

**ROCK HOUSE FITNESS INC.,
1847 N Ridge Road
Painesville, Ohio 44077,**

**OHIO SPORTS AND FITNESS LLC,
36540 Biltmore Place
Willoughby, Ohio 44094,**

**AIM FIT, LLC
dba AIM PERFORMANCE TRAINING,
7266 Commerce Drive
Mentor, Ohio 44060,**

BE FIT WITH MICHELE LLC
dba ARMSTRONG FITNESS
402 N. Lake Street
Madison, Ohio 44057,

DTFRITZY LLC
dba POWERHOUSE GYM OF EASTLAKE
34700 Vine Street, Suite 300
Eastlake, Ohio 44095,

HIPPIE & FIT LIMITED
dba FREDRICK'S FIT FACTORY
7247 Industrial Park Blvd
Mentor, Ohio 44060,

R.M. MCFADYEN HOLDINGS LIMITED
dba OHIO STRENGTH,
279 East 5th Avenue
Columbus, Ohio 43201,

Judge Lucci

**FIRST AMENDED COMPLAINT for
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF**

Exhibit 1:

Director's "Stay Safe Ohio Order"

Exhibit 2:

***Memorandum in Opposition to
Motion for TRO in Hartman v. Acton***

[continued on next page]

and

**FRIENDSHIP FITNESS LLC,
6625 Reflections Drive
Dublin, Ohio 43017,**

and

**SMALL TOWN FITNESS, INC.,
403 Jefferson Street
Greenfield, Ohio 45123,**

and

**BLIND DOG GYM LLC,
1607 State Road 60
Building E Suite 52
Vermilion, Ohio 44089,**

and

**SUMMIT MARTIAL ARTS, LTD.,
425 S. Sandusky Street
Delaware, Ohio 43015,**

and

**OLD SCHOOL IRON INC.,
5139 W. 140th Street
Brook Park, Ohio 44142,**

and

**KENT BARBELL CLUB LLC,
108 W College Avenue
Kent, Ohio 44240,**

and

**ACCELERATED FITNESS LLC,
2736 Medina Road, Ste 103
Medina, Ohio 44256,**

and

[continued on next page]

**KATE RAWLINGS, LLC
dba COCA CROSSFIT
34601 Mills Road
North Ridgeville, Ohio 44039,**

and

**BAR BENDERS LLC,
614 Glover Street
Portsmouth, Ohio 45662,**

and

**THE SPOT ATHLETICS LTD.,
1515 Delashmut Avenue
Columbus, Ohio 43212,**

and

**ZANESVILLE SPORTS, INC.
dba THE FIELDHOUSE SPORTS
AND RECREATION CENTER,
300 Sunrise Center Road
Zanesville, Ohio 43701,**

and

**THE WAREHOUSE GYM & FITNESS, LLC,
1110 Chambers Road
Columbus, Ohio 43212,**

and

**WOOSTER TOTAL FITNESS CENTER, LTD.,
1400 Old Columbus Road
Wooster, Ohio 44691,**

and

**EVOLUTION FITNESS &
LIFESTYLE MANAGEMENT LLC
4421 Linden Avenue
Cincinnati, Ohio 45236,**

and

[continued on next page]

**CRH FITNESS LTD
dba ADVANCED PERFORMANCE CROSSFIT
201 Great Oaks Trail
Wadsworth, Ohio 44281,**

and

**COMBATIVES DEVELOPMENT GROUP LLC
dba GRACIE CINCINNATI
11263 Williamson Road
Blue Ash, Ohio 45241,**

and

**RAIDER FITNESS LLC
dba CROSSFIT PICKERINGTON
671 Windmill Drive
Pickerington, Ohio 43147,**

and

**STREET SMART MARTIAL ARTS, LLC
dba STREET WISE SELF DEFENSE,
10880 Smoke Road Southwest
Pataskala, Ohio 43062,**

and

**EVERYBODIES GYM, LLC,
357 Washington Street
Chardon, Ohio 44024,**

and

**UNRIVALED STRENGTH AND FITNESS LLC
dba UNRIVALED STRENGTH AND FITNESS
4264 Strausser Street NW
North Canton, Ohio 44720,**

and

**DIAMOND STRENGTH CENTER, LLC
6044 State Route 139
Lucasville, Ohio 45648,**

Plaintiffs,

[continued on next page]

V.

**AMY ACTON, in her official capacity
as Director of the Ohio Department of Health
246 N High Street
Columbus, Ohio 43215,**

and

**LAKE COUNTY GENERAL HEALTH DISTRICT,
5966 Heisley Road
Mentor, Ohio 44060,**

Defendants.

Now comes Plaintiffs, and for their Complaint for Declaratory Judgment and Injunctive Relief, allege as follows:

INTRODUCTION

1. This is an action for declaratory judgment, and preliminary and permanent injunction, pursuant to Ohio Rev. Code Chapter 2721 and Ohio Rev. Code Chapter 2727, arising from Defendants' unconstitutional official conduct, policies, practices, regulations, restrictions, threats, intimidation, and/or harassment.

2. In prohibiting healthy behavior through exercise at Ohio gyms, Defendants continue to obstruct rather than advance Ohioans' health, all the while having continuously overinflated the risk of harm to the general public.

3. While the Ohio Department of Health and its Director, AMY ACTON, together with local health departments, including the LAKE COUNTY GENERAL HEALTH DISTRICT, maintain latitude to enforce regulations that ameliorate the effects of a pandemic, that latitude remains subject to limitations imposed by both the Ohio Constitution.

4. The Ohio Department of Health, its Director, and county health departments claim the authority to criminalize and fine operation of safe gyms and recreation.

5. Through various orders and fiat, the Director of the Ohio Department of Health has arbitrarily criminalized all safe gym, fitness, and recreation operations, without providing any process, venue, or judicial review to determine whether these Ohioans' businesses are in fact safe enough to warrant operation.

6. However, Plaintiffs remain entitled to due process, equal protection, and a government that abides by the doctrine of separation of powers with the attendant checks and balances.

7. The various orders and fiat of the Director of the Ohio Department of Health, together with their enforcement, violate those fundamental rights through the arbitrary imposition of excessive strict liability, together with criminal, civil, and equitable sanctions – unilaterally created by just one unelected individual within the bureaucracy of the State of Ohio – without due process, equal protection, or just compensation and *irrespective of safety*, and in violation of the doctrine of separation of powers.

8. As a direct and proximate result of the unconstitutional conduct, policies, practices, regulations, restrictions, threats, intimidation, and/or harassment of the Director of the Ohio Department of Health, together with enforcement efforts by local health departments Plaintiffs (as well as many others) face an imminent risk of criminal prosecution and extensive daily fines, and/or the decimation of their businesses, livelihoods, and economic security, as well as continued irreparable harm to their rights.

9. This harm may only be remedied by a ruling from this Court, and Defendants must be immediately and permanently enjoined from imposing criminal, civil, or equitable sanctions on the safe operation of Ohio gyms, including Plaintiffs.

PARTIES

10. Plaintiff ROCK HOUSE FITNESS INC., is an Ohio corporation, operating a gym, owned by Rocky and Elaine Nelson, located in Lake County, Ohio.

11. Plaintiff OHIO SPORTS AND FITNESS LLC is an Ohio limited liability company, operating a gym, owned by Frank Desico, located in Lake County, Ohio.

12. Plaintiff AIM FIT LLC, dba AIM PERFORMANCE TRAINING is an Ohio limited liability company, operating a gym and private training facility, owned by Alexander Dudas, located in Lake County, Ohio.

13. Plaintiff BE FIT WITH MICHELE, LLC dba ARMSTRONG FITNESS is an Ohio limited liability company, operating a gym, owned by Michele Armstrong, located in Lake County, Ohio.

14. Plaintiff DTFRITZY LLC dba POWERHOUSE GYM OF EASTLAKE is an Ohio limited liability company, operating a gym, owned by Dwight Fritz, located in Lake County, Ohio.

15. Plaintiff HIPPIE & FIT LIMITED dba FREDRICK'S FIT FACTORY is an Ohio limited liability company, operating a gym, owned by Kyleigh Fredrick, located in Lake County, Ohio.

