UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

GRETCHEN E. WHITMER and ROBERT GORDON,

Defendants.

No. 1:20-cv-00360

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

DEFENDANTS WHITMER AND GORDON'S BRIEF IN SUPPORT OF MOTION TO DISMISS

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BRIEF IN SUPPORT OF DEFENDANTS WHITMER AND GORDON'S MOTION TO DISMISS

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Dated: June 5, 2020

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1. Are Plaintiffs' claims moot under the newly issued executive orders?

2. Are Plaintiffs' claims also not justiciable for lack of standing and ripeness?

3. Do Plaintiffs otherwise fail to state a claim concerning their federal constitutional challenges?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Ammex, Inc. v. Cox, 351 F.3d 697 (6th Cir. 2003).

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

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

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

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

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

Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272 (6th Cir. 1997).

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992).

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

Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014).

INTRODUCTION

Under settled law, the government may temporarily restrict commercial activity when sufficient public health concerns take priority. The seriousness of the current pandemic is beyond dispute. The temporary nature of the restrictions that Plaintiffs have challenged in this case is also undisputed. Indeed, those restrictions have been lifted. Accordingly, Plaintiffs' claims are moot and otherwise not justiciable as presented. On their merits, they fail under the same law that authorized the restrictions in the first place. The necessary and appropriate legal outcome is dismissal of all of Plaintiffs' claims.

The requirement that a case or controversy exists is one of the threshold conditions of every legal dispute. On May 21, 2020, the Governor issued Executive Order 2020-96, which among other things rescinded Executive Order 2020-17 effective May 29, 2020, removing any requirement that health care facilities continue to implement a plan to postpone nonessential medical and dental procedures. As of May 29, nothing inhibits the dental Plaintiffs from safely reopening their dental practice in full.[1] For the commercial Plaintiffs, limitations on their business operations have been incrementally lifted over the past five to six weeks through a series of orders, leaving them free to engage in the very commercial activity they claim was restricted by previous, rescinded orders. As a

[1] The one-week delay in the effective date of the rescission was designed to ensure adequate time for facilities to implement the workplace safeguards required under E.O. 2020-96's companion order on that topic, E.O. 2020-97.

result, the case is moot. This Court should dismiss the case for that reason alone. Additionally, Plaintiffs' claims also fail for lack of ripeness and standing, including lack of organizational standing for at least one Plaintiff.

On their merits, Plaintiffs' claims fare no better. Claims similar to those raised by the Plaintiffs have already been evaluated and rejected as unlikely to be successful on the merits in other federal courts as well as the Michigan Court of Claims. That court's reasoned analysis applies just as well in this case, recognizing the significant judicial deference due to the reasonable and temporary measures challenged here.[2]

It is well established that, "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 27 (1905). To that end, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." *Id.* at 26. And when acting on questions fraught with medical and scientific uncertainties, the broad authority given to and duly exercised by state officials should not be "subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise

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

to assess public health and is not accountable to the people." *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California*, 509 U.S. ___, ___ (2020) slip op., p. 2 (summary order released May 29, 2020) (Roberts, C.J., concurring) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)).

The well-settled rule of law from *Jacobson* permits a state, in times of public health crises, to reasonably restrict the rights of business and individuals alike in order to secure the safety of the community. The scourge of COVID-19—a novel virus that quickly spread across the entire planet, infecting millions, and killing over three hundred and fifty thousand—presents such a crisis. Jurisdictions across the globe have had to impose aggressive measures to stem the viral tide that has overwhelmed healthcare systems worldwide. Schools have been shuttered, gatherings have been postponed, and business operations have been curtailed.

Michigan is one of the states hardest hit by the pandemic. As of June 4, 2020, there have been 58,241 persons confirmed infected and 5,595 have died, all in less than three months. There is no dispute that in the absence of any vaccine, social distancing has been the most effective way to combat the virus and keep these numbers from escalating. Recognizing this, Defendant Governor Gretchen Whitmer and Director Robert Gordon have taken bold, yet reasonable and necessary, steps to prioritize social distancing in Michigan.

In a series of executive orders, Governor Whitmer exercised her authority under Michigan law to put measures in place to suppress the spread of the virus

and protect the public health. The restrictions that Plaintiffs challenge here are part of this broader network of response efforts to suppress the spread of COVID-19, protect the State's health care resources from rapid depletion, and avoid many needless deaths.

These temporary response measures are designed to strike a reasonable balance between the need for unnecessary in-person contact to be regulated and the need for essential services to continue. Most importantly, they have worked for the benefit of the public health of everyone who lives in Michigan. As a result of them, countless lives have been saved, the curve of the virus's spread has been flattening, and the Governor has been able to gradually and correspondingly lift a number of the previously imposed restrictions—including the very ones challenged here.

Providing Plaintiffs with their requested relief would unduly disregard the deference that is owed the executive branch's management of this public health crisis and would undermine its effectiveness in a time of most dire need. The judicial creation of exceptions to these public health measures on a case-by-case, piecemeal basis infringes on the state's authority to act in a public health crisis and threatens its overarching plan to cope with the dangers and protect the lives and welfare of all Michiganders. Even if they were justiciable, the claims Plaintiffs raise lack merit and they should be dismissed.

STATEMENT OF FACTS

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

It is widely known and accepted that COVID-19, the disease that results from the virus, is highly contagious, spreading easily from person to person via "respiratory droplets."[3] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease.[4] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces, and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover, since many of those infected experience only mild symptoms, a person could spread the disease before he even realizes he is sick. Most alarmingly, a person with

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

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

COVID-19 could be asymptomatic, yet still spread the disease.[5] Everyone is vulnerable either as a potential victim of this scourge or a carrier of it to a potential victim.

Because there is no way to immunize or treat for COVID-19, the Centers for Disease Control and Prevention have indicated the best way to prevent illness is to "avoid being exposed."[6] And as experience from prior pandemics such as smallpox and the 1918 Spanish Influenza indicates, early intervention to slow COVID-19's transmission is critical.

In keeping with this advice, governmental entities have stressed the critical import of "social distancing," the practice of avoiding public spaces and limiting movement.[7] The objective of social distancing is what has been termed "flattening the curve," that is, reducing the speed at which COVID-19 spreads. If the disease spreads too quickly, the limited resources of our healthcare system could easily become overwhelmed.[8]

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

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[5] (*Id.*)

[6] (*Id.*)

[7] (*Id.*)

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

powers available to the Governor under Michigan law.[9] On March 13, 2020, Governor Whitmer issued Executive Order 2020-5, prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[10] Yet, even in the face of the social distancing recommendations and the six-foot rule, on Saturday, March 14, the public was out in droves.

