubation period of up to fourteen days, one in four carriers of the virus are asymptomatic, and the virus can live on surfaces for up to four days. Thus, any location (including Petitioners' businesses) where two or more people can congregate is within the disaster area.

We **[*35]** further note that ***HN14***[↑] the Emergency Code provides that, upon the declaration of a disaster emergency (as occurred here), the Governor has expansive emergency management powers including to "direct and compel the evacuation of all or part of the population from any stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery." *35 Pa.C.S. §§ 7301(f)(3)*. While the Governor took far less extreme measures with the closure of certain businesses, to the extent Petitioners are suggesting that the Governor lacked the authority to do so, this statutory authorization of a much more drastic measure disproves the point. Thus, the Executive Order's closure of non-essential businesses in

Pennsylvania is authorized by *Section 7301(f)(7)* of the Emergency Code. Based on the foregoing, we conclude that the COVID-19 pandemic triggered the Governor's authority under the Emergency Code and that as a result of the COVID-19 pandemic, the Governor had the authority under the Emergency Code to declare the entirety of the Commonwealth a disaster area.

Finally, in addition to their challenges based on the statutory language of the Emergency Code, Petitioners **[*36]** argue that Respondents, by ordering closure of all businesses deemed to be non-life-sustaining, have exceeded the permissible scope of their police powers. Petitioners cite the United States Supreme Court's decision in *Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894)*, for the "police powers" test:

> To justify the state in thus interposing its authority in behalf of the public, it must appear — First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton, 152 U.S. at 137 (cited by *Nat'l Wood Preservers v. Comm. Dept. of Envtl Res., 489 Pa. 221, 414 A.2d 37, 43 (Pa. 1980)*). Petitioners make three arguments to demonstrate that Respondents exceeded their authorized police power. First, Petitioners claim that the public's interests are not served by the mass closure of businesses, as the public has an interest in

continuing to receive the goods and services of these businesses. Petitioners' Brief at 24. Second, Petitioners insist that shuttering their businesses is unnecessary for the prevention of the spread of COVID-19 where the disease has not been detected at their places of business. *Id.* Third, Petitioners contend that closing their businesses **[*37]** was unduly burdensome to them and was, in fact "just about the most burdensome thing that can happen to a business, particularly businesses such as golf courses which cannot function anywhere but from their physical places of business." *Id.* at 24-25.

Under the exigencies created by the spread of the coronavirus and the critical interests of the public, generally, Petitioners cannot prevail in their arguments. As to the predicate requirements that the interests of the public justify the Governor's assertion of its authority, the nature of this emergency supports it. COVID-19 spreads "exponentially." Respondents report that in Pennsylvania, from the date they filed their answer to the Emergency Application (March 26, 2020) to the date they filed their brief (April 3, 2020) the number of reported cases increased from 1,687 to 7,016 and the number of deaths increased from 16 to 90. Respondents' Brief at 2. To punctuate the point and as noted previously (supra at 23), as of this writing, 24,199 of Pennsylvania's citizens have been confirmed to have been infected and 524 have died. The enforcement of social distancing to suppress transmission of the disease is currently the only mitigation tool. Department of Health, **[*38]** "COVID-19 Data for Pennsylvania," https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed 4/8/2020). Recent models for the COVID-19 pandemic predict that about 60,000 Americans will die. Peter Baker, "Trump Confronts a New Reality Before an Expected Wave of Disease and Death," The New York Times (Apr. 1, 2020) https://www.nytimes.com/2020/04/01/us/politics/coronavirus-trump.html (60,400 deaths predicted). Although a staggering death toll, it is lower than earlier predictions that between 100,000 and 240,000 Americans would die — even if the nation abided by social distancing. Respondents' Brief at 2-3 (citing Peter Baker, "Trump Confronts a New Reality Before an Expected Wave of Disease and Death." *Id.* The reason for the drop in the death toll projection is the enforcement of social distancing mechanisms and citizen's compliance with them. Quint Forgey, "Trump's top health officials predict diminished coronavirus death toll," Politico (Apr. 7, 2020) https://www.politico.com/news/2020/04/07/trumps-top-health-officials-predict-diminished-coronavirus-death-toll-171456.

Against this backdrop, Petitioners suggest that the public interest would best be served **[*39]** by keeping businesses open to maintain the free flow of business. Although they cite to none, we are certain that there are some economists and social scientists who support that policy position. But the policy choice in this emergency was for the Governor and the Secretary to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power. The choice made by the Respondents was tailored to the nature of the emergency and utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19. *See* Respondents' Answer at 3.

Petitioners' second argument, namely that there is no significant risk of the spread of COVID-19 in locations where the disease has not been detected (including at their places of business), is similarly unpersuasive. As previously discussed, COVID-19 does not spread because the virus is "at" a particular location. Instead it spreads because of person-to-person contact, as it has an incubation period of up to fourteen days and that one in four carriers of the virus are asymptomatic. Respondents' **[*40]** Brief at 4 (citing Coronavirus Disease 2019, "Symptoms," CDC, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last accessed 4/9/2020)). The virus can live on surfaces for up to four days and can remain in the air within confined areas and structures. *Id.* (citing National Institutes of Health, "Study suggests new coronavirus may remain on surfaces for days," (Mar. 27, 2020) https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days (last accessed 4/9/2020) and Joshua Rabinowitz and Caroline Bartman, "These Coronavirus Exposures Might be the Most Dangerous," The New York Times (Apr. 1, 2020) https://www.nytimes.com/2020/04/01/opinion/coronavirus-viral-dose.html).

Finally, Petitioners contend that their businesses should be permitted to remain open because of the burden placed on them. We recognize the serious and significant economic impact of the closure of Petitioners' businesses. However, the question is whether it is **unduly oppressive**, thus negating the utilization of the police power. Faced with protecting the health and lives of 12.8 million Pennsylvania citizens, we find that the impact of the closure of **[*41]** these businesses caused

by the exercise of police power is not unduly oppressive. The protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power.

IV. CONSTITUTIONAL CHALLENGES

Petitioners advance five intermingled constitutional arguments in support of their claim that the Executive Order should be vacated even if the Governor was authorized to issue it. Petitioners contend that the Executive Order violates the separation of powers doctrine; that the Executive Order constitutes a taking requiring just compensation; that Petitioners were not accorded procedural due process in the compilation of the list of life-sustaining and non-life-sustaining businesses or in the waiver process and that both are arbitrary, capricious and vague; that it violates equal protection principles; and that the Executive Order interferes with DeVito Committee's right of free speech and assembly. We address these arguments in turn.

1. Separation of Powers

The entirety of the Petitioners' challenge to the Executive Order as a violation of the Separation of Powers Doctrine follows:

> Executive orders can be classified into three permissible types: **[*42]** (1) proclamations for ceremonial purposes; (2) directives to subordinate officials for the execution of executive branch duties; and (3) interpretation of statutory or other law. *Markham v. Wolf, 647 Pa. 642, 190 A.3d 1175 (2018)*. Type 3 is implicated in this matter. "[A]ny executive order that, in essence, creates law, is unconstitutional." *Id. at 656*. The governor's comprehensive, detailed determination of which types of businesses "may continue physical operations" constitutes an attempt at legislation, which is the exclusive province of the legislative branch of government. *Id.* ("Foundationally, the legislature creates the laws. *Pa. Const. art. II, § 1*"). The governor, in attempting to legislate which businesses may operate from their physical locations and which may not, has violated the principles of separation of powers articulated and applied by the Pennsylvania Supreme Court in *Markham*.

Petitioners' Brief at 37.

The Emergency Code belies Petitioners' position. ***HN15***[↑] The Emergency Code specifically recognizes that under its auspices, the Governor has the authority to issue executive orders and proclamations which shall have the full force of law. *35 Pa.C.S. § 7301(b)*. Moreover, as previously explained, the General Assembly, by and through its enactment of the Emergency Code, specifically **[*43]** and expressly authorizes the Governor to declare a disaster emergency and thereafter to control the "ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein." *35 Pa.C.S. § 7301(c)*, *(f)(7)*. Inherent in that authorization is the Governor's ability to identify the areas where movement of persons must be abated and which premises will be restricted in order to mitigate the disaster. That the Governor utilized business classifications to determine the appropriate areas and premises to be directly impacted by the disaster mitigation is likewise inherent in the broad powers authorized by the General Assembly. Accordingly, the Executive Order does not violate the Separation of Powers Doctrine.