16. Plaintiff R.M. MCFADYEN HOLDINGS LIMITED dba OHIO STRENGTH is an Ohio limited liability company, operating a gym and fitness center, owned by Ryan McFadyen, Franklin County, Ohio.

17. Plaintiff FRIENDSHIP FITNESS, LLC, is an Ohio limited liability company, operating a gym and fitness center, owned by Jeffrey William Binek, with two locations in Delaware County and one location in Franklin County.

18. Plaintiff SMALL TOWN FITNESS, INC., is an Ohio corporation, operating a gym,, owned by Robert Arthurs, located in Highland County, Ohio.

19. Plaintiff BLIND DOG GYM, LLC, is an Ohio limited liability company, operating a gym and fitness center, owned by Mark Valenti, in Erie County, Ohio.

20. Plaintiff SUMMIT MARTIAL ARTS, LTD., is an Ohio limited liability company, operating a gym and fitness center specializing in martial arts instruction, owned by Charles Riedmiller, located in Delaware County, Ohio.

21. Plaintiff OLD SCHOOL IRON INC., is an Ohio corporation, operating a gym and athletics academy, owned by Thomas John Slomka, located in Cuyahoga County, Ohio.

22. Plaintiff KENT BARBELL CLUB, LLC, is an Ohio limited liability company, operating a gym and fitness center, owned by Phillip Roberts, located in Portage County, Ohio.

23. Plaintiff ACCELERATED FITNESS, LLC, is an Ohio limited liability company, operating a gym and fitness center, owned by Jeff Cheatham, located in Medina County, Ohio.

24. Plaintiff IRON PLATE GYM, LLC, is an Ohio limited liability company, operating a gym, owned by Ron and Sondra Reardon, located in Clermont County, Ohio.

25. Plaintiff BRAINS & BRAUN LLC dba SNAP FITNESS is an Ohio limited liability company, operating a gym, owned by Chris Braun, located in Richland County, Ohio.

26. Plaintiff VIRANT ENTERPRISES, INC., dba MAIN STREET GYM is an Ohio corporation, operating a gym, owned by David Virant, located in Ashtabula County, Ohio.

27. Plaintiff LUCAS TRAINING, LLC, is an Ohio limited liability company, operating a gym and private training facility, owned by Don Lucas, located in Stark County, Ohio.

28. Plaintiff HOISTING STEEL STRENGTH TRAINING FITNESS CLUB LLC is an Ohio limited liability company, operating a gym and private training facility, owned by Kevin Scalli, located in Lorain County, Ohio.

29. Plaintiff TEAM BSS LLC is an Ohio limited liability company, operating a gym and private training facility, owned by Shawn Schumaker, located in Mahoning County, Ohio.

30. Plaintiff LEXEN XTREME STRENGTH TRAINING, LLC, is an Ohio limited liability company, operating a gym and fitness center, owned by Daniel Dague, located in Franklin County, Ohio.

31. Plaintiff KATE RAWLINGS, LLC dba COCA CROSSFIT, is a Delaware limited liability company registered with the Ohio Secretary of State, operating a gym and private training facility, owned by Kate Rawlings, located in Cuyahoga County, Ohio.

32. Plaintiff BAR BENDERS GYM, LLC is an Ohio limited liability company, operating a gym, owned by Tyler Crisp, located in Scioto County, Ohio.

33. Plaintiff THE SPOT ATHLETICS, LTD., is an Ohio limited liability company, operating an appointment-only gym, owned by John Lewis Holdsworth, located in Franklin County, Ohio.

34. Plaintiff ZANESVILLE SPORTS, INC. dba THE FIELDHOUSE SPORTS AND RECREATION CENTER is an Ohio corporation, operating a gym, owned by Michael and Harriet Amicone, located in Muskingum County, Ohio.

35. Plaintiff THE WAREHOUSE GYM & FITNESS, LLC, is an Ohio limited liability company, operating a gym, owned by James McGuire, located in Franklin County, Ohio.

36. Plaintiff WOOSTER TOTAL FITNESS CENTER, LTD., is an Ohio limited liability company, operating a gym, owned by Christopher F. Green, located in Wayne County, Ohio.

37. Plaintiff EVOLUTION FITNESS & LIFESTYLE MANAGEMENT LLC, is an Ohio limited liability company, operating a gym, owned by Shelli Jones, located in Hamilton County, Ohio.

38. Plaintiff CRH FITNESS LTD dba ADVANCED PERFORMANCE CROSSFIT is an Ohio limited liability company, operating a gym, owned by Seth and Carmen Hill, located in Medina County, Ohio.

39. Plaintiff COMBATIVES DEVELOPMENT GROUP LLC dba GRACIE CINCINNATI is an Ohio limited liability company, operating a gym, owned by James Kelly, located in Hamilton County, Ohio.

40. Plaintiff RAIDER FITNESS LLC dba CROSSFIT PICKERINGTON is an Ohio limited liability company, operating a gym, owned by Tom Seeling, located in Franklin County, Ohio.

41. Plaintiff STREET SMART MARTIAL ARTS, LLC dba STREET WISE SELF DEFENSE is an Ohio limited liability company, operating a gym, owned by Klintom Tomlinson, located in Licking County, Ohio.

42. Plaintiff EVERYBODIES GYM, LLC is an Ohio limited liability company, operating a gym, owned by Daniel Sammon, located in Geauga County, Ohio.

43. Plaintiff UNRIVALED STRENGTH AND FITNESS LLC dba UNRIVALED STRENGTH AND FITNESS, is an Ohio limited liability company, operating a gym, owned by Justin Oliver, located in Stark County, Ohio.

44. Plaintiff DIAMOND STRENGTH CENTER, LLC is a gym, owned by Johnathan Royster & Abby Linchangco, located in Scioto County, Ohio.

45. Defendant AMY ACTON is, and has been at all times relevant to the facts at issue in this case, the Director of the Ohio Department of Health.

46. Defendant LAKE COUNTY GENERAL HEALTH DISTRICT is a county health district organized under Ohio Rev. Code Chapter 3709, charged with enforcing the Ohio Department of Health's Orders and empowered to make its own orders.

47. At all times relevant to the allegations in this Complaint, each and all of the acts of AMY ACTON alleged herein were undertaken in conformity with the regulations, customs, usages, policies, and practices of the State of Ohio and the Ohio Department of Health.

48. The actions of AMY ACTON described herein were either outside the scope of her respective office, or, if within the scope, undertaken in an arbitrary manner, grossly abusing the lawful powers of her office.

49. Defendants have personally undertaken and/or threaten to continue to personally undertake specific action so as to deprive and/or violate the constitutional rights of the Plaintiffs.

50. AMY ACTON is being sued herein in her official capacity.

FACTS

51. Ohio Rev. Code § 3701.13 delegates to the Director of the Ohio Department of Health, amongst other things, “ultimate authority in matters of quarantine and isolation.”

52. Ohio Rev. Code § 3701.352 mandates that “[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.”

53. In turn, Ohio Rev. Code § 3701.99(C) provides that any violation of Ohio Rev. Code § 3701.352 constitutes a second-degree misdemeanor, thus, subjecting any person violating Ohio Rev. Code § 3701.352 to up to 90 days in jail and a \$750 fine, or both.

54. On March 22, 2020, AMY ACTON, in her capacity as the Director of the Ohio Department of Health, issued a *Director’s Stay at Home Order*, ordering that “non-essential businesses and operations must cease” and “effective at 11:59 pm on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations as set forth in this Order.”

55. Rather than defining the category articulated as “Essential Businesses and Operations,” the *Director’s Stay at Home Order* attempted to name “essential businesses and operations” over the course of three pages and 25 paragraphs.

56. While the standard of “essentiality” may initially appear clear, *i.e.*, “necessary for survival,” the *Director’s Stay at Home Order* included within the category of “essential”, *inter alia*, liquor, marijuana, dry cleaners, and the state lottery.

57. Gyms did not make the list of “essential businesses” within the *Director’s Stay at Home Order*.

58. On April 2, 2020, AMY ACTON renewed the *Director’s Stay at Home Order*, with the issuance of the *Amended Director’s Stay at Home Order*.