On March 16, 2020, the Governor ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[11] And on March 17, 2020, the Governor issued an order rescinding Executive Order 2020-5, changing the cap on assemblages to fifty persons in a single shared indoor space, and expanding the scope of exceptions from that cap.[12]

In response to impending healthcare shortages, the Governor puts in place a temporary requirement that certain medical and dental care facilities to implement plans postponing non-essential medical and dental procedures.

On March 20, 2020, the Governor issued Executive Order 2020-17, entitled "Temporary restrictions on non-essential medical and dental procedures." E.O.

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[9] E.O. No. 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html. (Attached as Exhibit E).
[10] E.O. No. 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html. (Attached as Exhibit F).
[11] E.O. No. 2020-9, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. (Attached as Exhibit G) (Replaced by E.O. 2020-20).
[12] E.O. No. 2020-11, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521890--,00.html. (Attached as Exhibit H).

2020-17 required "all hospitals, freestanding surgical outpatient facilities, and dental facilities, and all state-operated outpatient facilities . . . must implement a plan to temporarily postpone . . . all non-essential procedures." (E.O. 2020-17, ¶ 1, Exhibit I.) As the order signaled in its preamble, this postponement-plan requirement was imposed "[t]o mitigate the spread of COVID-19, protect the public health, provide essential protections to Michiganders, and ensure the availability of health care resources," such as personal protective equipment, hospital beds, and other health care resources – which were in high and immediate demand as a result of this aggressively spreading pandemic, but in troublingly short supply.

The scope of the postponement plan required by the order was flexible and deferential to the judgment of the medical providers responsible for the care and treatment of the patient. Indeed, the order defined "non-essential procedure" as "a medical or dental procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, *as determined by a licensed medical provider*." (E.O. 2020-17, ¶ 1) (emphasis added). The order was thus designed to ensure that patients would continue to receive the treatment and care that, in the best clinical judgment of their medical providers, was necessary to preserve their health and safety during this pandemic.

Correspondingly, the order offered a few basic guideposts for its requisite postponement plan, which tracked this general principle. For instance, the order provided that "[a] plan . . . must exclude from postponement emergency or trauma-

related procedures where postponement would significantly impact the health, safety, and welfare of the patient." (*Id.* ¶ 3.) Similarly, a plan

> must postpone, at a minimum, any cosmetic or aesthetic procedures (such as veneers, teeth bleaching, or cosmetic bonding); any routine hygiene appointments; any orthodontic procedures that do not relieve pain or infection, do not restore oral function, or are not trauma-related; initiation of any crowns, bridges, or dentures that do not relieve pain or infection, do not restore oral function, or are not trauma-related; any periodontal plastic surgery; any extractions of asymptomatic non-carious teeth; and any recall visits for periodontally healthy patients. [E.O. 2020-17, ¶ 3.]

On May 21, 2020, the Governor issued Executive Order 2020-96, which rescinded Executive Order 2020-17 effective May 28, 2020 at 11:59 p.m. (E.O. 2020-96, ¶ 19, Exhibit J.) As that order's preamble explained, the rescission was "reasonable" at that time because the urgent concerns that had required the order's issuance had shown sufficiently reliable signs of abatement: "our health-care capacity has improved with respect to personal protective equipment, available beds, personnel, ventilators, and necessary supplies." (E.O. 2020-96.)

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

These concerns abated, and E.O. 2020-17 was able to be rescinded, as a result of a series of swift and targeted responsive measures the Governor took to mitigate the spread of COVID-19 across this State. Namely, three days after the issuance of E.O. 2020-17, on March 23, 2020, Governor Whitmer issued Executive Order No. 2020-21, which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social

distancing, and other limited exceptions.[13] The order also prohibited, with limited exceptions, all public and private gatherings of any number of people that are not part of a single household.[14]

Over the weeks that followed, the Governor reissued that Stay Home order periodically, adjusting its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.[15]

In addition to rescinding 2020-17 discussed above, on June 1, 2020, the Governor issued another executive order, E.O. 2020-110, (Exhibit L), which continued the incremental and data-driven reopening of the State by rescinding E.O. 2020-96 and replacing its Stay Home restrictions with narrower and more permissive limitations on certain gatherings, events, and businesses. Plaintiffs remain free under this order to engage in the commercial conduct they allege was unduly restricted under prior executive orders.

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

[14] (*Id.*)

[15] *See* E.O. Nos. 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92. Alongside these Stay Home executive orders, Director Gordon, acting pursuant to his authority under MCL 333.2253, issued emergency orders concluding that COVID-19 had reached epidemic status in Michigan and that the measures imposed in the Stay Home orders and certain related executive orders were necessary to control the epidemic and protect the public health. The first of these emergency orders was issued on April 2, 2018, with subsequent versions rescinding and replacing the prior versions of the order issued May 18, 2020 and May 21, 2020. As presented, Plaintiffs challenges appear directed primarily at the Governor's executive orders and only nominally against Director Gordon's April 2 Order.

Plaintiffs before the Court and their constitutional claims.

The following Plaintiffs seek declaratory relief specific to their respective claims of diminished economic activity:

> **Signature Sotheby's International Realty, Inc. ("Sotheby's")** – "a full service residential brokerage" claiming injuries under E.O. 2020-70 and 2020-77 (Am. Compl., ¶ 11.)
>
> **Executive Property Maintenance, Inc. ("EPM")** – a business that provides services to commercial, municipal, and residential clients in the form of lawn, snow, ice, fertilization, property maintenance, planting, softscape, hardscape, design and build, irrigation, and water feature services and claiming injuries under E.O. 2020-59 (*Id.*, ¶ 12.)
>
> **Intraco Corporation, Inc. ("Intraco")** – an exporter of automotive glass, automotive chemicals, and other goods. It claims for unspecified reasons that its business is based on personal face-to-face relationships and is not conducive to videoconferencing. (*Id.*, ¶ 13.)
>
> **Casite Intraco, LLC ("Casite")** – a wholly owned subsidiary of Intraco that distributes engine oil, fuel additives, and other after-market automobile products. It also claims for unspecified reasons that its business is based on personal face-to-face relationships and is not conducive to videoconference. (*Id.*, ¶ 14.)
>
> **Bahash & Company, LLC ("Hillsdale Jewelers)** – a storefront jewelry retailer that also provides jewelry repair services. (*Id.*, ¶ 15.)
>
> **William A. Shortt, D.D.S. & Therese F. Shortt, D.D.S. ("Shortt Dental")** – a professional corporation that provides dental services. (*Id.*, ¶ 16.)
>
> **Midwest Carwash Association, Inc. ("MCA")** – an association of car washes in Michigan, Wisconsin, Illinois, Indiana, and Ohio, which provides members with "programs and services at discount rates and networking opportunities with other carwash operators, manufacturers, and suppliers." (*Id.*, ¶ 17.)