2. Takings Without Compensation

Petitioners claim that because the Executive Order prohibits them from using their property[12] "at all," it resulted in a taking of private property for public use without the payment of just compensation, in violation of the *Fifth Amendment to the United States Constitution*[13]

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[12] Blueberry Hill is the owner of the property upon which the business is conducted. Emergency Application, ¶ 83. While Blueberry Hill claims that it is deprived of the use of its property in total, we note that it continues to operate on a take-out basis, the restaurant located on the property. Petitioners' Brief at 49. The record here does not establish what property interests, if any, that Petitioners DeVito Committee and/or Gregory purport to hold. Accordingly, as one petitioner (Blueberry Hill) has standing to assert a takings claim, we will proceed to consider the issue on its merits.

[13] The *Fifth Amendment* provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

and *Article I, Section 10 of the Pennsylvania Constitution.*[14] According to Petitioners, a taking need not involve a physical taking of the property to implicate the constitutional protections requiring just compensation. Petitioners' Brief at 41. Instead, referring **[*44]** to the Executive Order as a government regulation, Petitioners argue that it is sufficient if a governmental regulation "deprive[s] an owner of all economically beneficial or productive use of land..." *Id.* (citing *Machipongo Land & Coal Co. v. Dep't of Envtl. Protection, 569 Pa. 3, 799 A.2d 751, 754 (Pa. 2002)*).

Respondents point out that there is a critical distinction between the exercise of the police power, as here, and takings pursuant to eminent domain. They cite to a long line of Pennsylvania cases holding that the payment of just compensation is not required where the regulation of property involves the exercise of the Commonwealth's police power. Beginning with *Appeal of White, 287 Pa. 259, 134 A. 409 (Pa. 1926)*, this Court made the distinction:

> Under eminent domain, compensation is given for property taken, injured, or destroyed, while under the police power no payment is made for a diminution in use, even though it amounts to an actual taking or destruction of property. Under the *Fourteenth Amendment*, property cannot be taken except by due process of law. **Regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed**. The conditions on which its legitimate exercise is predicated **[*46]** should actually exist or their happening be so likely that restraint is necessary, similar to a court issuing a restraining order for injuries done or threatened to persons or property. Likewise, there should be a reasonable and substantial relation between the thing acted on and the end to be attained[.]

Id. at 411 (emphasis added).

Following *White*, this Court in *Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309 (Pa. 1995)*, again indicated that where governmental regulation restricting activity on private property is implemented pursuant to an exercise of police power, rather than through the government's power of eminent domain, no just compensation is due:

> Eminent domain is the power to take property for public use. The City must provide just compensation for any property taken pursuant to this power. The police power, on the other hand, involves the regulation of property to promote the health, safety and general welfare of the people. *White's Appeal, 287 Pa. 259, 134 A. 409 (1926)*. **It does not require that the City provide compensation to the property owner, even if the property is damaged or destroyed**. *Id.*

Id. at 314 (emphasis added); *see also Estate of Blose ex rel. Blose v. Borough of Punxsutawney, 889 A.2d 653, 657—58 (Pa. Commw. 2005)*; *Commonwealth v. Hinds, 2001 PA Super 121, 775 A.2d 859, 864 (Pa. Super. 2001)*.

The *Balent* case, however, differed in one important respect from the allegations made by Petitioners here. In *Balent*, the city of Wilkes-Barre demolished a structure **[*47]** that had been partially destroyed by fire. *Balent, 669 A.2d at 311-12*. While the structure was lost, the owners retained ownership of the property. Thus, unlike Petitioners' claim here, in *Balent*, there was no claim that the governmental action resulted in a loss of "all economically beneficial or productive use of land." Petitioners' Brief at 45 ("The Governor's Order ... is a restriction or interruption of the common and necessary use and enjoyment of property as it deprives Petitioners from using or operating their businesses at their physical location[.]") (citing *Andress v. Zoning Bd. of Adjustment, 410 Pa. 77, 85, 188 A.2d 709 (Pa. 1963)* ("[A]ny destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the property[.]")).

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deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[14] *Article 1, Section 10* provides:

> [N]o person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation **[*45]** of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

Based upon this distinction, Petitioners insist that the principle governing their claims is found in the United States Supreme Court's decision in Lucas v. S.C. Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). In *Lucas*, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. Before construction, however, the state legislature enacted a new law barring the erection of any **[*48]** permanent habitable structures on the parcels he had purchased. Lucas filed suit, arguing that even if the new legislation constituted a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" requiring the payment of just compensation. Noting Justice Holmes' prior opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), that "if regulation goes too far it will be recognized as a taking," id. at 415, the Court in *Lucas* held that generally when a regulation deprives an owner of "all economically beneficial uses" of the land, it constitutes a regulatory taking requiring the payment of just compensation. Id. at 1016.

We do not find that either *Balent* or Lucas is controlling. Instead, we rely on a subsequent Supreme Court decision, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002), for our disposition. In that case, respondent Tahoe Regional Planning Agency ("TRPA") imposed two moratoria, totaling thirty-two months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area. Petitioners, real estate owners affected by the moratoria and an association representing such owners, filed parallel suits, later consolidated, claiming that TRPA's actions had taken **[*49]** all viable economic uses of their property without compensation. Rather than apply its prior decision in *Lucas*, however, the Court recognized that while the regulation in *Lucas* stated that the ban on development "was unconditional and permanent," the regulations at issue in the case before it were merely temporary measures, which specifically stated that they would terminate. Id. at 329. As a result, the High Court affirmed the United States Court of Appeals for the Ninth Circuit's decision that because the regulations had only a temporary impact on petitioners' fee interest, no categorical taking had occurred. Id. at 342 (noting that "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim"). In so holding, the Court stated that "the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained," as it would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged **[*50]** buildings, or other areas that we cannot now foresee ... which have long been considered permissible exercises of the police power, which do not entitle the individuals affected to compensation." Id. at 334-35.

The United States Court of Appeals for the Third Circuit relied upon *Tahoe-Sierra* in a case involving an emergency situation bearing similarities to the present disaster crisis. In Nat'l Amusements Inc. v. Borough of Palmyra, 716 F.3d 57 (3d Cir. 2013), the Borough of Palmyra ordered closed for five months an open-air flea market, owned and operated by National Amusements, Inc. ("NAI"), due to safety concerns posed by unexploded munitions left behind when the site had been used as a weapons-testing facility for the United States Army. Relying on the holding in *Tahoe-Sierra*, the court of appeals categorically denied that a regulatory taking had occurred requiring the payment of just compensation:

> It is difficult to imagine an act closer to the heartland of a state's traditional police power than abating the danger posed by unexploded artillery shells. Palmyra's emergency action to temporarily close the Market therefore constituted an exercise of its police power that did not require just compensation.

Id. at 63.

Applying Tahoe-Sierra and Nat'l Amusements Inc. to the present **[*51]** facts, we conclude that Petitioners have not established that a regulatory taking has occurred. The Executive Order results in only a temporary loss of the use of the Petitioners' business premises, and the Governor's reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to "protect the lives, health, morals, comfort, and general welfare of the people[.]" Manigault v. Springs, 199 U.S. 473, 480, 26 S. Ct. 127, 50 L. Ed. 274 (1905). We note that the Emergency Code temporarily limits the Executive Order to ninety days unless renewed and provides the General Assembly with the ability to

terminate the order at any time. 35 Pa.C.S. § 7301(c). Moreover, the public health rationale for imposing the restrictions in the Executive Order, to suppress the spread of the virus throughout the Commonwealth, is a stop-gap measure and, by definition, temporary. While the duration of COVID-19 as a natural disaster is currently unknown, the development of a vaccine to prevent future outbreaks, the development of an immunity in individuals previously infected and the availability of widespread testing and contact tracing are all viewed **[*52]** as the basis for ending the COVID-19 disaster.[15]

3. Procedural Due Process

Petitioners next contend that they have been deprived of procedural due process.[16] Petitioners claim that the Executive Order, with its list distinguishing between life-sustaining and non-life-sustaining businesses, took effect without providing them with notice and an opportunity to be heard with respect to their placement on the list. Petitioners' Brief at 40, 46. Petitioners further argue that any waiver process must accord applicants procedural due process prior to final determinations, including, e.g., the right to know the applicable standards to be applied, to present and/or cross-examine witnesses, and to the availability of an appeal from an adverse result. *Id.* at 52.

From the Petitioners' arguments, we discern three procedural due process issues for our consideration. First, were Petitioners entitled to pre-deprivation notice and an opportunity to be heard prior to the Governor's entry of the Executive Order containing the list placing them in the non-life-sustaining category requiring the closure of their physical business operations. Second, if Petitioners were not entitled to pre-deprivation due **[*53]** process, were they entitled to post-deprivation due process protections. Finally, if the answer to the second issue is in the affirmative, does the Governor's waiver process constitute sufficient post-deprivation due process under the circumstances presented here.