59. The *Director’s Stay at Home Order* was issued by AMY ACTON without enabling legislation or administrative rulemaking.

60. The *Amended Director’s Stay at Home Order* was issued by AMY ACTON without enabling legislation or administrative rulemaking

61. The *Amended Director’s Stay at Home Order* clarified the intent of the Ohio Department of Health and its enforcement agents to rely upon Ohio Rev. Code § 3701.352 to punish any violation of “any order the director of or department of health issues” with subjection to “a misdemeanor of the second degree, which can include a fine of not more than \$750 or not more than 90 days in jail, or both.”

62. The *Amended Director’s Stay at Home Order* further provided for “Dispute Resolution” through a Dispute Resolution Commission that continues to the date of this filing.

63. However, the Dispute Resolution Commission is (1) limited to reviewing situations where “any local health department issues a determination under Section 17 of this Order that is in conflict with a determination issued by a different local health department;” (2) appointed solely by the Director of Health; (3) immune from any right to judicial review, as “the decision of the Dispute Resolution Commission *shall be final*;” and (4) without instruction as to how to allocate the burden of proof.

64. Applying this new power, the Dispute Resolution Commission has clarified that local health departments are limited to answering questions regarding the Order solely “if a public official enforcing the Order has questions.”

65. In so doing, the Dispute Resolution Commission, without hearings, has issued a series of copied-and-pasted two-page orders, typically varying from one another by only one sentence.

66. In one such order, the Dispute Resolution Commission determined that “businesses providing car washing services are essential if operating within the following parameters: 1) employees have no direct interactions with customers; 2) employees do not hand-wash or hand-dry vehicles; 3) employees maintain social distancing and comply with the other requirements outlined in the order; and 4) the number of employees is limited to only those necessary to operate the business within these parameters.”

67. On April 30, 2020, AMY ACTON renewed the *Director’s Stay at Home Order*, with the issuance of the *Director’s Stay Safe Ohio Order*.

68. A true and accurate copy of the *Director’s Stay Safe Ohio Order* is attached hereto as Exhibit 1.

69. The *Director’s Stay Safe Ohio Order* provides, *inter alia*, as follows:

- a. “All businesses and operations in the State, except as defined below, are permitted to reopen within the State so long as all workplace safety standards are met.”

Page 1, ¶2.

- b. “For the purposes of this Order, the following businesses and operations are to remain closed until this Order is amended or rescinded: . . . (g)

Entertainment/Recreation/Gymnasiums.” Page 5, ¶13(g)(“gymnasiums” is hereinafter referred to as “gym” or “gyms”).

70. The *Director’s Stay Safe Ohio Order* cites Ohio Rev. Code § 3701.56 for the proposition that “boards of health of a general or city health district . . . shall enforce quarantine and isolation orders.” See *Director’s Stay Safe Ohio Order (Exhibit 1 attached hereto)* ¶18, at p. 7.

71. Pursuant to both the *Director’s Stay Safe Ohio Order* and Ohio Rev. Code § 3701.56, Defendant LAKE COUNTY GENERAL HEALTH DISTRICT maintains authority to enforce the criminalization of gym operations against Plaintiffs.

72. In addition to the foregoing, the *Director’s Stay Safe Ohio Order* empowers local health departments to regulate beyond the regulations articulated in the *Order* itself. See *Director’s Stay Safe Ohio Order (Exhibit 1 attached hereto)* ¶22, at p. 10.

73. The *Director’s Stay Safe Ohio Order* expressly forbids the opening or operation of gymnasiums. See *Director’s Stay Safe Ohio Order (Exhibit 1 attached hereto)* ¶13(g), at pp. 5-6.

74. The *Director’s Stay Safe Ohio Order* is unconstitutional as applied to Plaintiffs, who are owners and operators of “gymnasiums.”

75. Paragraph 13(g) of the *Director’s Stay Safe Ohio Order* is unconstitutional on its face, insofar as it forbids the opening of “gymnasiums.”

76. Prior to the expiration of the *Director’s Stay Safe Ohio Order*, i.e., prior to May 29, 2020, Plaintiffs desire and intend to reopen their businesses thereby subjecting Plaintiffs to the immediate risk of criminal, civil, and equitable sanctions, pursuant to the penalty provisions

chronicled in each order issued by AMY ACTON, *i.e.*, the *Director's Stay at Home Order*, the *Amended Director's Stay at Home Order*, and the *Director's Stay Safe Ohio Order*.

77. Venue is proper within this County and division because (i) Plaintiffs are situated within this county and the Defendants are regulating gyms, including Plaintiffs, within this county; and (ii) all of the claims asserted by Plaintiffs arose within this county.

First Cause of Action
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Vagueness and Separation of Powers

Article I, Sections 1, 2, 16, 19 and 20 and Article II, Section 1 of the Ohio Constitution

78. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

79. Through enactment of Ohio Rev. Code § 3701.13, the Ohio General Assembly delegated to the Ohio Department of Health, *inter alia*, “ultimate authority in matters of quarantine and isolation.”

80. In delegating “ultimate authority in matters of quarantine and isolation” to the Ohio Department of Health, the Ohio General Assembly has delegated legislative authority without an intelligible principle.

81. The vagueness concerns raised by the delegation of “ultimate authority” to the Ohio Department of Health is aggravated by the unilateral creation of strict liability crimes by the various orders issued by AMY ACTON.

82. “Without sufficient limitations, the delegation of authority can be deemed void for vagueness as allowing ad hoc decisions or giving unfettered discretion.” *Biener v. Calio*, 361 F.3d 206, 215-17 (3d Cir. 2004).

83. “A delegation of legislative authority offends due process when it is made to an unaccountable group of individuals and is unaccompanied by ‘discernible standards,’ such that the delegatee’s action cannot be ‘measured for its fidelity to the legislative will.’” *Ctr. for Powell Crossing, LLC v. City of Powell, Ohio*, 173 F. Supp. 3d. 639, 675-79 (S.D. Ohio 2016).

84. “To pass muster under the void-for-vagueness doctrine, Ohio law dictates an ordinance must survive the tripartite analysis set forth in *Grayned*. The three aspects examined under *Grayned* are: (1) the ordinance must provide fair warning to the ordinary citizen of what conduct is proscribed, (2) the ordinance must preclude arbitrary, capricious, and discriminatory enforcement, and (3) the ordinance must not impinge constitutionally protected rights.” *Viviano v. City of Sandusky*, 2013-Ohio-2813, 991 N.E.2d 1263 (6th Dist. 2013).

85. “Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.” *Norwood v. Horney*, 110 Ohio St.3d 353, at 361-62 (2006) (internal citations omitted).

86. And these “venerable rights associated with property” are not confined to the mere ownership of property: “[t]he rights related to property, i.e., to *acquire, use, enjoy*, and dispose of property, are among the most revered in our law and traditions.” *Norwood v. Horney*, 110 Ohio St.3d 353, at 361-62 (2006)

87. In sum, “the free use of property is guaranteed by Section 19, Article I of the Ohio Constitution.” *State v. Cline*, 125 N.E.2d 222, 69 Ohio Law Abs. 305.

88. More specifically, Ohio businesses “have a constitutionally protected property interest” in freedom “from unreasonable and arbitrary interference from the government.” *Mariemont Apartment Association v. Village of Mariemont*, 2007-Ohio-173, at ¶40-42.

89. In *Norwood v. Horney*, 2006-Ohio-3799, at ¶ 83, the Ohio Supreme Court explained that “[i]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application”).

90. “Though the degree of review for vagueness is not described with specificity, if the enactment ‘threatens to inhibit the exercise of constitutionally protected rights,’ (such as property rights in Ohio), a more stringent vagueness test is to be applied.” *Yoder v. City of Bowling Green, Ohio*, No. 3:17 CV 2321, 2019 WL 415254, at 4-5 (N.D. Ohio Feb. 1, 2019), citing *Norwood*, 110 Ohio St.3d at 379.

91. Because there is no means of exercising judicial review over any order issued by AMY ACTON purportedly under the authority of Ohio Rev. Code § 3701.13, that delegation is impermissibly vague.