Plaintiffs assert the following theories of constitutional violation:

> Count I – Dormant Commerce Clause

Count II – Privileges and Immunities

Count III – Privileges or Immunities

Count IV – Procedural Due Process

Count V – Substantive Due Process

Count VI – Equal Protection

Count VII – Void for Vagueness

Threshold issues of justiciability stand in the way of each of these claims. And on their merits, each theory of constitutional violation is unfounded on its face. For the reasons stated below, dismissal of all claims is appropriate.

STANDARD OF REVIEW

In a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(1) and (6), this Court must accept as true the allegations of the complaint and then determine whether the statements are sufficient to make out a right of relief. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). However, although it must accept well-pled facts as true, the Court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). In evaluating the sufficiency of a plaintiff's pleadings, this Court may make reasonable inferences in the non-moving party's favor, "but [this Court is] not required to draw [p]laintiffs' inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, conclusory allegations are "not entitled to be assumed true." *Iqbal*, 556 U.S. at 681.

ARGUMENT

As an initial matter, there are threshold issues of justiciability that Plaintiffs cannot overcome. In particular, Plaintiffs' claims are moot and are not ripe for judicial review, and Plaintiffs lack standing to bring them.

I. Plaintiffs' claims are moot because Governor Whitmer has issued a series of executive orders that permit the very activities Plaintiffs allege are prohibited.

Since the filing of the complaint, the Governor has issued an executive order rescinding the challenged restrictions on non-essential dental procedures, effective May 29, 2020. Other commercial restrictions were also lifted incrementally over the course of various reissuances of the Stay Home order, including the June 1, 2020 issuance of E.O. 2020-110. Similarly, Plaintiffs' claims regarding Director Gordon's April 2, 2020 epidemic order are also moot. That order was expressly rescinded by Director Gordon through an order issued on May 18, 2020.[16]

Considering this change in circumstances, the Plaintiffs have no legally cognizable interest in the outcome of this litigation and their claims are moot. This Court should dismiss on this basis alone.

[16] https://www.michigan.gov/documents/coronavirus/MDHHS_epidemic_order_-_reinforcing_governors_orders_5-18_SIGNED_691125_7.pdf

A. Without a live case-or-controversy, Article III Courts lack jurisdiction.

A case is moot and is outside of this Court's Article III authority "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (cleaned up). An "advisory opinion[] on abstract propositions of law" must be avoided. *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).

In fact, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation" within Article III "of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotes omitted). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). The limits of Article III jurisdiction are "built on separation-of-powers principles," which "serve[] to prevent the judicial process from being used to usurp the powers of the political branches." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407 (2013)).

Generally, and pertinent here, the legislative repeal of a statute renders a case challenging that statute moot. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir 1997); *see also Massachusetts v. Oakes*, 491 U.S. 576, 582-84 (1989) (refusing to reach First Amendment overbreadth challenge because legislative amendment of the challenged statute while the case was pending rendered the issue moot). The U.S. Supreme Court has also applied this principle

to the rescission of executive orders, holding that that when "temporary restrictions" in an executive order "expire[ ] before . . . [a] [c]ourt [takes] any action" the action is rendered moot. *See Trump v. Hawaii*, 138 S.Ct. 2392, 2404 (2018) (citing *Trump v. IRAP*, 138 S.Ct. 353 (2017), and *Trump v. Hawaii*, 138 S.Ct. 377 (2017)).

Such circumstances are present here. The Governor has rescinded Executive Order 2020-17, *see* Executive Order 2020-96, as well as the restrictions challenged in the Stay Home Order, *see, e.g.,* Executive Order 2020-110. Accordingly, there is nothing left to remedy in this case. Plaintiffs' claims are mooted.

In an attempt to avoid mootness, Plaintiffs may argue that the Governor's action amounts to a "voluntary cessation." While mere "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000), where "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," a case is moot. *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (quoting *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979)). And, where the government is the actor sought to be enjoined, a course change "has been treated with more solicitude by the courts than similar action by private parties." *Id.* (cleaned up). Official government action "provides a secure foundation for dismissal based on mootness so long as it appears genuine." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale*

v. Turnock, 841 F.2d 1358, 1365 (7th Cir. 1988), in turn citing 13A Wright, Miller & Cooper *Federal Practice and Procedure* § 3533.7, at 353 (2d ed. 1984)).

The Governor's new executive orders are not mere "voluntary cessation." In fact, the challenged executive orders no longer have any legal force. They are extinct. The lifting of the temporary restrictions, like the various other modifications made in these executive orders, is "genuine" and driven by the Governor's ongoing assessment of the pandemic and the changing needs of the state to combat it. *Mosely*, 920 F.2d at 415. This is not a circumstance in which the Governor was or is dead-set on enjoining specific activities, and the new orders are simply a shadow to avoid litigation.

To the contrary, the now-rescinded executive orders imposed temporary regulations, *see, e.g.,* 2020-17's Title ("Temporary restrictions on non-essential medical and dental procedures"), responding to the needs of the evolving public health crisis and the scarcity of medical resources. And as E.O. 2020-110 well summarized, these temporary restrictions were put in place, and then incrementally lifted, as part of the Governor's overarching strategy to move this State and its residents as swiftly and safely as possible through the surge of COVID-19's spread that began to ravage Michigan this spring:

> 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. . . . 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. [E.O. 2020-110, Preamble.]

The novelty of the virus and the rapidity of its spread required such nimble action. And as data evolved (and continues to evolve) and circumstances changed (and continue to change), with additional executive orders, the Governor has modified the scope of the temporarily restricted activities to appropriately balance the stringent measures necessary to protect the public health with carveouts to sustain the basic needs of society.