With respect to the first issue, Petitioners, without any argument or citation to authority, insist that they were entitled to the full panoply of procedural due process rights to challenge the Executive Order (containing the list placing them in the non-life-sustaining category) prior to its entry. Petitioners' Brief at 46 ("[T]he placing of Petitioners' businesses on the non-life-sustaining list and forcing their closing constituted a deprivation of the property interests of the Petitioners, and as such the Governor was required to provide Petitioners with due process **before the taking**.") (emphasis in original). ***HN16***[⬆] An entity's entitlement to procedural due process, however, cannot be determined in a static environment, since due process is "not a technical conception with a fixed content unrelated to time, place and circumstance." *Gilbert v. Homar, 520 U.S. 924, 930, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997)*. "[N]ot all situations calling for procedural safeguards call for the same kind of procedure," **[*54]** *Commonwealth v. Batts, 640 Pa. 401, 163 A.3d 410, 455 (Pa. 2017)*, and the "amount of due process that is due in any particular circumstance is flexible and calls for such procedural protections as the particular situation demands." *Comm. Dep't of Transp., Bureau of Driver Licensing v. Clayton, 546 Pa. 342, 684 A.2d 1060, 1064 (Pa. 1996)*.

In *In re Fortieth Statewide Investigating Grand Jury, 197 A.3d 712 (Pa. 2018)*, this Court recently reaffirmed that ***HN17***[⬆] the amount of process that is due in any

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[15] See remarks by Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases: National Institute of Allergy and Infectious Diseases, "NIH Clinical Trial of Investigational Vaccine for COVID-19 Begins," NIH (Mar. 16, 2020) https://www.niaid.nih.gov/news-events/nih-clinical-trial-investigational-vaccine-covid-19-begins; Peter Sullivan, "Fauci: Improved testing and tracing can help reopen country," The Hill (Apr. 1, 2020) https://thehill.com/homenews/administration/490713-fauci-improved-testing-and-tracing-can-help-reopen-country; Hayden Bird, "5 important points from Dr. Anthony Fauci's interview on 'The Daily,'" Boston.com (Apr. 2, 2020) https://www.boston.com/news/health/2020/04/02/5-important-points-from-dr-faucis-interview-on-the-daily.

[16] Petitioners' brief does not indicate whether the due process claim asserted is in the nature of one for procedural due process or substantive due process. In responding to Petitioners' arguments, Respondents understood Petitioners to be asserting infringements of only their **procedural** due process rights. Respondents' Brief at 33 n.18. We agree, as Petitioners cite to cases identifying the fundamental hallmarks of procedural due process ("notice and a meaningful opportunity to be heard"), *see* Petitioners' Brief at 40 (citing *Harris v. City of Phila., 47 F.3d 1333, 1335 (3d Cir. 1995)*), and the types of procedural safeguards typically available (e.g., notice, a neutral arbitrator, an opening statement, an opportunity to present and cross-examine witnesses, representation by counsel, and a decision on the record stating the reasons for the result), *see* *Rogin v. Bensalem Twp., 616 F.2d 680, 694 (3d Cir. 1980)*. Accordingly, we will proceed to consider the procedural due process claims raised by Petitioners.

particular circumstance must be determined by application of the three-part balancing test first established in *Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)*. *Id. at 717*. This balancing test considers three factors: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. *Id.*

In *Bundy v. Wetzel, 646 Pa. 248, 184 A.3d 551 (Pa. 2018)*, this Court also clarified that whether pre-deprivation notice is required largely depends upon the second *Mathews* factor. *Id. at 557*. We indicated that while there is a general preference that procedural safeguards apply in the pre-deprivation timeframe, *Pa. Coal Mining Ass'n v. Ins. Dep't, 471 Pa. 437, 370 A.2d 685, 692 (Pa. 1977)*; *Zinermon, 494 U.S. at 127-28*, the "controlling inquiry" in this regard is "whether the state is in a position to provide for pre-deprivation process." *Id.* (citing *Hudson v. Palmer, 468 U.S. 517, 534, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)*); *see also Logan v. Zimmerman Brush Co., 455 U.S. 422, 436, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982)* ("'[T]he necessity of quick action by the State or the impracticality **[*55]** of providing any pre-deprivation process' may mean that a post-deprivation remedy is constitutionally adequate.").

Under the circumstances presented here, namely the onset of the rapid spread of COVID-19 and the urgent need to act quickly to protect the citizens of the Commonwealth from sickness and death, the Governor was not in a position to provide for pre-deprivation notice and an opportunity to be heard by Petitioners (and every other business in the state on the non-life-sustaining list). The result would have been to delay the entry of the Executive Order by weeks, months, or even years, an entirely untenable result given the duties and obligations placed on the Governor under the Emergency Code to abate the looming disaster. As such, Petitioners were not entitled to pre-deprivation notice and an opportunity to be heard.

We cannot agree, however, with Respondents' contention that Petitioners were not entitled to any procedural due process, either before or after the entry of the Executive Order. Respondents' Brief at 35 ("Viewing the present public health emergency through a *Mathews* lens, it is apparent what balance is to be struck. — No additional safeguards are feasible, and **[*56]** the countervailing public interest is beyond debate."). ***HN18***[⬆] The Supreme Court has held that at all times, even when the country is at war, essential liberties remain in effect. *Bell v. Burson, 402 U.S. 535, 542, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971)*.

> It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action. "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."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-65, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

While procedural due process is required even in times of emergency, we conclude that the waiver process provides sufficient due process under the circumstances presented here.[17] ***HN19***[⬆] The Supreme Court has

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[17] We agree with Respondents' contention that ***HN20***[⬆] an appellant may not assert a procedural due process claim if he has not availed himself of an available grievance procedure. Respondents' Brief at 32-33. In *Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000)*, the Third Circuit held, "In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." *Id. at 116*. The court of appeals stated that "a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them." *Id.* (quoting *Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir.1982))*. According to the federal court, a due process violation "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Id.* (quoting *Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990))*. If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants. *Id.*

Here Gregory has not filed a waiver application. Blueberry Hill filed a waiver application on March 23, 2020, but has to date received no response. Petitioners' Brief at 7-8 n.1. DeVito

acknowledged that a different level of process may be sufficient in times **[*57]** of emergency. *Bell, 402 U.S. at 542*. As the High Court acknowledged in *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981)*, "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is '[o]ne of the oldest examples' of permissible summary action." *Id. at 300-01*.

The waiver process provides precisely that, namely a summary procedure that provides businesses with an opportunity to challenge the Governor's placement of their business on the non-life-sustaining list. Seen in this light, it is clear that the term "waiver" is a misnomer in the present context. Instead, the "waiver" process is in actuality a review process that provides businesses an opportunity to challenge, and the Governor's office to reconsider, whether the placement of a business on the non-life-sustaining list was a proper categorization. According to public announcements by the Governor, businesses categorized as non-life-sustaining may file a "waiver" application in which they can attempt to demonstrate either that they provide goods or services that are necessary to maintain operations at a business on the life-sustaining list or that they **[*58]** belong in one of the critical infrastructure categories outlined in the CISA. Richard E. Coe, "Pennsylvania Grants Waivers Allowing Non-'Life-Sustaining' Businesses to Resume Operations," (Apr. 1, 2020), https://www.natlawreview.com/article/pennsylvania-grants-waivers-allowingnon- life-sustaining-businesses-to-resume. This procedure establishes the criteria to defeat the categorization as a non-life-sustaining business. The "waiver" process does not exist to provide waivers to businesses that are not life-sustaining, but rather constitutes an attempt to identify businesses that may have been mis-categorized as nonlife- sustaining.

The Governor's efforts to correct mis-categorizations of certain businesses is an entirely proper focus of procedural due process. ***HN21***[] Procedural due process is geared toward protecting individuals from the **mistaken** deprivation of life, liberty or property. As the United States Supreme Court explained in *Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)*:

> Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly **[*59]** has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process . . . ." *Mathews v. Eldridge, 424 U.S. 319, 344, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)*. Such rules "minimize substantively unfair or mistaken deprivations of" life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin, supra, 407 U.S., at 81, 92 S.Ct., at 1994*.

Id. at 259-60.

Petitioners contend the "waiver" process by way of a summary administrative proceeding is arbitrary and capricious because they are denied a formal hearing, at which they may, inter alia, make opening presentations, enter evidence, and present and cross-examine witnesses. Petitioners' Brief at 52. As of the filing of the Respondents' brief, however, more than 34,000 waiver applications have been filed, Michael Rubinkam and Mark Scolforo, "Deadline Looms for Pennsylvania Virus-Shutdown Waivers," Associated Press (Apr. 2, 2020) https://www.usnews.com/news/best-states/pennsylvania/articles/2020-04-02/state-sets-deadline-for-exemptions-from-wolf-shutdown-order, and it would be impossible, given available resources, to provide the level of due process suggested by Petitioners to every applicant (or any significant percentage of them) and to reach final determinations **[*60]** with respect to the merits of those applications in a timeframe commensurate with the existence of the disaster so that relief could be afforded.