92. The vague delegation, both on its own and in combination with the various orders issued by AMY ACTON, has violated, continues to violate, and will further violate Plaintiffs’ due process rights.

93. AMY ACTON has already conceded, and in fact repeatedly claimed that “Dr. Acton’s generally-applicable orders are legislative acts,” and “general policy decisions.” See *Hartman v. Acton*, Case No. 2:20-cv-1952 (S.D. Ohio 2020), *Memorandum in Opposition to Motion for TRO*

(Doc. 4, PageID#71, 79, 80 & 81 (“the Amended Order is a legislative act of general application.... A State can make general policy decisions...”).

94. A true and accurate copy of the *Memorandum in Opposition to Motion for TRO* is attached hereto as Exhibit 2.

95. AMY ACTON and her attorneys have framed her as a policymaker, explaining that “Dr. Acton weighed the danger from the spread of Covid-19 with the need of Ohioans to obtain necessary goods and services.” *Memorandum in Opposition to Motion for TRO*, at PageID#80.

96. AMY ACTON and her attorneys have claimed that all Ohio businesses “take their business-operation rights subject to those restrictions” that may be imposed by Acton, no matter what those restrictions may be. *Memorandum in Opposition to Motion for TRO*, at PageID#83.

97. AMY ACTON and her attorneys have claimed that the Ohio Department of Health may usurp the function of the Ohio General Assembly by creating strict liability criminal penalties, *i.e.*, disobedience with any order issued by AMY ACTON, including, without limitation, the *Director’s Stay at Home Order*, the *Amended Director’s Stay at Home Order*, and the *Director’s Stay Safe Ohio Order*.

98. One of two conclusions is necessarily true: either (i) the General Assembly’s delegation of authority to the Ohio Department of Health in Ohio Rev. Code § 3701.13 is too broad or vague; or (ii) the Ohio Department of Health’s exercise of the delegated authority is too broad. Under either conclusion, the *Director’s Stay at Home Order*, the *Amended Director’s Stay at Home Order*, and/or the *Director’s Stay Safe Ohio Order*, in criminalizing the operation of gyms, violates the separation of powers guarantees to which Plaintiffs are entitled.

99. In order to prevent the continued violation of Plaintiffs' constitutional rights by Defendants, it is appropriate and proper that a declaratory judgment be issued, declaring unconstitutional the *Director's Stay at Home Order*, the *Amended Director's Stay at Home Order*, and/or the *Director's Stay Safe Ohio Order* as such orders are imposed pursuant to vague and unfettered enforcement authority that creates the crime of operating a gym and violates the doctrine of separation of powers.

100. It is further appropriate and hereby requested that preliminary and permanent injunctions issue prohibiting the Defendants from enforcing the *Director's Stay at Home Order*, the *Amended Director's Stay at Home Order*, and/or the *Director's Stay Safe Ohio Order* against Plaintiffs.

101. It is further appropriate and hereby requested that preliminary and permanent injunctions issue enjoining Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from engaging in any further official conduct that threatens, attempts to threaten, and/or actually interferes with Plaintiffs' occupation and operation of their private property despite their disfavored identity.

Second Cause of Action
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF
Deprivation of Property Rights without Equal Protection and Due Process / Takings
Article I, Sections 1, 2, 16, 19 and 20 of the Ohio Constitution

102. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

103. "[T]he Ohio Constitution is more protective of private property rights than its federal counterpart [and] the Ohio Supreme Court insists upon a more stringent Equal Protection

analysis.” *Yoder v. City of Bowling Green, Ohio*, No. 3:17 CV 2321, 2019 WL 415254, at p. 4-5 (N.D. Ohio Feb. 1, 2019), citing *Norwood* and Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 198 (2018), at 16 (“Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees in the U.S. Constitution when it comes to the rights guarantees in their own constitutions”).

104. On Equal Protection and Due Process, Article I, Section 2 of the Ohio Constitution provides that “[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit...”

105. In *State v. Mole*, the Ohio Supreme Court indicated that the Ohio Constitution’s equal protection guarantees can be applied to provide greater protection than their federal counterparts: “Although this court previously recognized that the Equal Protection Clauses of the United States Constitution and the Ohio Constitution are substantively equivalent and that the same review is required, we also have made clear that the Ohio Constitution is a document of independent force.” *State v. Mole*, 2016-Ohio-5124, ¶¶ 14, citing *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42 (1993).

Equal Protection and Substantive Due Process

106. Nowhere is this “independent force” of Ohio’s equal protection clause more relevant than with *protection of private property rights*, since those rights are “fundamental rights” in Ohio but not so pursuant to federal constitutional precedent.

107. A regulation of property violates the Ohio Constitution’s guarantees of Due Process and Equal Protection when it is “arbitrary,” “unduly oppressive upon individuals,” not “necessary for the public welfare,” or fails to *substantially* advance a legitimate interest *through*

a substantial relationship to it. See Direct Plumbing Supply v. City of Dayton, 138 Ohio St. 540 (1941); *Olds v. Klotz*, 131 Ohio St. 447, 451 (1936); *City of Cincinnati v. Correll*, 141 Ohio St. 535, 539 (1943).

108. Pursuant to the foregoing standards, the Ohio Supreme Court recently applied exacting scrutiny to invalidate an Ottawa Hills zoning restriction, due to its “disparate treatment” of homeowners. *Boice v. Village of Ottawa Hills*, 137 Ohio St.3d 412, 999 N.E.2d 649, 2013-Ohio-4769 ¶¶17-19 (observing that “there was disparate treatment of the residents in the village when it came to permitting houses to be built on lots smaller than 35,000 square feet,” that the land use at issue involved a *de minimus* difference, and that other similarly situated houses were “grandfathered in.”).

109. In *State ex rel. Pizza v. Rezcallah*, 84 Ohio St.3d 116, 702 N.E.2d 81, 1998-Ohio-313, the Ohio Supreme Court explained that “the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only when the restriction thereof bears a *substantial relationship* to the public health, morals and safety.”

110. “Ohio courts, interpreting the Ohio Constitution, apply something higher than rational basis review, but less than strict scrutiny to cases involving property rights.” *Yoder v. City of Bowling Green, Ohio*, No. 3:17 CV 2321, 2019 WL 415254, at 3–6 (N.D. Ohio Feb. 1, 2019)(“[t]he dwelling limit is impermissibly arbitrary, oppressive, and untailored . . . Within the regulations, the City claims to be effectuating a governmental interest in limiting population density. * * * But the City’s dwelling limit only focuses on the type of relationship between those living together in a home, and as such, is both over- and under-inclusive with respect to either of these interests. The Court thus concludes the dwelling limit is an ‘unreasonable and

arbitrary’ restriction on the issue of property, and does not bear a “substantial relationship” to its avowed goals”), citing *Norwood v. Horney*, 110 Ohio St.3d 353, 361-62 (2006); *Mariemont Apartment Ass’n v. Village of Mariemont*, 2007 WL 120727, at 7 (Ohio Ct. App.) (homeowners “have a constitutionally protected property interest in running their residential leasing businesses free from unreasonable and arbitrary interference from the government” under the Due Process Clause); *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 128 (1998); *Boice v. Ottawa Hills*, 137 Ohio St. 3d 412, 416-17 (2013) (invalidating zoning regulation requiring lots of a certain size because of “disparate treatment of the residents in the village when it came to permitting houses to be built on lots smaller than 35,000 square feet,” a *de minimis* difference between prohibited and permitted, and other similarly situated houses were “grandfathered in” . . . “It was clearly arbitrary for the village to single this lot out for a denial of the grandfathering-in treatment enjoyed by similar lots in the same neighborhood!”).

111. No classification may be arbitrary: “the attempted classification ‘must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.’ *State v. Mole*, 149 Ohio St.3d 215, ___ N.E.2d ___, 2016-Ohio-5124 ¶¶12-29.

112. “Discrimination of an unusual character especially suggest[s] careful consideration to determine whether they are obnoxious to the constitutional provision.” *Id.*

113. Otherwise put, “classifications must have a reasonable basis and may not ‘subject individuals to an arbitrary exercise of power.’” *Id.*, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 288 (1992).