Viewed as a continuum, the Governor's Executive Orders show an evolution of responses framed by an increasing body of knowledge being brought to bear on ever-changing conditions. For Plaintiffs to survive the mootness test, they must convince the Court that the Governor will be in a position to invoke the same responses in the future to identical conditions. The notion the Governor will again put into place the same restrictions is speculative, and the notion that identical conditions will exist in this dynamic situation in the future is conjecture premised on an impossibility.

The mootness here is confirmed by comparison to cases in which the concept of "voluntary cessation" has been illustrated. The Governor's new executive orders are not merely a governor's "announcement" to apply a law differently after the Supreme Court granted certiorari, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 fn.1 (2017), or akin to a private party's temporary compliance with a pollution permit, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). *See also Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (after the Supreme Court granted

certiorari on the issue whether a public-sector union could require all members to pay a fee supporting the union's political activities, the union's sending of a notice offering a refund to all class members was an insufficient voluntary cessation). These types of "cessations" lack the force of law and are easily reversed.

But here, "there is no reasonable expectation that the [alleged] wrong will be repeated." *Mosley*, 920 F.2d at 415 (cleaned up). The Governor has not simply voluntarily halted the enforcement of the challenged executive orders. Instead, the Governor has taken an official executive action that rescinds and replaces them, to match the changed needs and conditions presented by this pandemic. Those needs and conditions will surely continue to change, but whether, as a result, Plaintiffs might at some point find themselves again subject to and aggrieved by the same restrictions challenged in this case is a matter of pure speculation, not "reasonable expectation." And, as mentioned, the above legal analysis showing the mootness of Plaintiffs' challenge to the executive orders applies with equal force to its claims regarding the order issued by Director Gordon. Accordingly, Plaintiffs' claims are moot and should be dismissed.

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

Even if Plaintiffs' claims were somehow not moot, they would nonetheless be nonjusticiable for lack of standing. To have Article III standing, a plaintiff must have a personal stake in the outcome of a controversy, and that stake must be in the form of an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Driehaus*, 573 U.S. at 158. An allegation of future

injury may suffice if the threatened injury is "certainly impending," or there is a "'substantial risk' that the harm will occur." *Id.* And as the Supreme Court has made clear, when—as here—the merits of a constitutional question pit the judiciary to pass on the constitutionality of the other branches of government, the standing inquiry is "especially rigorous." *Clapper*, 568 U.S. at 408.

Plaintiffs bring their claims in a pre-enforcement posture. As such, to satisfy the "injury-in-fact" requirement of Article III standing, they must allege (1) an intention to engage in the conduct they claim is unconstitutionally proscribed and (2) a credible threat of prosecution. *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016). Here, Plaintiffs have satisfied neither of these requirements. They face no credible threat of prosecution for violating the restrictions because the restrictions they challenge no longer exist. Furthermore, even when the orders were in effect, Plaintiffs commendably acknowledge that they did not violate the orders and they have given no reason to believe that they had any intent to do so. Plaintiffs' standing cannot survive cursory scrutiny, let alone the "especially rigorous" sort that applies to their claims. *Clapper*, 568 U.S. at 408. As a result, dismissal for lack of Article III standing is warranted.

C. Plaintiffs' claims are not ripe.

Relatedly, Plaintiffs' claims are also unripe. "Ripeness . . . is a question of timing," and "becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997); see *id.* ("A case is ripe for pre-enforcement review under the

Declaratory Judgment Act only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (cleaned up)). Where, as here, the claims at issue arise in the pre-enforcement context, the ripeness of the claims depends on: (1) whether "legal analysis [of the claims] would benefit from having [the] concrete factual context" afforded by an enforcement action; (2) "the extent to which the enforcement authority's legal position is subject to change before enforcement"; and (3) "the hardship to the parties of withholding court consideration." *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003).

Under these standards, Plaintiffs' pre-enforcement challenges are plainly not ripe. With the challenged restrictions fully rescinded, "the enforcement authority's legal position" has already changed prior to Plaintiffs experiencing any enforcement action under those orders, and Plaintiffs face no limitation in, or threat of enforcement for, engaging in their desired conduct. The restrictions which Plaintiffs now challenge were never held out to be anything other than temporary, and so they have proven to be.

While Plaintiffs may claim the restrictions may return, that assertion, as discussed, is entirely speculative and based only on the general possibility that a resurgence of COVID-19 at some point in the future might require the imposition of emergency response measures that are currently not necessary. But there is nothing to indicate that any such resurgence is at all certain or imminent; indeed, the Governor and Director are doing, and will continue to do, everything in their

power to avert it. Nor is there anything to indicate that, should a resurgence occur at some undetermined point in the future, it will be necessary to reimpose the same particular restrictions that were required to combat the virus's initial surge. The necessary response will instead depend on a number of factors, including the nature and extent of the resurgence and the state's preparation for it—all of which may differ substantially from the circumstances the State has confronted over these past few months.

None of these factors, or how they might impact the Plaintiffs at some point in the future, is (or even can be) known at this time: there is no "concrete factual context" by which this Court could measure the constitutionality of any future limitations Plaintiffs might experience, nor any assurance or even indication that any such limitations would resemble the ones that Plaintiffs have challenged. And there is no hardship that might befall Plaintiffs from this Court waiting for these circumstances to materialize, if they ever do, before attempting to adjudicate any potential claim of constitutional infringement that Plaintiffs might allege to arise from them. There is simply nothing in this case that is "substantial" enough "and of sufficient immediate and reality" for this Court to consider at this time. *Magaw*, 132 F.3d at 284. Plaintiffs' claims are thus not ripe, and they warrant dismissal on that basis as well.

D. Plaintiff MCA lacks organizational standing.

For additional reasons, Plaintiff MCA lacks standing. An organization can establish standing two ways. First, it may assert "organizational standing" on its

own behalf because it has suffered a palpable injury as a result of the defendants' actions. *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 332–33 (6th Cir. 2002). Second, an organization may claim standing as a representative of its members who would have standing to sue individually. *Id.* To establish standing, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000).

Here, MCA contends that it has suffered its own injury by way of a reduction in membership. (Am. Compl., ¶ 73(e).) But MCA offers nothing to support drawing such a causal connection between that reduction and the executive orders. As a result, the contention is conjecture and insufficient to establish standing. In addition, MCA claims members in several states other than Michigan. It is therefore unclear from the complaint what real injury MCA has suffered that is not simply derivative of its members' putative claims – or, for that matter, what proportion of the injury arose in Michigan as opposed to Illinois, Indiana, Ohio, or Wisconsin.