In this regard, we consider the appropriateness of the due process afforded in light of the fact that the loss of Petitioner' property rights are temporary and find this significant. The temporary deprivation impact effects each of the factors in the *Mathews* balancing test. While the private interest, the closure of the business, is important, the risk of erroneous temporary deprivation does not outweigh the value of additional or substitute safeguards which could not be provided within a realistic

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Committee filed a waiver application on March 31, 2020 and received a denial letter on April 3, 2020. Supplemental Application for Relief on behalf of DeVito Committee, ¶ 16. Because one of the Petitioners (DeVito Committee) has standing to assert a procedural due process challenge to the waiver process, we will proceed to consider the issue on its merits.

timeframe. The government interest in focusing on mitigation and suppression of the disaster outweighs the massive administrative burden of the additional procedural requirements demanded by Petitioners. These procedural requirements would overwhelm an entire department of government otherwise involved with disaster mitigation.

We make the further observation that the summary procedure of a review of an application for a waiver meets the exigency of this disaster — social distancing. As conceived by the Petitioners, due process requires in person **[*61]** testimonials, cross-examination and oral argument. Thus, not only would massive numbers of staff be necessary (who would be working from home) but troves of telecommunication devices would be necessary to accomplish it. The near impossibility of such procedures contrasted with the temporary deprivation at issue here drives the conclusion that the waiver process, as designed, provides an adequate opportunity for Petitioners to make their case for reclassification. ***HN22***[⬆] Under the circumstances of an ongoing disaster emergency, a full evidentiary proceeding is not a viable post-deprivation procedural process.[18]

Petitioners claim that they are entitled to judicial review of the denial of a waiver application. However, we find no basis for a right of appeal under the Pennsylvania Constitution in this circumstance. *Article V, Section 9* states:

> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or **from an administrative agency to a court of record or to an appellate court**, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

Pa. Const. art. V, § 9 (emphasis **[*62]** added). Attached to the Supplemental Application for Relief by Petitioner Kathy Gregory is a letter, on the Governor's letterhead and signed by both the Governor and Secretary Levine, granting a waiver request by another real estate brokerage company. Supplemental Application, ¶ 15 (Exhibit A). The letter was attached to the Supplemental Application to demonstrate that "[b]y the approval of this waiver, the Governor has determined that real estate services are life-sustaining." *Id.*, ¶ 16. While it is clear that specific requests are reviewed by employees of the DCED, Respondents' Answer at 24, the decision to grant the waiver was that of Governor Wolf and Secretary Levine and was not an administrative adjudication of the DCED.[19] The grant letter does not even reference the DCED's participation in the review process. ***HN24***[⬆] Neither the Governor nor the Secretary is an "administrative agency." Because *Article V, Section 9* does not confer a right of appeal from an executive decision of the Governor or the Secretary, no right of appeal lies in this instance.

4. Equal Protection

Petitioners contend that the Executive Order violates the *equal protection clauses of the United States* and *Pennsylvania Constitutions*. *U.S. Const. amend. XIV*; *Pa. Const. art. I, § 26*. In *Commonwealth v. Bullock, 590 Pa. 480, 913 A.2d 207 (Pa. 2006)*, this Court held that ***HN25***[⬆] "[w]hile **[*63]** the *Equal Protection Clause* assures that all similarly situated persons are treated alike, it does not obligate the government to treat all persons identically." *Id. at 215*. Petitioners contend that the Executive Order prevents DeVito Committee from using its principle place of business for operations in running Mr. DeVito's political campaign. Petitioners' Brief at 57. In contrast, they argue that elected officials,

[18] Our conclusion that the summary procedure for review of written requests for waiver is constitutionally adequate is not a suggestion that the procedure is not without flaws. Much of the Petitioners' written submissions to this Court reflect a frustration with the lack of transparency with the procedure. For example, why are some waivers granted and others denied? While, as described, the criteria for consideration of a re-classification are set forth in communications from the Governor, businesses that have been denied a waiver receive a form letter advising of such determination. The lack of transparency in this process, while explainable because of time constraints, has caused a level of discontent above that of owning a shuttered business. However, ***HN23***[⬆] a lack of transparency, while perhaps a sign of lack of good government practices, does not constitute a violation of procedural due process.

[19] The DCED has adjudicatory bodies that make administrative determinations, including for example the State Board of Property. The work of reviewing and deciding waiver requests is, however, not the work of an adjudicatory body with the DCED, but rather that of about fifty DCED employees familiar with the NAICS code. Madasyn Lee, "Nearly 10K Pennsylvania businesses apply for closure waivers," TribLive (Mar. 22, 2020) https://triblive.com/local/regional/nearly-10k-pennsylvania-businesses-apply-for-closure-waivers/.

including the state representative against whom Mr. Devito is running, are permitted to continue to use their offices, staff, equipment and supplies at their discretion. *Id.* Mr. Devito further contends that he is similarly situated to both his political opponent and social advocacy organizations in that they all advocate for social and political causes, but elected officials and social advocacy groups are identified in the Executive Order as life-sustaining and thus are not barred from their physical place of operations. *Id.*

Campaign offices and legislative offices are not similarly situated. When legislators, like Mr. DeVito's political opponent, use their district offices, they do so as government officials, not as candidates. Indeed, it is a crime for public officials to use public resources - including **[*64]** taxpayer funded offices, staff, or equipment—to run for reelection. See e.g., *18 Pa.C.S. § 3926* (theft of services); *18 Pa.C.S. § 4113* (misapplication of government property); *65 Pa.C.S. § 1103* (conflict of interest). As the Respondents correctly note, while the legislative office of Mr. DeVito's opponent remains open, albeit without public visitations, its operations are limited to serving the public during this pandemic and to voting remotely on legislation. Respondents' Brief at 57. But all **candidates**' physical offices, whether incumbent or challenger, must be closed. *Id.* The Executive Order thus does not advantage or disadvantage any candidate or campaign committee. *Id.*

Furthermore, DeVito Committee is not similarly situated to social advocacy groups. Social advocacy groups advocate for vulnerable individuals during this time of disaster. While Mr. DeVito personally may similarly advocate for worthy social and political causes, there is no indication that DeVito Committee does so nor is it the primary focus of the operation. To the contrary, in the Emergency Application, Petitioners alleged that DeVito Committee's political candidate committee was formed to operate and administer a political campaign, and to that end, its members **[*65]** meet with volunteers, supporters, potential media, vendors and other persons or parties instrumental to conducting a political campaign, as well as conducting direct mail activities, press conferences and other promotions. Emergency Application ¶¶ 61, 63.

Finally, Petitioners indicate that Blueberry Hill is similarly situated to municipal golf courses, but that the Executive Order has closed public, but not municipal, golf courses. Petitioners' Brief at 55. As Respondents properly indicate, however, the list of life-sustaining businesses makes no distinction between public and municipal golf courses. To the extent that municipal golf courses remained open because they were subject to local control, i.e., municipal governments, Respondent cites to a growing list of municipal golf courses that are closed by reason of efforts to mitigate COVID-19. *Id.* at 45.

For these reasons, the Executive Order does not violate constitutional equal protection principles.

5. *First Amendment* Rights

The *First Amendment to the United States Constitution* states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." *U.S. Const. Amend. I*. **[*66]** Further, *Article I, Sections 7* and *20* of the Pennsylvania Constitution provide, in pertinent part, that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty" and "citizens have a right in a peaceable manner to assemble together for their common good..." *Pa. Const. Art. 1, §§ 7*, *20*. DeVito Committee argues the Executive Order impinges upon these constitutional guarantees, as it interferes with the right to peacefully assemble, as it closed a "place of physical operations" they wish to use to "hold meetings and to engage in speech and advocacy." Petitioners' Brief at 58.

HN26[] Constitutional rights to free speech and assembly, however, are not absolute, and states may place content neutral time, place, and manner regulations on speech and assembly "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)*; *Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 658 (10th Cir. 2006)* (the right of assembly and expressive association are "'no more absolute than the right of free speech or any other right; consequently there may be countervailing principles that prevail over the right of association'") (quoting *Walker v. City of Kansas City, 911 F.2d 80, 89 n. 11 (8th Cir. 1990)*); *Duquesne v. Fincke, 269 Pa. 112, 112 A. 130, 132 (Pa. 1920)* (*Article 20* does not grant "the right to assemble **[*67]** with others, and to speak wherever he and they choose to go"). "The principal inquiry in determining content neutrality ... is whether

the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)*.

There is no question that the containment and suppression of COVID-19 and the sickness and death it causes is a substantial governmental interest. As to whether the Executive Order unreasonably limits alternative avenues of communication, it does not.