114. “A statutory classification violates equal protection if it treats similarly situated individuals differently based upon an illogical and arbitrary basis.” *Mariemont Apartment Association v. Village of Mariemont*, 2007-Ohio-173, at ¶28, citing *Adamsky v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, at 362, 1995-Ohio-298.

115. The face of the *Director’s Stay Safe Ohio Order* articulates the governmental interest as follows: “The intent of this order is to ensure the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling additional day to day activities to continue, to slow the spread of Covid-19 to the greatest extent possible.” ¶17.

116. The *Director’s Stay Safe Ohio Order* is overbroad, underinclusive, and untailored with respect to the foregoing governmental interest.

117. In selectively singling out and disfavoring seven industries, including Ohio gyms, on the basis of their *identity*, rather than their *safety*, the *Director’s Stay Safe Ohio Order* fails to provide any basis whatsoever for its disparate treatment.

118. There is no basis in law or fact for the disparate treatment of gyms.

119. The *Director’s Stay Safe Ohio Order* fails to articulate any basis for disparate treatment of gyms, with reference to the foregoing governmental interest.

120. Disparate prohibition of the operation of gyms is arbitrary.

121. The United States Government’s *Guidelines for Opening Up America Again* (<https://www.whitehouse.gov/openingamerica/>) indicates that, during “phase one,” “gyms can open if they adhere to strict physical distancing and sanitation protocols,” even as other operations ranging from schools, visits to senior living facilities and hospitals, and bars “should remain closed.” See page 10 (“Phase One – Specific Types of Employers”).

122. A true and accurate copy of the *Guidelines for Opening Up America Again* can be found here: <https://www.whitehouse.gov/openingamerica/>.

123. Plaintiffs are willing and able to abide by the safety regulations mandated by the *Director's Stay Safe Ohio Order*, including but not limited to ¶8 (requiring facial masks), ¶16 (requiring "Social Distancing Requirements"); ¶21(a) (requiring certain safety protocols of "manufacturing, distribution, & construction" employers); ¶21(b) (requiring certain safety protocols of "consumer, retail & services" employers); ¶21(c) (requiring certain safety protocols of "general office environments" employers).

124. Unlike many retail establishments and other workplaces permitted to open, Plaintiffs' gyms maintain private memberships and carefully control access to their facilities.

125. Unlike many retail establishments and other workplaces permitted to open, Plaintiffs' gyms maintain exceptionally large spaces capable of effectuating social distancing.

126. Some of Plaintiffs' facilities are as large as 10,000 square feet, and many of Plaintiffs operate by appointment only.

127. Nearly 100 percent of deaths caused by the pandemic occur amongst those *over* the age of 60, and nearly 100 percent of Plaintiffs' clients and/or members are *under* the age of 60, meaning that Plaintiffs' operations pose a significantly lower risk of harmful infections than nearly any alternative operation.

128. There is no factor inherent in the operation of a gym or fitness business that provides a unique threat of spreading any particular pandemic above and beyond factors inherent in the operation of any other permitted business

129. Upon information and belief, gyms remain closed even as other industries open because fitness entrepreneurs do not maintain lobbyists or trade associations.

Equal Protection and Procedural Due Process

130. While the State has afforded a hearing on safety to some, it has afforded no such hearings to Plaintiffs.

131. A procedural due process limitation, unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person's life, liberty, or property interest. It simply requires that the government provide 'due process' before or after making such a decision.

132. The goal is to minimize the risk of substantive error, to assure fairness in the decision-making process, and to assure that the individual affected has a participatory role in the process. The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard 'in a meaningful manner.'" *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996), citing *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 563 (6th Cir.1983), *aff'd*, 470 U.S. 532 (1985).

133. Interests in operating a business or earning a living are more than sufficient to invoke procedural due process guarantees. *Johnson v. Morales*, 946 F.3d 911, 935–37 (6th Cir. 2020)("Johnson's interest in her business license is enough to invoke due process protection").

134. "There is no dispute that *never* providing an opportunity to challenge a permit revocation violates due process. Thus, the revocation of [the right to remain in business] without a pre-deprivation hearing or a post-deprivation hearing violated due process." *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 488 (6th Cir. 2014).

135. Even when such property interests are deprived in an “emergency situation,” government must provide an “adequate post-deprivation process.” *United Pet Supply*, 768 F.3d at 486.

136. These safeguards for liberty are so beyond objection that “[n]o reasonable officer could believe that revoking a permit to do business without providing any pre-deprivation or post-deprivation remedy [is] constitutional.” *Id.*, at 488.

137. Putting an Ohioan out of business without any opportunity for a hearing “is one of the rare situations where the unconstitutionality of the application of a statute to a situation is plainly obvious” such that “a clearly established right” is violated, and even qualified immunity is to be denied. *Id.*, at 489.

138. The fundamental requirement of due process is the opportunity to be heard and it is an “opportunity which must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

139. *Further*, even when the “the government has a substantial interest in ensuring the safety of its citizens,” a postdeprivation hearing is still required. See *Johnson v. Morales*, 946 F.3d 911, at 923 (6th Cir. 2020).

140. *Finally*, in requiring a postdeprivation hearing, at least with respect to the decimation of one’s business and livelihood, it matters not that the deprivation may be only “temporary” in nature. *Fuentes v. Shevin*, 407 U.S. 67, at 84–85 (“[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a ‘deprivation’ in the terms of the Fourteenth Amendment.”).

141. “Due process of law requires that plaintiffs be afforded a *prompt* hearing before a neutral judicial or administrative officer.” *Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006)(25 day delay for post-deprivation hearing unconstitutional); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993)(“the Due Process Clause requires ... an opportunity for some kind of predeprivation or *prompt* post-deprivation hearing at which some showing of the probable validity of the deprivation must be made”).

142. Because “burden-shifting can be a problem of constitutional dimension in the civil context,” *Johnson v. Morales*, 946 F.3d 911, 916–40 (6th Cir. 2020), the Ohio Constitution requires, in this context, that the State carry the burden of proving why any appealing gym must remain closed.

143. The Ohio Department of Health is required to supply Ohioans who own businesses it has closed with a prompt hearing where the burden is on the Department to justify its decision mandated full closure of those Ohioans’ businesses.

144. The Ohio Department of Health is required to supply Ohioans who own businesses it has closed with hardship relief, such as narrowing its closure order so as to permit limited safe operations.

145. The Ohio Department of Health has entirely ignored these clear and important safeguards in imposing its “Orders” indefinitely closing gym and fitness businesses, even though the Orders have been renewed and carried on for nearly two months at the time of this filing, and even though county health departments alone have been privileged to receive hearings.

146. In an unknown and unknowable but not insignificant number of cases, such as Plaintiffs' case, the Ohio Department of Health would be unable to justify forbidding gyms from reopening on, at minimum, a limited basis on the same safety terms as other open businesses.

147. Without the capacity to open their business on or before June 1, 2020, Plaintiffs' business will fail, and either bankruptcy or closure would be a virtual certainty.

148. Neither the *Director's Stay Safe Ohio Order* nor any other law or rule entitles Plaintiffs or others to any hearing where they can explain these factors to a neutral decisionmaker with the power to lift or amend the closure of their business.

149. The Ohio Supreme Court has expressed that due process requires all inferences to be drawn in favor of *the Ohio property owner rather than against them*.

150. Plaintiffs face irreparable harm in the form of permanent closure and failure of their business and/or criminal, civil, and equitable penalties.

151. Plaintiffs have suffered and continues to suffer actual and nominal damages due to the State's failure to supply a hearing, including but not limited to the total deprivation of all or nearly all gross business revenue and personal financial harm.

Takings

152. Plaintiffs hereby incorporates by reference the allegations in the foregoing paragraphs as if set forth fully herein.

153. The ongoing closure of Plaintiffs' operations, through unequal, unilateral, and unexplained administrative action with no end date, has taken Plaintiffs' property without due process or just compensation.

154. The threatened imposition of fines on Plaintiffs or physical closure of Plaintiffs' property threatens both impermissible takings and impermissible monetary exactions.

155. The State has forced Plaintiff gyms to bear a burden that should be born by the public at large, rather than by the few who businesses who remain subject to Defendants' forced closure.