Further, regardless of whether MCA is asserting standing on its own behalf or on behalf of its members, in light of the fact that MCA and its member car washes can now operate in Michigan, neither MCA nor any of its members can establish the "injury in fact" or "redressability" elements of standing. As a result,

MCA's claims must be dismissed. *See Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 607 (6th Cir. 2007) ("If Plaintiffs cannot establish constitutional standing, their claims must be dismissed for lack of subject matter jurisdiction.")

II. Plaintiffs' claims lack merit.

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

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

The worldwide impact of COVID-19 is recognized by all. Such an extraordinary circumstance requires extraordinary governmental measures. The measures taken in the Governor's executive orders were necessary to meet the demands of these extraordinary times and are reasonable and constitutional. Accordingly, judicial invalidation of those orders is not warranted.

1. *Jacobson v. Commonwealth of Massachusetts*

Faced with "great danger[ ]," state actors are permitted great latitude to secure the public health. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905). And in this time of crisis, securing the public health requires temporary

sacrifices by each of us: "Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Id.* at 26.

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

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

Jacobson, 197 U.S. at 29.

Jacobson even highlighted the circumstance, without hesitation, in which seemingly healthy people were quarantined against their will aboard a ship on which others had cases of serious diseases. *Id.* at 29. The Court noted that such a drastic measure was reasonable "until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the

community at large has disappeared." *Id.* Recognizing the separation of powers, and the limits on the judiciary to invade the authority of a co-equal branch, the Court refused to "usurp the functions of another branch of government" by second-guessing the executive's exercise of police power in such circumstances. *Id.* at 28.

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

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

And *Jacobson* not only remains good law, *see, e.g.*, *Kansas v Hendricks*, 521 U.S. 346, 356 (1997) (block quoting *Jacobson* in support of the proposition that "an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context"), but federal circuits have recently had occasion to apply *Jacobson* to COVID-19-related regulations, upholding certain restrictions that burden a fundamental right. *See, e.g., In re Abbott*, 954 F.3d 772, 786 (5th Cir., April 7, 2020) ("*Jacobson* instructs that *all* constitutional rights may be reasonably

restricted to combat a public health emergency.") (emphasis in original); *In re Rutledge*, 956 F.3d 1018 (8th Cir., April 22, 2020).[17]

Recently, the Sixth Circuit has confirmed that *Jacobson* is the proper starting point for considering restrictions promulgated in response to the COVID-19 crisis that touch upon constitutional rights. *See Adams & Boyle, P.C. v. Slatery*, ___ F.3d ___ (6th Cir., issued April 24, 2020); *Maryville Baptist Church, Inc. v. Beshear*, ___ F.3d ___ (6th Cir., issued May 2, 2020)); *Roberts v. Neace*, ___ F.3d ___ (6th Cir., issued May 9, 2020). In those cases, the Court determined that despite the very deferential standard of *Jacobson*, the Plaintiffs were likely to succeed on the

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

merits of their claims challenging a complete abortion ban in Tennessee and a total ban on group religious services in Kentucky.

Quite plainly, the restrictions considered by the Sixth Circuit in *Adams & Boyle*, *Maryville Baptist Church, Inc.*, and *Roberts* were different in kind and severity than the limited and temporary (and now rescinded) restrictions challenged by the Plaintiffs in this case. Unlike those cases, Governor Whitmer's executive orders did not impose a complete ban on the exercise of fundamental constitutional rights. Instead, the Plaintiffs challenge temporary and partial restrictions on certain commercial activity—none of which comes close to plainly or palpably invading a fundamental right beyond all question, and all of which had a real and substantial relation to stopping the spread of the virus, preventing the overwhelming of this state's health care system, and avoiding needless deaths.[18]

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

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

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

There is no viable path for Plaintiffs around *Jacobson*'s well-settled rule of law. Plaintiffs cannot dispute the gravity of the pandemic in Michigan. It is a once-in-a-century kind of epidemiological public health crisis. In such times, the State has wide plenary authority to temporarily restrict activity that presents a diffuse but real threat to the public health.

Thus, under *Jacobson* and applicable principles of separation of powers, judicial deference to the Governor's authority responding to the crisis is paramount. Indeed, the Michigan Court of Claims has recognized as much in denying a motion for a preliminary injunction. As so aptly stated by the Michigan Court of Claims:

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

(Ex A, p. 11.) Plaintiffs' claims cannot survive this settled standard. Therefore, the Court should dismiss the complaint.

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

Plaintiffs allege the impingement of constitutional rights as a result of E.O. 2020-17's (now-rescinded) requirement that certain health care facilities temporarily implement a postponement plan for non-essential procedures, and also object to various (now-rescinded) restrictions on retail and other commercial activity. These claims plainly fail under *Jacobson*'s duly deferential review.

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

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

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

In responding to this pandemic, the Governor has had to make countless difficult decisions, in short order and with many lives at stake. Plaintiffs disagree with some of these decisions. While no line-drawing is immune to disagreement, judicial deference is owed to the Governor's assessment of how to most effectively limit the spread of the virus while not restricting life-sustaining activity and services. That assessment included consideration of the temporary nature of any restriction and what as a general matter could be endured while flattening the curve.

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

To wit, a simple trip to a dentist, retailer, or other such business might appear both innocuous and inoculated for purposes of the virus.

But appearances are deceiving. To get to that position, the individual patient, customer or employee likely had to handle multiple objects – vehicles, gas pumps, handles and door knobs, etc. – as did each of the other workers, patients, and/or patrons at the business or facility. These individuals then all share space, breathe the same air, and touch common surfaces. Each of these contacts increases the incidence of this highly contagious and asymptomatically transmittable virus spreading. Like innumerable small breezes against a sail, enough will push a sailboat over a waterfall if the course is not changed and the sail not brought under control. Use of personal protective equipment (PPE), sanitizers, and the like will only do so much to avoid these harms and presents the downside of depleting resources critically needed to provide emergency care to those afflicted by COVID-19 and other conditions immediately threatening their health and safety.