The Executive Order does not place a restriction on supporters of DeVito Committee to assemble with each other and speak to each other, it only forecloses doing so in the physical campaign office. It does not in any respect limit the ability to speak or assemble, however, as it does not in any respect prohibit operations by telephone, video-conferencing, or on-line through websites and otherwise. In this era, cyberspace in general and social media in particular have become the lifeblood for the exercise of *First Amendment* rights. *See Packingham v. North Carolina, 137 S.Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017)*.

Finally, "the principle inquiry in determining content neutrality — is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." **[*68]** *Ward, 491 U.S. at 791*. Respondents argue that the Executive Order is content neutral. It does not regulate speech at all, let alone based on content. It applies to a large number of non-life sustaining businesses regardless of message, whether "campaign office, rock concerts, or haberdasheries." Respondents' Brief at 41. We agree. The Executive Order is tailored to meet the exigencies of COVID-19 restricting in-person gatherings to promote social distancing. It does not otherwise prohibit alternative means of communication or virtual gathering.

Accordingly, we conclude that the Executive Order does not violate the *First Amendment to the United States Constitution* or Article I, Sections 7 and *20 of the Pennsylvania Constitution*.

V. The Supplemental Applications of Gregory and Blueberry Hill

Subsequent to the filing of the Emergency Application, Petitioners Gregory and Blueberry Hill filed supplemental applications for relief, requesting that this Court enter orders directing the Governor to move them from the non-life-sustaining list to the life-sustaining list. It is not for this Court, but rather for the Governor pursuant to the powers conferred upon him by the Emergency Code, to make determinations as to what businesses, or types of businesses, are properly placed in either **[*69]** category. This Court's grant of King's Bench jurisdiction here was expressly limited to deciding the statutory and constitutional challenges to the Executive Order presented in Petitioners' Emergency Application. *See* supra at 15. As the Supplemental Applications lack any jurisdictional basis, they are dismissed.

VI. Disposition

We grant the request to exercise our King's Bench jurisdiction. For the reasons set forth in this opinion, we conclude that Respondents had the statutory authority to issue the Executive Order and that Petitioners have not established any basis for relief based upon their constitutional challenges. The claim for relief requested in the Application, to vacate or strike the Executive Order, is therefore denied.

Justices Baer, Todd and Wecht join the opinion.

Chief Justice Saylor files a concurring and dissenting opinion in which Justices Dougherty and Mundy join.

Concur by: SAYLOR

Dissent by: SAYLOR

Dissent

CONCURRING AND DISSENTING OPINION

CHIEF JUSTICE SAYLOR

Respectfully, I would refrain from exercising discretion to grant King's Bench jurisdiction, albeit I agree with the majority that the circumstances are extraordinary and matters of great public importance are involved. I find, however, that several material **[*70]** aspects of the petitioners' claims may involve issues of disputed fact. And it also appears to me that some of the majority's conclusions have mixed legal and factual overtones.

For these reasons -- and in light of the ongoing public health crisis -- I believe there is much to be said for treating the executive branch's actions as presumptively valid for now, while not foreclosing colorable challenges from moving forward in the appropriate court of original jurisdiction, *i.e.*, the Commonwealth Court. Importantly, that court, unlike this one, is organized to support orderly fact-finding. Thus, it can more appropriately administer the necessary judicial consideration in the first instance, subject to appellate review by this Court if necessary.

That said, since the merits are now being explored, I lend my support to the majority's conclusion that the present public-health crisis may properly be regarded as a "disaster emergency," triggering the Governor's special powers to respond. *See* Majority Opinion, *slip op.* at 23-26 (citing 35 Pa.C.S. §7102). While there are factual aspects attending the majority's reasoning on this point, I believe judicial notice can appropriately be taken concerning the severity of the current **[*71]** emergency and the need for strong countermeasures.

I am less confident, however, in the majority's conclusion that "summary administrative action" by the executive branch to close many businesses throughout the Commonwealth must evade judicial review as a check against arbitrariness. Majority Opinion, *slip op.* at 42. While the majority repeatedly stresses that such closure is temporary, *see id.*, this may in fact not be so for businesses that are unable to endure the associated revenue losses. Additionally, the damage to surviving businesses may be vast. Significantly, moreover, the Supreme Court of the United States has admonished that the impermanent nature of a restriction "should not be given exclusive significance one way or the other" in determining whether it is a proper exercise of police power. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337, 122 S. Ct. 1465, 1486, 152 L. Ed. 2d 517 (2002)*.

The majority opines that "[t]he protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power." *Id.* at 30. I believe, however, that greater account must be given to the specific nature of the exercise, and that arbitrariness cannot be tolerated, particularly when the livelihoods of citizens are being impaired to the degree presently asserted. **[*72]**

To me, the majority allocates too much weight to temporariness to defeat developed allegations of a lack of due process in the executive branch's determination of which businesses must close and which must remain closed. *See* Majority Opinion, *slip op.* at 37-38.[1] Again, there seems to be a factual dynamic that should not be dismissed out of hand. Certainly, the executive branch may engage in *proper* exercises of police power in a disaster emergency, and a fair amount of deference to its decisions may be in order. At least short of martial law, however -- relative to the broad-scale closure of Pennsylvania business for a prolonged period -- I don't believe the executive's determinations of propriety can go untested in the face of the present allegations of inconsistency and irrationality.[2]

In summary, in my considered judgment, the matters raised in the emergency application for **[*73]** extraordinary relief -- especially those related to alleged inconsistency and arbitrariness in the waiver process -- should be left to the Commonwealth Court, in the first instance, as the court of original jurisdiction invested with fact-finding capabilities.

Justices Dougherty and Mundy join this concurring and dissenting opinion.

End of Document

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[1] Such allegations include the following:

> It is not clear why some businesses are on the life-sustaining list[.] For example, why are "beer, wine, and liquor stores," determined to be non-life-sustaining, but "beer distributors" are determined to be "life-sustaining?" Why are "department stores" non-life-sustaining, but "other general merchandise stores" life-sustaining?

Brief for Petitioners at 48 (footnote omitted).

[2] The majority observes that the General Assembly has the ability to terminate the Governor's order. *See* Majority Opinion, *slip op.* at 37 (citing 35 Pa.C.S. §7301(c)). Although I agree with the majority that this serves as one check on executive power, I note that the Constitution serves as another.

DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF INDPENDENT FITNESS FACITLITIES 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,
RMP FITNESS INC.,
STRENGTH BEYOND LLC,
24/7 BOOTCAMP AND BOXING INC., and
4 SEASONS GYM, LLC,
Plaintiffs,
v.
GRETCHEN E. WHITMER and
ROBERT GORDON,
Defendants.

Civil No. 1:20-cv-00458

Hon. Paul L. Maloney

ERSKINE LAW, PC
Scott M. Erskine (P54734)
Carly Van Thomme (P59706)
Attorneys for Plaintiffs
612 W. University

Exhibit 19

Cavel Int'l, Inc. v. Madigan

United States Court of Appeals for the Seventh Circuit

August 16, 2007, Argued; September 21, 2007, Decided

No. 07-2658

Reporter
500 F.3d 551 *; 2007 U.S. App. LEXIS 22510 **

CAVEL INTERNATIONAL, INC., et al., Plaintiffs-Appellants, v. LISA MADIGAN, et al., Defendants-Appellees.

Subsequent History: US Supreme Court certiorari denied by Cavel Int'l v. Madigan, 2008 U.S. LEXIS 4938 (U.S., June 16, 2008)

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Western Division. No. 07 C 50100--Frederick J. Kapala, Judge.

Cavel Int'l, Inc. v. Madigan, 500 F.3d 544, 2007 U.S. App. LEXIS 18654 (7th Cir. Ill., 2007)

Core Terms

horses, meat, slaughter, human consumption, Inspection, foreign commerce, slaughterhouses, export, animals, state law, consumers, importing, interstate, regulation, killed, plants, Zoos, interstate commerce, horse-meat, invalid, cases, shut, eat

Case Summary

Procedural Posture

Appellant foreign-owned horse slaughterhouse appealed from the order of the United States District Court for the Northern District of Illinois, which declined to issue a preliminary injunction barring the enforcement of an amendment to the Illinois Horse Meat Act (Illinois Act), 225 Ill. Comp. Stat. 635. The slaughterhouse argued that the Illinois Act violated both the federal Meat Inspection Act and the commerce clause.