Conclusion

156. Because Defendants claim in paragraph 1 of the *Director's Stay Safe Ohio Order* issued on April 30, 2020, that "if the situation deteriorates additional targeted restrictions will need to be made," any permission to operate issued to Plaintiffs by Defendants fails to moot Plaintiffs' claims.

157. The *Director's Stay Safe Ohio Order* is entitled to no deference and no presumption of constitutionality, because it is neither a statute duly enacted by the Ohio General Assembly nor an administrative rule enacted through the Notice and Comment rulemaking procedures required by R.C. 119.

158. Nearly every prediction made by Defendants and their attorneys to justify their arbitrary policymaking during the pandemic has been proven false.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and that this Court:

- (1) Declare that Ohio Rev. Code § 3107.13, Ohio Rev. Code § 3701.56, and the closure and criminalization of gym operations within the *Director's Stay Safe Ohio Order* pursuant thereto are unconstitutional on their faces and as applied to Plaintiffs due to the statutes and the *Director's Stay Safe Ohio Order*: (i) failing to provide meaningful

- procedural due process (ii) failing to afford equal protection of the law; (iii) violating the doctrine of separation of powers; and (iv) are unconstitutionally vague.
- (2) Declare that the closure and criminalization of gyms within the *Director's Stay Safe Ohio Order* is unconstitutional as applied to Plaintiffs' gymnasiums, so long as the gymnasiums operate safely.
- (3) Declare that Defendants' fines, threatened fines, and equitable action such as physical closure taken against Plaintiffs effectuates impermissible takings.
- (4) Issue a temporary restraining order, and a preliminary and permanent injunction, prohibiting Defendants and Defendants' agents from enforcing the mandate within the *Director's Stay Safe Ohio Order* that safe gyms remain closed.
- (5) Issue a preliminary and permanent injunction prohibiting Defendants from enforcing or relying on the mandate closing gyms so as to prosecute, fine, imprison, or otherwise punish Plaintiffs or others who operate safely.
- (6) Pursuant to Ohio Rev. Code § 2335.39 ("the Equal Access to Justice Act"), and other applicable law, award Plaintiff its costs, actual damages, nominal damages and expenses incurred in bringing this action, including reasonable attorneys' fees;
- and*
- (7) Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

/s/ Maurice A. Thompson
Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
122 E. Main Street
Columbus, Ohio 43215
(614) 340-9817
MThompson@OhioConstitution.org
Counsel of Record

Christopher Finney (0038998)
Julie M. Gugino (0074471)
Finney Law Firm, LLC
4270 Ivy Pointe Boulevard, Suite 225
Cincinnati, Ohio 45245
(513) 943-6660
(513) 943-6669 (fax)
Chris @FinneyLawFirm.com

CURT C. HARTMAN (0064242)
THE LAW FIRM OF CURT C. HARTMAN
7394 Ridgepoint Drive, Suite 8
Cincinnati, Ohio 45230
TEL: (513) 379-2923
HartmanLawFirm@fuse.net



DIRECTOR'S STAY SAFE OHIO ORDER

Re: Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders...for preventing the spread of contagious or infectious diseases" **Order** the following to prevent the spread of COVID-19 into the State of Ohio:

- 1. Preamble:** The sacrifices and incredible efforts that Ohioans have undertaken, make it possible to begin to lift the mandatory requirements and restrictions that were needed during the initial phase of the COVID-19 Pandemic. The adjustment of these orders is able to proceed based upon the facts and the science existing at this time in Ohio, however if the situation continues to improve, then more restrictions will be lifted, and if the situation deteriorates additional targeted restrictions will need to be made. While government can set the baseline, it should be understood that these orders set forth the minimum acts that must be taken and if people do more than the minimum to act safely, it will benefit everyone.
- 2. Business and operations to reopen.** All businesses and operations in the State, except as defined below, are permitted to reopen within the State so long as all workplace safety standards are met. All businesses and operations, except as defined below, are encouraged to either reopen or remain open if they have not ceased operation during the prior Stay at Home Orders. Businesses and operations shall continue to comply with Social Distancing Requirements as defined in this Order, including by maintaining six-foot social distancing for both employees and members of the public at all times, including, but not limited to, when any customers are standing in line.
- 3. Stay at home or place of residence.** With exceptions as outlined below, all individuals currently living within the State of Ohio are ordered to stay at home or at their place of residence except as allowed in this Order. To the extent individuals are using shared or outdoor spaces when outside their residence, they must at all times and as much as reasonably possible, maintain social distancing of at least six feet from any other person, with the exception of family or household members, consistent with the Social Distancing Requirements set forth in this Order. All persons may leave their homes or place of residence only to participate in activities, businesses or operations as permitted in this Order.

Individuals experiencing homelessness are exempt from this Order, but are strongly urged to obtain shelter, and governmental and other entities are strongly urged to make such shelter available as soon as possible and to the maximum extent practicable (and to use in their operation COVID-19 risk mitigation practices recommended by the U.S. Centers for Disease Control and

Prevention (CDC) and the Ohio Department of Health (ODH)). This order does not apply to incarcerated individuals. Incarcerated individuals are to follow the guidance of the facility in which they are confined. Individuals whose residences are unsafe or become unsafe, such as victims of domestic violence, are permitted and urged to leave their home and stay at a safe alternative location. For purposes of this Order, homes or residences include hotels, motels, shared rental units, shelters, and similar facilities.

4. **Prohibited activities.** All public and private gatherings of any number of people occurring outside a single household and connected property, or living unit and connected property are prohibited, except for the limited purposes permitted by this Order. Any gathering of more than ten people is prohibited unless exempted by this Order. This is in accordance with President Trump's coronavirus guidelines issued March 16, 2020. Nothing in this Order prohibits the gathering of members of a household, family or residence. This Section does not apply to weddings and funerals, although wedding receptions are subject to the ten-person limitation. This Section does not apply to religious facilities, entities and groups and religious gatherings. This Section does not apply to First Amendment protected speech, including petition or referendum circulators and any activity by the Media, which includes newspapers, television, radio and other media services.
5. **Prohibited and permitted travel.** People riding on public transit must comply with Social Distancing Requirements to the greatest extent feasible. This Order allows travel into or out of the State including travel that originates and ends outside of the state. However, persons entering the State with the intent to stay are asked to self-quarantine for fourteen days unless they are doing so for critical infrastructure or healthcare workforce purposes. For purposes of clarity this does not apply to persons who as part of their normal life live in one state and work or deliver services in another state. Persons who have tested positive for COVID-19, are presumptively diagnosed with COVID-19 or are exhibiting the symptoms identified in the screening guidance available from the U.S. Centers for Disease Control and Prevention and the Ohio Department of Health shall not enter the State, unless they are doing so under medical orders for the purposes of medical care, are being transported by Emergency Medical Services (EMS), are driving or being driven directly to a medical provider for purposes of initial care, or are a permanent resident of the State.
6. **Elderly people and those who are vulnerable as a result of illness should take additional precautions.** People at high risk of severe illness from COVID-19, including elderly people and those who are sick, are urged to stay in their residence to the extent possible except as necessary to seek medical care. According to CDC, those at high-risk for severe illness from COVID-19 include people who are sixty-five years or older and people of all ages with underlying medical conditions, particularly if not well controlled, including:
 - a. People with chronic lung disease or moderate to severe asthma;
 - b. People who have serious heart conditions;
 - c. People who are immune compromised;
 - d. People with severe obesity (body mass index [BMI] of 40 or higher);
 - e. People with diabetes;
 - f. People with chronic kidney disease undergoing dialysis; and
 - g. People with liver disease.
7. **Businesses covered by this Order.** For the purposes of this Order, covered businesses include any for-profit, non-profit, educational entities, or governmental entities (other than federal)

regardless of the nature of the service, the function it performs, or its corporate or entity structure. Nothing in this Order is intended to encroach on or interfere with the separation of powers under the Ohio Constitution.