This last point merits emphasis. Until recently, Michigan, like other states, had been in the throes of an impending and dangerous shortage of health care resources available to handle the steep and immediate demands created by this pandemic, from PPE for medical professionals (and other critical infrastructure workers), to ventilators and other necessary medical supplies, to hospital beds. As the virus began to ravage the State, health systems were quickly reaching or exceeding their capacity. Medical supplies were dwindling, and beds in intensive care units were in short supply. There was a very real and imminent danger that

hospitals could be completely overrun. Indeed, the TCF Center (formerly Cobo Center) – typically the home of auto shows and black-tie galas – was retrofitted as a makeshift field hospital in anticipation of local bed shortages.[19] That it has not seen thousands of patients is a blessing, and a result of the carefully calibrated measures put in place—like E.O. 2020-17 and the Stay Home orders—to stem the tide.

Accordingly, there was ample good reason to temporarily regulate health care interactions and business activities, as the executive orders challenged in this case did. Those restrictions served to protect the public health of the State and its residents, and to prevent its health care system from collapsing under the strain of easily transmittable, potentially fatal, and still untreatable virus. They—like the broader set of measures regarding travel and in-person work and activities that were put in place by the Governor's emergency orders—were temporary, tailored, and aimed at guiding the state as swiftly and safely as possible through the severe dangers posed by this pandemic.

Plaintiffs complain that the restrictions they challenge lasted too long. But adequate time must be given for the public health goals to be served and a transition to economic normalcy to return—and due deference must be given under

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

Jacobson to the Governor's assessment and actions in that regard.[20] See, e.g., *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California*, 509 U.S. ___ (2020) (Roberts, C.J., concurring in summary denial order) (explaining that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," and the judgment of "the politically accountable officials" to whom those decisions are entrusted "should not be subject to second-guessing" by the courts).

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

Judicial deference is appropriate not just on the substance of this challenge but the timing as well. As a matter of separation of powers, distinctions between

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

essential and non-essential and safe and unsafe are best left to the branch designed for and equipped to make those calls. The Governor's executive orders should not be undercut by disparate preliminary judicial carveouts in the wake of a particular litigant's race to the courthouse.

In sum, the limited and temporary restrictions in the Governor's orders have been necessary and appropriate, with a "real [and] substantial relation" to stopping the spread of the virus, and they most certainly do not constitute, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. As stated by the Michigan Court of Claims:

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

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

B. Even absent *Jacobson's* deferential standard, Plaintiffs' constitutional challenges fail.[21]

1. Plaintiffs fail to state a viable dormant commerce clause claim.

By empowering Congress to regulate interstate commerce, the Commerce Clause is interpreted to, correspondingly, prohibit states from interfering with the same. U.S. Const., Art. I, s. 8, cl. 3. This negative implication, commonly known as

[21] There is no plausible claim for relief against Director Gordon because none of the constitutional challenges in the complaint contain any allegations against Director Gordon.

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

Any burden of the executive orders on interstate commerce or out-of-state actors is minuscule compared to the benefit to the state and local communities as a whole. The challenges presented by the spread of COVID-19 required swift action throughout Michigan to stop the spread of a highly contagious and deadly disease. This includes the complained-of restrictions on business and dental activity raised in Plaintiffs' amended complaint. Many businesses and individuals throughout the State have faced these necessary and temporary restrictions.

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

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

2. Plaintiffs fail to state a viable privileges and/or immunities claim.

Plaintiffs bring claims under both the Privileges and Immunities Clause, U.S. Const. art. IV, Sec. 2, and the Privileges or Immunities Clause of the Fourteenth

Amendment, U.S. Const. amnd. XIV, Sec. 1.[22] Plaintiffs' claims under these clauses fail because under settled law the clauses do not provide Plaintiffs protection from the laws of their own state.

The Privileges and Immunities Clause states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, Sec. 2. The Privileges or Immunities Clause of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . [U.S. Const. amnd. XIV, Sec. 1].

The Supreme Court has long held that the two clauses do not establish or protect any rights of citizens against their own states. See *Paul v. State of Virginia*, 75 U.S. 168, 180 (1868), *overruled in part by United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533 (1944); *United Bldg. & Const. Trades Council of Camden Cty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 217 (1984) (holding that in-state "residents have no claim under the Privileges and Immunities Clause" against their own state"); *Slaughter-House Cases*, 83 U.S. 36, 77-78 (1872) (noting that the Privileges and Immunities Clause does not "profess to control the power of the State governments over the rights of its own citizens" and applying that restriction to the Privileges or Immunities Clause).

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[22] There is no meaningful difference between the two clauses as pled by Plaintiffs.

The reason for this is sound. The clauses are meant to protect noncitizens from discrimination by other states when they travel to those states. See *Paul*, 75 U.S. at 180 ("It was undoubtedly the object of the [Privileges and Immunities Clause] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.") The clauses do not create an independent, fundamental right to travel. Instead, they facilitate travel between the states by guaranteeing certain rights to all citizens of the United States as they travel between states. See *Saenz v. Roe*, 526 U.S. 489, 501 (1999) ("[B]y virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits.")

Plaintiffs argue that the Privileges and Immunities Clause protects a citizen's right to pursue a livelihood in a State other than the State in which he is a resident, and that the Privileges or Immunities Clause guarantees the right to travel between States and the right to engage in interstate commerce. They argue that prior executive order restrictions violated their rights to conduct business in and out of state and to travel out of state for business.

Plaintiffs' argument is fundamentally untenable. First, and most importantly, they do not have a claim under the clauses against their own state. *Paul*, 75 U.S. at 180; *United Bldg. & Const. Trades Council of Camden Cty. & Vicinity*, 465 U.S. at 217; *Slaughter-House Cases*, 83 U.S. at 77-78. Second, the

clauses do not guarantee the right to travel and conduct business out of state. See *Saenz*, 526 U.S. at 501. Indeed, the case Plaintiffs cite in their complaint, *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 386 (1978), held that "a *nonresident's* right to pursue a livelihood in a State other than his own, [is] a right that is protected by the Privileges and Immunities Clause." Finally, even if Plaintiffs could bring a claim under the clauses, the challenged restrictions did not treat non-residents any differently than residents. Its restrictions applied to anyone and everyone in Michigan. Thus, none of the lifted restrictions would have violated the clauses even as to nonresidents. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985) (requiring some level of unjustifiable discrimination against nonresidents to violate the clauses).