Overview

The Illinois Act was amended to make it unlawful for any person in the state either to slaughter a horse for human consumption, or to import into or export from Illinois horse meat to be used for human consumption. The slaughterhouse operated the only facility in the United States for slaughtering horses. The slaughterhouse first pointed to the Meat Inspection Act's preemption clause and argued that it signified Congress's decision to sweep aside any state law that would render the federal requirements inapplicable to the slaughterhouse by forbidding horses to be slaughtered. However, the court held that when the Meat Inspection Act was passed, it was not a decision that states had to allow horses to be slaughtered for human consumption. The more difficult question was whether the Illinois Act violated the commerce clause as interpreted to prohibit state regulations that unduly interfered with the foreign commerce of the United States. The court held that the curtailment of foreign commerce by the amendment was slight and the court was reluctant to condemn a state law, supported by a legitimate state interest--that being the treatment of animals in Illinois.

Outcome

The district court's judgment was affirmed, the slaughterhouse's suit was dismissed with prejudice, and the injunction that the court granted pending appeal was dissolved.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

Governments > Agriculture & Food > Animal Protection

HN1 **Agriculture & Food, Meat Inspections**

The Illinois Horse Meat Act, 225 Ill. Comp. Stat. 635, has been amended to make it unlawful for any person in the state either to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption, *225 Ill. Comp. Stat. 635/1.5(a)*, or to import into or export from Illinois, or to sell, buy, give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption. *225 Ill. Comp. Stat. 635/1.5(b)*.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

HN2 **Commerce Clause, Commerce With Other Nations**

The *commerce clause* in *U.S. Const. art. I, § 8*, merely empowers Congress to regulate interstate and foreign commerce but has been interpreted to limit the power of states to regulate interstate and foreign commerce even in the absence of federal legislation inconsistent with the state regulation.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

HN3 **Agriculture & Food, Meat Inspections**

The Meat Inspection Act, *21 U.S.C.S. § 606*, is concerned with inspecting premises at which meat is produced for human consumption, rather than with preserving the production of particular types of meat for people to eat.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN4 **Congressional Duties & Powers, Commerce Clause**

The clearest case of a state law that violates the *commerce clause* is a law that discriminates in favor of local firms.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN5 **Congressional Duties & Powers, Commerce Clause**

The absence of outright discrimination does not terminate inquiry into a possible violation of the *commerce clause*.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Tests

HN6 **Interstate Commerce, Tests**

Where a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. The United States Court of Appeals for the Seventh Circuit has expressed doubt that even this tough test is available to plaintiffs unless they show at least "mild" discrimination against interstate commerce; precedent seems to require that at least "incidental" effects on interstate commerce be shown.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Tests

HN7 **Interstate Commerce, Tests**

Even in the absence of discrimination, a burden on interstate commerce that has no rational justification would be invalid.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > Substantive Due Process > Scope

HN8 **Congressional Duties & Powers, Commerce Clause**

Any law that irrationally burdens property rights can, quite apart from the *commerce clause*, be challenged as a deprivation of property without due process of law.

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > ... > Miscellaneous Offenses > Cruelty to Animals > General Overview

HN9 **Constitutional Law, Substantive Due Process**

States have a legitimate interest in prolonging the lives of animals that their population happens to like. They can ban bullfights and cockfights and the abuse and neglect of animals.

Criminal Law & Procedure > ... > Miscellaneous Offenses > Cruelty to Animals > General Overview

HN10 **Miscellaneous Offenses, Cruelty to Animals**

It is permitted to balance a state's interest in horses' welfare against the other interests of its (human) population; and it is also permitted to take one step at a time on a road toward the humane treatment of our fellow animals.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

International Trade Law > State Legislation > General Overview

HN11 **Commerce Clause, Commerce With Other Nations**

Quite apart from economic consequences, an interference by a state with foreign commerce can complicate the nation's foreign relations, which are a monopoly of the federal government; states are not permitted to have their own foreign policy, their own embassies and consuls and ambassadors, and so forth. Foreign commerce is preeminently a matter of national concern. In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN12 **Reviewability of Lower Court Decisions, Preservation for Review**

Where the merits have been fully briefed and argued and there are no unresolved factual issues the resolution of which in a trial would alter the result, in such a case, courts treat an appeal as if it were from a final judgment.

Counsel: For CAVEL INTERNATIONAL, INCORPORATED, Plaintiff - Appellant: J. Philip Calabrese, SQUIRE SANDERS & DEMPSEY, Cleveland, OH.

For JAMES D. TUCKER, Plaintiff - Appellant: J. Philip Calabrese, SQUIRE SANDERS & DEMPSEY, Cleveland, OH USA.

For RANDY BEASLEY, Plaintiff - Appellant: J. Philip Calabrese, SQUIRE SANDERS & DEMPSEY, Cleveland, OH USA.

For ANGELA FABRIS, Plaintiff - Appellant: J. Philip Calabrese, SQUIRE SANDERS & DEMPSEY,

Cleveland, OH USA.

For RUBEN GONZALEZ, Plaintiff - Appellant: J. Philip Calabrese, SQUIRE SANDERS & DEMPSEY, Cleveland, OH USA.

For RON MATEKAITIS, Defendant - Appellee: John E. Farrell, DEKALB COUNTY STATE'S ATTORNEY'S OFFICE, Sycamore, IL.

For LISA MADIGAN, Defendant - Appellee: Mary E. Welsh, OFFICE OF THE ATTORNEY GENERAL, Civil Appeals Division, Chicago, IL USA.

For CHARLES A. HARTKE, Defendant - Appellee: Mary E. Welsh, OFFICE OF THE ATTORNEY GENERAL, Civil Appeals Division, Chicago, IL USA.

For HORSEMEN'S COUNCIL OF ILLINOIS, Amicus Curiae: Robert C. Pottinger, BARRICK, SWITZER, LONG, BALSLEY & VAN EVERA, Rockford, IL **[**2]** USA.

Judges: Before EASTERBROOK, Chief Judge, and POSNER and ROVNER, Circuit Judges.

Opinion by: POSNER

Opinion

[*552] POSNER, *Circuit Judge*. Horse meat was until recently an accepted part of the American diet--the Harvard Faculty Club served horse-meat steaks until the 1970s. No longer is horse meat eaten by Americans, Christa Weil, "We Eat Horses, Don't We?," *New York Times*, Mar. 5, 2007, p. A19, though it is eaten by people in a number of other countries, including countries in Europe; in some countries it is a delicacy. Meat from American horses is especially prized because our ample grazing land enables them to eat natural grasses, which enhances the flavor of their meat. Mary Jacoby, "Why Belgians Shoot Horses in Texas For Dining in Europe," *Wall St. J.*, Sept. 21, 2005, p. 1.

Cavel International, the plaintiff in this case, owns and operates the only facility in the United States for slaughtering horses. Until recently it was one of three such facilities, but the other two, both in Texas, stopped slaughtering horses after the Fifth Circuit upheld a Texas law similar to the Illinois law challenged in this case. *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry, 476 F.3d 326, 336-37 (5th Cir. 2007)*.

Cavel's slaughterhouse, **[**3]** located in DeKalb, Illinois, near Chicago, has some sixty employees and slaughters some 40,000 to 60,000 horses a year, out of a total of about 700,000 horses that either are killed or die of natural causes in the United States annually. Cavel buys its horses for about $ 300 apiece from brokers who obtain them at auctions. The company has been in operation for 20 years and has some $ 20 million in annual revenues.

Horses are the only animals that Cavel slaughters, and it represented to us without contradiction that if it loses this case it will have to shut down. The Texas slaughterhouses were more eclectic--they slaughtered, besides horses, such sources of "atypical meat products" as bison and ostrich. But they too represented to the courts that if forbidden to slaughter horses they would have to shut down, though it appears that after a brief shutdown they reopened, adding cattle to their menu, as it were. Illinois House Bill 1711, Bill for an Act Concerning Horses, 95th General Assembly 16 (April 18, 2007) (statement of Representative Molaro).

In the United States, horses are killed in slaughterhouses only when the horses' **[*553]** flesh is destined for eating by human beings or (a detail **[**4]** to be considered later) zoo animals. The flesh of horses that is intended for pet food is obtained from the corpses hauled to rendering plants for disposal; the plants also produce glue and other products from the carcasses. (All these businesses are in terminal decline. Jeffrey McMurray, "Some Horses Left to Starve as Market for Meat Shrivels," *Chi. Tribune*, Mar. 15, 2007, p. 3.) Unlike Cavel's slaughterhouse, a rendering plant's methods of producing meat from dead horses do not have to comply with the requirements that the federal Meat Inspection Act, *21 U.S.C. § 601*, prescribes for the production of meat, expressly including horse meat, *§§ 601(j)*, *(w)*, intended for human consumption. The Act is fully applicable to Cavel, see *21 U.S.C. § 617*, even though, because there is no U.S. domestic market for

horse meat as a human food, Cavel's entire output is exported to such countries as Belgium, France, and Japan. Indeed, Cavel is the subsidiary of a Belgian company.