- 8. Facial Coverings (Masks).** Businesses must allow all customers, patrons, visitors, contractors, vendors and similar individuals to use facial coverings, except for specifically documented legal, life, health or safety considerations and limited documented security considerations. Businesses must require all employees to wear facial coverings, except for one of the following reasons:
- a. Facial coverings in the work setting are prohibited by law or regulation;
 - b. Facial coverings are in violation of documented industry standards;
 - c. Facial coverings are not advisable for health reasons;
 - d. Facial coverings are in violation of the business's documented safety policies;
 - e. Facial coverings are not required when the employee works alone in an assigned work area;
or
 - f. There is a functional (practical) reason for an employee not to wear a facial covering in the workplace.

Businesses must provide written justification, upon request, explaining why an employee is not required to wear a facial covering in the workplace. At a minimum, facial coverings (masks) should be cloth/fabric and cover an individual's nose, mouth, and chin.

- 9. Medical Care.** The Director of Health Order signed March 17, 2020, for the management of non-essential surgeries and procedures throughout Ohio, is rescinded effective at 11:59 p.m. on April 30, 2020. Governor DeWine asked hospitals and other providers to reassess all surgeries and procedures that were delayed consistent with the March 17 Order. Surgeries and procedures were to be prioritized and performed if there is a:
- a. Threat to the patient's life if the surgery or procedure is delayed;
 - b. Threat of permanent dysfunction of an extremity or organ system if delayed;
 - c. Risk of metastasis or progression of staging if delayed;
 - d. Risk of rapidly worsening to severe symptoms if delayed, or
 - e. Presence of severe symptoms causing an inability to perform activities of daily living.

Effective at 11:59 p.m. on April 30, 2020, medical providers, including dentists, in the State may resume non-essential surgeries and procedures. This type of health care typically does not require an inpatient or overnight stay. These surgeries, procedures and other health care services, that utilize minimal personal protective equipment (PPE) have a minimal impact on inpatient hospital bed capacity, may resume only if the provider meets the following conditions:

- a. The provider follows infection control and other environmental practices in accordance with the ODH and CDC guidelines;
- b. The provider maintains adequate inventories of PPE, supplies, equipment, and medicine in their facility for each patient, considering all phases of care the patient may require,
- c. The provider creates a plan for conservation and monitoring that may include decontamination and reuse protocols to preserve PPE, supplies, equipment, and medicine to be prepared for an influx of patients, including those who do not have COVID-19;

- d. The provider evaluates access to a reliable supply chain to support continued operations for non-COVID-19 cases, and to respond to an unexpected surge in COVID-19 cases in a timely manner;
- e. The provider frequently counts PPE inventory. For hospitals, this information will continue to be reported to the State's COVID-19 resource management system on a daily basis;
- f. The provider defines processes for timely COVID-19 testing of patients and staff in accordance with the ODH guidelines;
- g. The provider continues to use telehealth modalities whenever possible; and
- h. The provider develops an actionable plan for communication, outreach, and equitable delivery of services that:
 - i. Recognizes the underlying social determinants of health and the disproportionate impact of COVID-19 on minority populations;
 - ii. Engages patients in discussion regarding the risk of contracting COVID-19; and
 - iii. Engages patients in shared decision making regarding the need for and timing of health care services. Surgeries and other procedures could still be delayed based upon mutual decisions made by patients and their clinicians.

As a provider prepares to restart non-essential health care services, hospitals and other providers should review the following types of considerations:

- a. Pre-restart considerations;
- b. Prioritizing patient outreach and scheduling;
- c. Patient Communication;
- d. Patient Screening for COVID-19;
- e. Facility Considerations;
- f. Workforce/Staffing;
- g. Sanitation Procedures;
- h. Personnel Protective Equipment;
- i. Supplies;
- j. Patient and Staff Testing; and
- k. Consultation of additional Resources.

Providers should continue to use telehealth modalities, whenever possible, and create or use existing internal strategies to prioritize cases based on the medical staff's governance and resolution structure. Providers should also follow the Responsible Restart Ohio Guide for Health Care distributed by ODH.

10. Manufacturing, distribution and construction. Manufacturing, distribution and construction businesses that were ordered to cease all activities pursuant to the April 2, 2020, Amended Director of Health Order that ordered all persons in the State to stay home unless engaged in essential work or activity, shall stay closed until May 4, 2020. Effective at 12:01 a.m. on May 4, 2020, the closed manufacturing, distribution and construction businesses may reopen, subject to the Sector Specific COVID-19 Information and Checklist for Businesses/Employers set forth in Section 21 of this Order.

- 11. General Office Environments.** General office environments that were ordered to cease all activities pursuant to the April 2, 2020, Amended Director of Health Order that ordered all persons in the State to stay home unless engaged in essential work or activity, shall stay closed until May 4, 2020. Effective at 12:01 a.m. on May 4, 2020, the closed general office environments may reopen, subject to the Sector Specific COVID-19 Information and Checklist for Businesses/Employers set forth in Section 21 of this Order. Businesses should strongly encourage as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing, subject to the discretion of the employer.
- 12. Retail.** Retail establishments and facilities that were ordered to cease all activities pursuant to the April 2, 2020, Amended Director of Health Order that ordered all persons in the State to stay home unless engaged in essential work or activity, shall stay closed until May 12, 2020. Effective at 12:01 a.m. on May 12, 2020, the closed retail establishments and facilities may reopen, subject to the Sector Specific COVID-19 Information and Checklist for Businesses/Employers set forth in Section 21 of this Order. Currently closed retail establishments and facilities, that will restrict their operations to curbside pickup, delivery or appointment-only (limited to 10 customers at any one time) may reopen effective May 1 at 11:59 p.m.
- 13. Closed Businesses and Operations.** For the purposes of this Order, the following businesses and operations are to remain closed until this Order is amended or rescinded:
- a. Schools.** The Second Amended Director of Health Order signed April 29, 2020, or as it may be subsequently amended, that closed all K-12 schools in the State remains in effect;
 - b. Restaurants and Bars.** The Director of Health Order signed March 15, 2020, or as it may be subsequently amended, that closed restaurants and bars to all but carry-out and delivery activities in the State remains in effect;
 - c. Personal Appearance/Beauty.** The Director of Health Order signed March 19, 2020, or as it may be subsequently amended, that closed hair salons, day spas, nail salons, barber shops, tattoo parlors, body piercing locations, tanning facilities, massage therapy locations and like businesses in the State remains in effect.;
 - d. Adult Day Support or Vocational Habilitation Services in a Congregate Setting.** The Amended Director of Health Order signed March 21, 2020, or as it may be subsequently amended, that prohibited adult day support or vocational habilitation services in a congregate setting in the State remains in effect;
 - e. Older Adult Day Care Services and Senior Centers.** The Director of Health Order signed March 24, 2020, or as it may be subsequently amended, that prohibited older adult day care services and closed senior centers in the State remains in effect;
 - f. Child Care Services.** The Director of Health Order signed March 24, 2020, or as it may be subsequently amended, that prohibited child care services, except for facilities with a Temporary Pandemic Child Care License, in the State remains in effect; and
 - g. Entertainment/Recreation/Gymnasiums.** The Director of Health Order signed March 21, 2020, or as it may be subsequently amended, that closed all indoor family entertainment businesses and venues such as laser tag facilities, roller skating rinks, ice skating rinks, arcades and indoor miniature golf facilities, as well as, adult and child skill or chance game facilities

in the State remains in effect. The Amended Director of Health Order signed March 17, 2020, or as it may be subsequently amended, that closed auditoriums, stadiums, arenas, parades, fairs, festivals, bowling alleys, health clubs, fitness centers, workout facilities, gyms, yoga studios, indoor trampoline parks, indoor water parks, movie and other theatres (excluding drive-in theatres), performance theatres, all public recreation centers, and indoor sports facilities in the State remains in effect. All places of public amusement, whether indoors or outdoors, including, but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, museums, arcades, fairs, children's play centers, playgrounds, funplexes, theme parks, bowling alleys, concert and music halls, and country clubs or social clubs shall be closed. Recreational sports tournaments, organized recreational sports leagues, residential and day camps shall be prohibited. Swimming pools, whether public or private, shall be closed, unless it is a swimming pool for a single household. Campgrounds, including recreational camps and recreational vehicle (RV) parks, shall be closed, except that persons residing in recreational vehicles ("RVs") at campgrounds who genuinely have no other viable place of residence may remain in the campground. This campground closure also excludes cabins, mobile homes, or other self-contained units, meant for single families and where preexisting full season agreements already have been established. An example would be individuals who have part-time preestablished seasonal sites at campgrounds for the entire season or a long term property interest or lease agreement with a campground for residential activity. Such persons should comply with all applicable guidance from the U.S. Centers for Disease Control and Prevention and the Ohio Department of Health regarding social distancing.