3. Plaintiffs fail to state a viable procedural due process claim.

It is difficult to discern what process Plaintiffs claim is lacking here for purposes of their procedural due process claim. The general touchstone for such claims is notice and an opportunity to be heard on a pre- or post-deprivation basis. *See Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976). But under the holding of *Mathews*, none of the instant Plaintiffs have suffered a final deprivation of any protected interest. The challenged executive orders contain temporary restrictions, not final ones. Additionally, *Mathews* concerned termination of disability benefits and not a generally applicable emergency order in a pandemic that need only be disseminated to the public through the usual media channels. Indeed, due process

is "flexible and calls for such procedural protections as the particular situation demands." *Morissey v. Brewer*, 408 U.S. 471, 481 (1972).

Here, Plaintiffs seem to be seeking some sort of process by which they can challenge a determination that their dental or commercial activity is "non-essential." But that is not a question that is amenable to any declaratory relief. Further, the dental Plaintiffs wholly overlook the fact that, under the executive orders, they themselves had flexibility and discretion to determine what procedures were essential on a case-by-case, patient-by-patient basis. The dental Plaintiffs can point to nothing to indicate that, given this "particular situation," due process would somehow "demand[]" further "procedural protections" regarding their determinations of what procedures are or are not necessary to preserve the health and safety of their patients during this pandemic. *Id.* And while the dental Plaintiffs may very well prefer not to have had to make these determinations over the preceding weeks, it is inevitable that any effective response to a rapidly unfolding and deadly pandemic will involve some measure of disruption to the normal operations of dental businesses.

For the commercial Plaintiffs, the amended complaint fails on its face to present a viable claim that any additional process was due here to realtors, jewelers, property managers, sellers of the goods described in the complaint, car wash associations, and the like. Many millions of individuals, businesses, and enterprises were all subject to the same general, temporary orders. Plaintiffs have offered nothing in the federal constitution or cases construing it that would have

required any more here than general promulgation of the temporary executive orders issued under emergency authority. See, e.g., *Hartman v Acton*, No. 2:20-CV-1952, 2020 WL 1932896, at *6-10 (S.D. Ohio Apr. 21, 2020) (in the context of a TRO, rejecting a plaintiff business owner's procedural due process challenge to Ohio's COVID-19-related "Stay-at-home order" that "direct[ed] non-essential businesses to cease operating their physical locations").

4. Plaintiffs fail to state a viable substantive due process claim.

The Sixth Circuit has recognized that a substantive due process violation occurs when arbitrary and capricious government action deprives an individual of a constitutionally protected property interest. *See Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1216-1217 (6th Cir. 1992); *see also Nectow v. City of Cambridge,* 277 U.S. 183, 187–88 (1928) (holding that a court should not interfere unless the locality's action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense") (internal quotation marks and citation omitted).

While challenges to arbitrary and capricious government action appear most frequently in cases involving zoning and other ordinances, *see, e.g., Vill. of Belle Terre v. Boraas,* 416 U.S. 1, 8 (1974), they are not necessarily limited to such cases, *see, e.g., Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 82–83 (1978) (noting that federal economic regulations will be upheld "absent proof of arbitrariness or irrationality on the part of Congress") (citation omitted).

Here, however, there was nothing illogical, arbitrary, or capricious about the Governor's promulgation of the executive orders. Given the characteristics of COVID-19, the restrictions ordered in the executive orders were necessary to protect the public from the rapid spread of an aggressive, untreatable, and potentially fatal disease, and to ensure this State's health care system had the capacity and resources to manage that spread. The same is true of any of the challenged pandemic orders signed by Director Gordon. "The fundamental nature of an individual's interest in liberty . . . may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *Salerno*, 481 U.S. at 750–51. Such was the case here.

In addition, there is nothing conscience-shocking about prioritizing types of medical care during a pandemic for purposes of not depleting or misdirecting scarce health-care resources (PPE, drugs, emergency room capacity, ICE capacity, etc.), nor about placing temporary limitations on certain types of business activities within the State in order to strike a necessary and carefully tailored balance between reducing in-person work and travel—and therefore human interactions and community spread of this deadly virus throughout the State—and allowing citizens to engage in essential functions. There is no substantive due process issue with these measures, and Plaintiffs' claims on that basis should be dismissed for failure to state a recognized claim for relief.

5. Plaintiffs fail to state a viable equal protection challenge.

Plaintiffs fall far short of establishing an equal protection claim. "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* Courts apply a "strong presumption" that a challenged law is valid and plaintiffs have the heavy burden of negating "every conceivable basis" which might support the law. *Id.* at 314-15.

For the reasons already stated, each challenged restriction had a rational basis. During a pandemic, it makes eminent sense to adopt measures that require social distancing, limit person to person contact, and preserve valuable PPE. This unsurprisingly meant different things for different businesses. For the dental Plaintiffs, for instance, it meant the temporary postponement of non-emergency dental care. For Sotheby's, realtor activity had to be remote for a few weeks. And for an organization like MCA, which itself does not allege to operate car washes, it had to limit its in-person programs, services, and networking opportunities that it provides to its members.

The amended complaint incorrectly presumes that each of these businesses was meaningfully similarly situated to different businesses that may have faced

looser restrictions under the prior orders. Not so. Even in a lockdown, people have to eat. So it is both rational and expected that grocery stores and food businesses would continue limited in-person operations while Plaintiffs could not. The same goes for pet shops, car repair businesses, and other industries more closely linked to life-sustaining activity and thus not similarly situated to Plaintiffs. The rational basis is the overarching response to the virus, and not the microscopic view of how each area of regulation might impact a particular business that takes exception to any particular line-drawing.

The efficacy of contact tracing provides yet another rational basis for how various lines are drawn as phases of society and the economy reopen. Allowing some social gatherings, for instance, does not imply that restricting commercial gatherings is irrational. In the case of families and social networks, the ability to perform contact tracing is easier than in the case of businesses that are less capable of identifying each person who might have had an appointment or stopped in for business (accompanied or unaccompanied). Simply put, there are multiple, readily apparent rational bases—from suppressing the spread of the virus, to preserving the supply of PPE, to ensuring workable conditions for contact tracing—that inform and support what restrictions have put in place and when and how they have been lifted. Accordingly, the Court should dismiss Plaintiffs' equal protection challenge.