On May 24 of this year, ***HN1***[⬆] the Illinois Horse Meat Act, 225 ILCS 635, was amended to make it unlawful for any person in the state either "to slaughter a horse if that person knows or should know that any of the horse meat will **[**5]** be used for human consumption," *§ 635/1.5(a)*, or "to import into or export from this State, or to sell, buy, give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption." *§ 635/1.5(b)*. (Prior to the amendment, the statute merely required a license to slaughter horses and imposed various inspection, labeling, and other regulatory restrictions on licensees. The prohibition has made these provisions academic). Cavel claims that the amendment violates both the federal Meat Inspection Act and ***HN2***[⬆] the *commerce clause*--the provision in Article I, section 8, of the federal Constitution that in terms merely empowers Congress to regulate interstate and foreign commerce but that has been interpreted to limit the power of states to regulate interstate and foreign commerce even in the absence of federal legislation inconsistent with the state regulation. *Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252, 7 L. Ed. 412 (1829)* (Marshall, C.J.); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 127 S. Ct. 1786, 1792-93, 167 L. Ed. 2d 655 (2007)*.

Cavel moved for a preliminary injunction against the enforcement of the amendment. **[**6]** The district court declined to issue it, on the ground that Cavel had failed to make a strong showing that it was likely to prevail on the merits. Cavel appealed, and we enjoined the application of the amendment to Cavel pending our decision of its appeal, *500 F.3d 544, 2007 U.S. App. LEXIS 18654, 2007 WL 2239215 (7th Cir. July 18, 2007)*, Chief Judge Easterbook dissenting.

The challenge based on the Meat Inspection Act need detain us only briefly. Cavel points to the Act's preemption clause--"requirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under title I of this Act [including facilities at which horses are slaughtered, *21 U.S.C. §§ 601(d)*, *(j)*] which are in addition to, or different than those made under this Act may not be imposed by any State or Territory or the District of Columbia," *§ 678*--and argues that it signifies Congress's decision to sweep aside any state law that would render the federal requirements inapplicable to Cavel's slaughterhouse by forbidding horses to be slaughtered. The argument confuses a premise with a conclusion. When the Meat Inspection Act was passed (and indeed to this day), it was lawful in some **[**7]** states to produce horse **[*554]** meat for human consumption, and since the federal government has a legitimate interest in regulating the production of human food whether intended for domestic consumption or for export--exporting meat unfit for human consumption would be highly damaging to the nation's foreign commerce--it was natural to make the Act applicable to horse meat. That was not a decision that states must allow horses to be slaughtered for human consumption. The government taxes income from gambling that violates state law; that doesn't mean the state must permit the gambling to continue. *Given* that horse meat is produced for human consumption, its production must comply with the Meat Inspection Act. But if it is not produced, there is nothing, so far as horse meat is concerned, for the Act to work upon.

Of course in a literal sense a state law that shuts down any "premises, facilities and operations of any establishment at which inspection is provided" is "different" from the federal requirements for such premises, but so literal a reading is untenable. If despite its title the Meat Inspection Act were intended to forbid states to shut down slaughterhouses, it would have to set forth **[**8]** standards and procedures for determining whether a particular slaughterhouse or class of slaughterhouses should be shut down; and it does not.***HN3***[⬆] The Act is concerned with inspecting premises at which meat is produced for human consumption, see, e.g., *21 U.S.C. § 606*, rather than with preserving the production of particular types of meat for people to eat. *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry, supra, 476 F.3d at 333*.

The more difficult question is whether the horse-meat amendment violates the *commerce clause* as interpreted to prohibit state regulations that unduly interfere with the foreign commerce of the United States. Cavel fastens on *subsection (b)* of the Illinois amendment, which forbids the importing and exporting of horse meat for human consumption. But that provision is not addressed to Cavel; it is addressed to a middleman who having procured horse meat from Cavel tries to export it, or that imports horse meat to Illinois hoping to induce Americans to eat it. (We assume that the terms "import" and "export" refer to bringing horse meat into Illinois from another state, or shipping it to another state, as well as to importing horse meat from

and exporting it **[**9]** to a foreign country.) The provision directed at Cavel is *subsection (a)*, which forbids the slaughtering of horses for human consumption. If that subsection is valid, Cavel loses its case.

HN4[] The clearest case of a state law that violates the *commerce clause* is a law that discriminates in favor of local firms. E.g., *Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992)*; *Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988)*; *American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987)*; *Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521-22, 55 S. Ct. 497, 79 L. Ed. 1032 (1935)* (Cardozo, J.). Suppose a state passed a law that forbade the importation of wild baitfish. That would be a discrimination against interstate and foreign commerce. This would not make the law unconstitutional per se, because the state might be able to prove that it needed the law in order to protect "unique and fragile fisheries" from parasites prevalent in out-of-state fisheries and that there was "no satisfactory way to inspect shipments of live baitfish" for those parasites--that is *Maine v. Taylor, 477 U.S. 131, 141, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986)*. The case turned on factual **[*555]** issues of a kind that a court can resolve without undue risk of error.

There **[**10]** is no discrimination in the present case insofar as the prohibition against slaughter is concerned. If a local firm (remember that Cavel is foreign-owned) wanted to slaughter horses, it could not do so. No local merchant or producer benefits from the ban on slaughter. Compare *Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*, with *Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978)*.

HN5[] The absence of outright discrimination does not terminate inquiry into a possible violation of the *commerce clause*. There are situations in which states by ostensibly local regulations distort the operation of interstate markets. An example is a severance tax on a raw material, such as oil or coal, of which the state (perhaps in conjunction with other states) has a monopoly or near monopoly and which is almost entirely exported rather than consumed locally. The incidence of the tax will fall on the consumers in other states, who have no voice in the politics of the producing state, and the result may be a level of taxation and resulting price to consumers that greatly exceeds the cost of the services the state provides to producers of the raw material, and that by doing so burdens **[**11]** the export of the raw material to other states. Or imagine a state's imposing onerous taxes on all trucks that use its highways, knowing that almost all the truck traffic originates and terminates in other states and exploiting a locational monopoly to shift the costs of public services unrelated to highway maintenance to suppliers and consumers in other states.

Such cases present more difficult factual issues than cases of outright discrimination. Plaintiffs have sometimes prevailed, at least if the impact on commerce is evident. E.g., *Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978)*; *Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 664, 101 S. Ct. 1309, 67 L. Ed. 2d 580 (1981)*; but see *South Carolina State Highway Department v. Barnwell Bros., Inc., 303 U.S. 177, 58 S. Ct. 510, 82 L. Ed. 734 (1938)*. But in the case of the severance tax the "local" character of the activity taxed, although it does not immunize the tax from scrutiny, *Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981)*, causes a judicial hiccup, see *id. at 618-19*, even though the incidence of the tax is not local. In this case, too, the activity restricted by the state--the slaughter of horses in Illinois--has a local character but primarily foreign **[**12]** consequences. There can be harmful effects on free trade among the states that do not stem from even a mild disparity in treatment--as in this case, or the highway cases that we cited earlier, where there is no discrimination in favor of a local supplier. But the plaintiff has a steep hill to climb. ***HN6***[] "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is *clearly* excessive in relation to the putative local benefits." ***Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*** (emphasis added); see also *Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471-74, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981)*.

We have expressed doubt that even this tough test is available to plaintiffs unless they show at least "mild" discrimination against interstate commerce; *Pike* seems to require that at least "incidental" "effects on interstate commerce be shown." *National Paint & Coatings Ass'n v. City of **[*556]** Chicago, 45 F.3d 1124, 1131 (7th Cir. 1995)*; *Grant's Dairy-Maine, LLC v. Commissioner of Maine Dep't of Agriculture, Food & Rural Resources,*

232 F.3d 8, 18 (1st Cir. 2000); Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc., 155 F.3d 59, 75 (2d Cir. 1998); **[**13]** Instructional Systems, Inc. v. Computer Curriculum Corp., 35 F.3d 813, 825-26 (3d Cir. 1994). Some cases disagree, and take "even-handedly" at face value, Eastern Kentucky Resources v. Fiscal Court, 127 F.3d 532, 544-45 (6th Cir. 1997); American Target Advertising, Inc. v. Giani, 199 F.3d 1241, 1254 (10th Cir. 2000), heartened by a footnote in GMC v. Tracy, 519 U.S. 278, 299 n. 12, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997), in which the Supreme Court noted that "a small number of our [i.e., the Supreme Court's] cases have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation."