6. Plaintiffs fail to state a viable void for vagueness challenge.

Courts apply a two-part test to determine whether a law is unconstitutionally vague: first, the law must give a person of "ordinary intelligence a reasonable

opportunity to know what is prohibited, so that [they] may act accordingly[;]" and second, the standards of enforcement must be precise enough to avoid "involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (internal citation omitted); *Columbia Natural Resources v. Tatum,* 58 F.3d 1101, 1105 (6th Cir. 1995).

There is no claim here that any of the Plaintiffs have been subject to selective enforcement or otherwise unsure about what is or is not permitted in their particular situations. Indeed, the stated purpose of their lawsuit is to reopen their dental and other commercial businesses and to conduct in-person economic activity. Even absent the mootness of this purpose in light of new executive orders, nothing signals any vagueness in the restrictions that Plaintiffs claim to have improperly impeded it.

At bottom, Plaintiffs are attempting to use the doctrine of vagueness to secure retroactive exemptions from executive orders they had no problem understanding, but simply would rather have not followed. While the orders' restrictions no doubt impacted the lives of many, Plaintiffs included, that impact has been necessary and tailored to meet an overarching, critical public health need. There is nothing unconstitutionally vague about the content of these restrictions, and Plaintiffs have failed to state a viable void for vagueness challenge.

III. Response to Statement of Interest on Behalf of the United States

On May 29, 2020, the United States filed a statement of interest pursuant to 28 U.S.C. § 517. Scant examples of other such statements are cited, with only one concerning the current pandemic and none ever filed in this judicial district or circuit. *See Uzuegbunam v. Preczewski*, 378 F.Supp.3d 1195 (N.D. Ga. 2018) (religious speech on college campus); *Shaw v. Burke*, 2018 WL 459661 (C.D. Ca. No. 2:17-cv-02386) (free speech on college campus); *Espinoza v. Montana Dep't of Revenue*, 393 Mont. 446 (2018) (tax credit for religiously affiliated private school); *Lighthouse Fellowship Church v. Northam*, 2020 WL 2110416 (E.D. Va. No. 2:20-cv-204) (criminal citation for violation of COVID-19 executive order).

The statement is helpful to the extent that it confirms that *Jacobson* deference and rational basis review provide the proper legal frameworks to apply. Additionally, the statement only addresses the equal protection and dormant commerce clause claims. Therefore, it can be inferred that the United States has no similar interest or concern to share with the Court regarding the other claims – privileges and immunities, privileges or immunities, procedural due process, substantive due process, and void for vagueness.

The statement is not helpful to the extent that it airs hypothetical concerns and merely pulls at the edges of reasonable and not arbitrary and capricious line-drawing in certain prior executive orders. Collectively and individually, these points fail to establish that Plaintiffs have stated any viable, recognized claims for relief under the law of the dormant commerce clause or equal protection clause.

First, the points are stale and moot under the executive orders currently in effect. Second, they raise academic hypotheticals that often fail to relate to any specific Plaintiff here and that fall well short of negating the rational bases supporting the challenged restrictions.[23] Indeed, the statement scarcely engages with those bases, such as flattening the curve of the virus's spread, preserving PPE, or setting favorable conditions for contact tracing – all of which are eminently rational and compelling, but which the statement only acknowledges in passing, if at all, while suggesting the orders might be unconstitutionally "arbitrary and oppressive."

Any rule of legislation or executive order is susceptible to this sort of superficial nitpicking. To illustrate, one might question the rationality of any regulation by simply noting its boundaries. Is a person exceeding a speed limit by one mile per hour necessarily less safe than the one driving a mile below it? For voting, is the eighteen-year-old necessarily more qualified than the person aged seventeen years and 355 days? Is the same true for drafting soldiers into the military? For alcohol consumption, why draw the line at twenty-one years old?

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[23] For instance, while the statement of interest fixates on car washes, it wholly disregards that Plaintiff MCA is an organization and does not allege that its business operations include operating a car wash impacted by any executive orders. The statement's references to marijuana businesses and flower shops are (accuracy aside) even further beside the point. And as illustrated by its example of purchasing a Carhartt jacket, the statement's proffered legal analysis is prone not only to straying well beyond the scope of the actual case in which it claims an interest, but to drawing specious comparisons between dissimilar businesses and activities on the basis of a single and/or superficial point of overlap between them.

"Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required. The provision does not offend the Constitution simply because the classification is not made with mathematical nicety." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (quotations, citations omitted) (rational basis review met for mandatory age sixty retirement for foreign service officers); *see also Breck v. Michigan*, 203 F.36 392 (6th Cir. 2000) (upholding state law imposing mandatory age limit for running for judicial office).

But skepticism and implications about the margins of a rule do not make the rule itself irrational. In a dynamic and fluid pandemic situation, there is no single set of lines to be drawn and rules to be promulgated. Instead, there are overarching goals to serve and details to decide, adjust, and rework – all in the context of imperfect information, countless variables, time delays between input and output, developing data about causation and correlation, and untold other factors. In that sense, the federal statement picks cherries from a conjured, imagined tree. As Chief Justice Roberts made clear on the very same day this statement was filed, such grasping and "second-guessing" have no place here. *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California*, 509 U.S. ___ (2020) (Roberts, C.J., concurring in summary denial order). For the reasons already stated, and with all due respect to the statement of interest, Plaintiffs' commerce clause and equal protection claims can bear no fruit.

CONCLUSION AND RELIEF REQUESTED

There are no longer any live controversies underlying Plaintiffs' challenges, and Plaintiffs have no legally cognizable interests in the outcome of this litigation. Thus, their claims are moot. Further, Plaintiffs never violated the orders, and there is no chance that the now extinct orders will be enforced against them. As a result, Plaintiffs also lack standing and their claims are unripe.

Even if Plaintiffs' claims were justiciable, they fail as a matter of law. A piecemeal lifting of restrictions by this Court as Plaintiffs' desire, without the ability to globally coordinate the State's carefully considered, deliberate, ongoing plan to combat the crisis and transition back to normalcy, is not only legally unwarranted, but would increase the risk and potential harm to everyone. For the reasons already briefed, a particular party's race to the courthouse should not control who is and is not excepted, particularly in a time of great public need when all in Michigan must grab hold of an oar and row in the same direction.

Defendants Whitmer and Gordon respectfully request that the grant this motion, dismiss all claims, and grant any other appropriate relief to Defendants.

Respectfully submitted,

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Dated: June 5, 2020

CERTIFICATE OF SERVICE

I certify that on June 5, 2020, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/ *John G. Fedynsky*
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