There may be no real disagreement in the case law. *National Paint & Coatings Ass'n* acknowledges that ***HN7***[⬆] even in the absence of discrimination, a burden on interstate commerce that had no rational justification would be invalid. 45 F.3d at 1131. An example is the Illinois mudguard law invalidated in Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959). The law required all trucks in the state, **[**14]** thus including those traveling interstate, to be equipped with curved mudguards that the district court had found not only conferred "no" safety benefits over straight ones but actually created "hazards previously unknown." Id. at 525. The law impeded interstate commerce--though maybe local commerce just as much--and because it lacked a rational basis it was invalid despite the lack of proof of a disparate impact. National Paint & Coatings Ass'n v. City of Chicago, supra, 45 F.3d at 1131; *Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 404-05 (3d Cir. 1987)*.

HN8[⬆] Any law, moreover, that irrationally burdens property rights can, quite apart from the commerce clause, be challenged as a deprivation of property without due process of law. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540-45, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); Greater Chicago Combine & Center, Inc. v. City of Chicago, 431 F.3d 1065, 1071-72 (7th Cir. 2005). That makes us wonder just what work ***Pike*** does, but that is not an issue we need pursue.

Cavel argues, in the spirit of *Bibb*, that Illinois's ban on slaughtering horses for human consumption serves no purpose at all. The horses will be killed anyway when they are too old to be useful and what difference **[**15]** does it make whether they are eaten by people or by cats and dogs? But the horse meat used in pet food is produced by rendering plants from carcasses rather than by the slaughter of horses, and the difference bears on the effect of the Illinois statute. Cavel pays for horses; rendering plants do not. If your horse dies, or if you have it euthanized, you must pay to have it hauled to the rendering plant, and you must also pay to have it euthanized if it didn't just die on you. So when your horse is no longer useful to you, you have a choice between selling it for slaughter and either keeping it until it dies or having it killed. The option of selling the animal for slaughter is thus financially more advantageous to the owner, and this makes it likely that many horses (remember that Cavel slaughters between 40,000 and 60,000 a year) die sooner than they otherwise would because **[*557]** they can be killed for their meat. ***HN9***[⬆] States have a legitimate interest in prolonging the lives of animals that their population happens to like. Hughes v. Oklahoma, 441 U.S. 322, 337, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979); cf. 7 U.S.C. § 2131; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); Hoctor v. U.S. Dept. of Agriculture, 82 F.3d 165, 168 (7th Cir. 1996). **[**16]** They can ban bullfights and cockfights and the abuse and neglect of animals.

Of course Illinois could do much more for horses than it does--could establish old-age pastures for them, so that they would never be killed (except by a stray cougar), or provide them with free veterinary care. ***HN10***[⬆] But it is permitted to balance its interest in horses' welfare against the other interests of its (human) population; and it is also permitted to take one step at a time on a road toward the humane treatment of our fellow animals. E.g., Greater Chicago Combine & Center, Inc. v. City of Chicago, supra, 431 F.3d at 1073; cf. Bowen v. Owens, 476 U.S. 340, 346-47, 106 S. Ct. 1881, 90 L. Ed. 2d 316 (1986); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488-89, 75 S. Ct. 461, 99 L. Ed. 563 (1955); Milner v. Apfel, 148 F.3d 812, 818-19 (7th Cir. 1998); Johnson v. Daley, 339 F.3d 582, 596 (7th Cir. 2003).

There is a wrinkle in this analysis, however, though unremarked by the parties. Zoos feed a considerable amount of horse meat to their charges. Brad Haynes, "Zoos in a Pickle Over Horse Meat," *Seattle Times*, Aug. 14, 2007, http://seattletimes.nwsource.com/html/localnews/2003835227_horsemeat14m.html (visited Sept. 18, 2007). For

living proof, we reproduce a photograph **[**17]** from Haynes's article, with its caption:

[SEE PHOTOGRAPH IN ORIGINAL]

> "Kwanzaa, a young South African lion at Cameron Park Zoo in Waco, Texas, celebrates his birthday with a cake made from 10 pounds of horse meat, plus whipped cream and a carrot."

As the article explains, American zoos, seeing the handwriting on the wall so far as the domestic slaughter of horses is concerned, are shifting to importing horse meat. So the slaughter of horses will continue. For all we know, Cavel may seek out a new market in America's zoos. We do not know why, with the cessation of horse slaughtering at the Texas slaughterhouses, Cavel has not done so already.

But even if no horses live longer as a result of the new law, a state is permitted, within reason, to express disgust at what people do with the dead, whether dead human beings or dead animals. There would be an uproar if restaurants in Chicago started serving cat and dog steaks, even though millions of stray cats and dogs are euthanized in animal shelters. A follower of John Stuart Mill would disapprove of a law that restricted the activities of other people (in this case not only Cavel's owners and employees but also its foreign consumers) on the **[**18]** basis merely of distaste, but American governments are not constrained by Mill's doctrine.

The careful reader will have noted that we have so far been discussing the legal principles governing state burdens on interstate commerce, though the Illinois statute burdens foreign commerce. ***HN11***[↑] Quite **[*558]** apart from economic consequences, an interference by a state with foreign commerce can complicate the nation's foreign relations, which are a monopoly of the federal government; states are not permitted to have their own foreign policy, their own embassies and consuls and ambassadors, and so forth. "Foreign commerce is preeminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.' *Board of Trustees v. United States, 289 U.S. 48, 59, 53 S. Ct. 509, 77 L. Ed. 1025, Treas. Dec. 46306 (1933)*." *Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448-51, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979)*; see also *Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 113 S. Ct. 1095, 122 L. Ed. 2d 421 (1993)*.

Suppose Cavel were the only source of horse meat for human consumption in Europe and the law provoked European governments into remonstrating with our State **[**19]** Department, which in response submitted to us an amicus curiae brief denouncing the law. See *Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 195, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983)*. True, a *Japan Line* challenge failed in *Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 324-28, 114 S. Ct. 2268, 129 L. Ed. 2d 244 (1994)*, even though a number of our trading partners complained loudly about a state law that increased the costs to foreign companies of filing U.S. tax returns. But the case was special because Congress had repeatedly refused to grant the relief sought by those companies. Although Congress had not explicitly authorized the state practice, the Court ruled that Congress's lengthy consideration, followed by inaction, was an implicit authorization that defeated the *commerce-clause* challenge.

But assuming therefore that the doctrine of *Japan Line* survives the *Barclays Bank* case, this cannot help Cavel, which did not tell the district court and has not told us what percentage of the horse meat consumed by Europeans it supplies and thus whether its being closed down is likely to have a big effect on the price of horse meat in Europe. And while it is true that the foreign minister of Belgium wrote a letter to Governor Blagojevich **[**20]** inquiring about the status of the bill that became the horse-meat amendment, he did not say that his government was opposing the bill. So far as we know, there was no follow-up (we have not been told whether the letter was answered and if so what it said); and we have heard nothing from any other foreign government or from the State Department.

The curtailment of foreign commerce by the amendment is slight and we are naturally reluctant to condemn a state law, supported if somewhat tenuously by a legitimate state interest, on grounds as slight as presented by Cavel. Yet we are not entirely happy about having to uphold the Illinois statute. That the company is foreign-owned and its entire output exported means that the shareholders and consumers harmed by the amendment have no influence in Illinois politics, though there is no hint in the history of the amendment of local hostility to foreigners but only of indifference to them, in the remark of the state's agriculture director that "there is no *domestic* market for horsemeat and, *therefore*, no need for this practice to continue in Illinois." Governor's Office Press Release, "Gov. Blagojevich Signs Legislation Banning the Slaughter of **[**21]** Horses in Illinois for Human Consumption," May 24, 2007,

www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=5995 (visited Sept. 5, 2007) (emphasis added).

[*559] The fact that the governor's signing statement acknowledges the role of the Hollywood actress Bo Derek, author of the book *Riding Lessons: Everything That Matters in Life I Learned From Horses* (2002), in outlawing the slaughtering of horses could be thought to inject a frivolous note into a law that forces the closing of a business that has very little to do with the people of Illinois. But this is not a basis for invalidating a nondiscriminatory statute that interferes minimally with the nation's foreign commerce and cannot be said to have no rational basis.

Although the appeal is from the denial of a preliminary injunction, HN12[↑] the merits of Cavel's challenge to the horse-meat law have been fully briefed and argued and there are no unresolved factual issues the resolution of which in a trial would alter the result. In such a case, courts treat the appeal as if it were from a final judgment. *Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 494-95, 20 S. Ct. 708, 44 L. Ed. 856, 1900 Dec. Comm'r Pat. 285 (1900)*; *Illinois Council On Long Term Care v. Bradley, 957 F.2d 305, 309-10 (7th Cir 1992)*; **[**22]** *Amandola v. Town of Babylon, 251 F.3d 339, 343-44 (2d Cir. 2001)* (per curiam); *Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1272-74 (11th Cir. 2005)*. So the judgment is affirmed, the suit dismissed with prejudice, and the injunction that we granted pending appeal dissolved.

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