14. Minimum Basic Operations. Any activity, business or operation, if ordered closed, is still permitted to engage in Minimum Basic Operations. For the purposes of this Order, Minimum Basic Operations include the following, provided that employees comply with Social Distancing Requirements, to the extent possible, while carrying out such operations:

- a. The minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions; and
- b. The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.

15. Travel. For the purposes of this Order, permitted Travel includes travel for any of the following purposes. Individuals engaged in any Travel must comply with all Social Distancing Requirements as defined in this Section.

- a. Any travel related to the provision of or access to activities, businesses and operations that are permitted to be open under this Order or Minimum Basic Operations;
- b. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons;
- c. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services;
- d. Travel to return to a place of residence from outside the jurisdiction;

- e. Travel required by law enforcement or court order, including to transport children pursuant to a custody agreement; and
- f. Travel required for non-residents to return to their place of residence outside the State. Individuals are strongly encouraged to verify that their transportation out of the State remains available and functional prior to commencing such travel.

16. Social Distancing Requirements. For purposes of this Order, Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

- a. **Required measures.** Essential Businesses and Operations and businesses engaged in Minimum Basic Operations must take proactive measures to ensure compliance with Social Distancing Requirements, including where possible:
 - i. **Designate six-foot distances.** Designating with signage, tape, or by other means six-foot spacing for employees and customers in line to maintain appropriate distance;
 - ii. **Hand sanitizer and sanitizing products.** Having hand sanitizer and sanitizing products readily available for employees and customers;
 - iii. **Separate operating hours for vulnerable populations.** Implementing separate operating hours for elderly and vulnerable customers; and
 - iv. **Online and remote access.** Posting online whether a facility is open and how best to reach the facility and continue services by phone or remotely.

17. Intent of this Order. The intent of this Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling additional day to day activities to continue, to slow the spread of COVID-19 to the greatest extent possible. When people need to leave their places of residence to perform or to otherwise facilitate authorized activities necessary for continuity of social and commercial life, they should at all times and as much as reasonably possible comply with Social Distancing Requirements. All provisions of this Order should be interpreted to effectuate this intent.

18. Enforcement. This Order may be enforced by State and local law enforcement to the extent set forth in Ohio law. Specifically, pursuant to R.C 3701.352 “[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.” R.C. 3701.56 provides that “[b]oards of health of a general or city health district, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and other officers and employees of the state or any county, city, or township, shall enforce quarantine and isolation orders, and the rules the department of health adopts.” To the extent any public official enforcing this Order has questions regarding what services are prohibited under this Order, the Director of Health hereby delegates to local health departments the authority to answer questions in writing and consistent with this Order, but does not require local health departments to provide advisory opinions to nongovernmental entities.

19. Penalty. A violation of R.C. 3701.352 is guilty of a misdemeanor of the second degree, which can include a fine of not more than \$750 or not more than 90 days in jail, or both.

20. General COVID-19 Information and Checklist for Businesses/Employers. Business and employers are to take the following actions:

- a. Strongly encourage as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing, subject to the discretion of the employer;
- b. Actively encourage sick employees to stay home until they are free of fever (without the use of medication) for at least 72 hours (three full days) AND symptoms have improved for at least 72 hours AND at least seven days have passed since symptoms first began. Do not require a healthcare provider's note to validate the illness or return to work of employees sick with acute respiratory illness; healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way;
- c. Ensure that your sick leave policies are up to date, flexible, and non-punitive to allow sick employees to stay home to care for themselves, children, or other family members. Consider encouraging employees to do a self-assessment each day to check if they have any COVID-19 symptoms (fever, cough, or shortness of breath);
- d. Separate employees who appear to have acute respiratory illness symptoms from other employees and send them home immediately. Restrict their access to the business until they have recovered;
- e. Reinforce key messages — stay home when sick, use cough and sneeze etiquette, and practice hand hygiene — to all employees, and place posters in areas where they are most likely to be seen. Provide protection supplies such as soap and water, hand sanitizer, tissues, and no-touch disposal receptacles for use by employees;
- f. Frequently perform enhanced environmental cleaning of commonly touched surfaces, such as workstations, countertops, railings, door handles, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label. Provide disposable wipes so that commonly used surfaces can be wiped down by employees before each use; and
- g. Be prepared to change business practices if needed to maintain critical operations (e.g., identify alternative suppliers, prioritize customers, or temporarily suspend some of your operations).
- h. Comply with all applicable guidance from the U.S. Centers for Disease Control and Prevention and the Ohio Department of Health regarding social distancing.

21. Sector Specific COVID-19 Information and Checklist for Businesses/Employers. Businesses and employers, whether currently open or reopening, are to take the following actions:

- a. Manufacturing, distribution & construction:
 - i. Ensure minimum 6 feet between people, if not possible, install barriers;
 - ii. Employees must perform daily symptom assessment that should include taking temperature with a thermometer and monitoring for fever. Also watching for coughing or trouble breathing;

- iii. Require employees to stay home if symptomatic;
- iv. Consider having distributors and guests wear face coverings at all times;
- v. Require regular handwashing;
- vi. Stagger or limit arrivals of employees and guests;
- vii. Have employees work from home whenever possible;
- viii. Daily disinfection of desks and workstations;
- ix. Change shift patterns (e.g. fewer shifts);
- x. Stagger lunch and break times;
- xi. Daily deep disinfection of high-contact surfaces;
- xii. Space factory floor to allow for distancing;
- xiii. Regulate max number of people in cafeterias/common spaces;
- xiv. Establish maximum capacity;
- xv. Immediately isolate and seek medical care for any individual who develops symptoms while at work;
- xvi. Contact the local health district about suspected cases or exposures; and
- xvii. Shutdown shop/floor for deep sanitation if possible.

b. Consumer, retail & services

- i. Ensure minimum 6 feet between employees, if not possible, install barriers;
- ii. Employees must perform daily symptom assessment that should include taking temperature with a thermometer and monitoring for fever. Also watching for coughing or trouble breathing;
- iii. Require employees to stay home if symptomatic;
- iv. Consider having customers wear face coverings at all times;
- v. Require regular handwashing by employees;
- vi. Place hand sanitizers in high-contact locations;
- vii. Clean high-touch items after each use (e.g. carts, baskets);
- viii. Ensure minimum 6 feet between customers;
- ix. Specify hours for at-risk populations (e.g. elderly);
- x. Ask customers and guests not to enter if symptomatic;
- xi. Stagger entry of customers and guests;
- xii. Post social distancing signage and disinfect high-contact surfaces hourly;
- xiii. Clean merchandise before stocking if possible;
- xiv. Establish maximum capacity;
- xv. Discontinue self-service food stations, product samples;
- xvi. Food courts remain closed;
- xvii. Immediately isolate and seek medical care for any individual who develops symptoms while at work;
- xviii. Contact the local health district about suspected cases or exposures; and
- xix. Shutdown shop/floor for deep sanitation if possible.

c. General office environments

- i. Ensure minimum 6 feet between employees, if not possible, install barriers;

- ii. Personnel should work from home when possible;
- iii. Employees must perform daily symptom assessment that should include taking temperature with a thermometer and monitoring for fever. Also watching for coughing or trouble breathing;
- iv. Require employees to stay home if symptomatic;
- v. Consider having customers wear face coverings at all times;
- vi. Require regular handwashing by employees;
- vii. Reduce sharing of work materials;
- viii. Limit travel as much as possible;
- ix. Stagger arrival of all employees and guests;
- x. Post signage on health safety guidelines in common areas;
- xi. Frequent disinfection of desks, workstations, and high-contact surfaces;
- xii. Daily disinfection of common areas;
- xiii. Cancel/postpone in person events when social distancing guidelines cannot be met;
- xiv. No buffet in cafeteria;
- xv. Utilize disposable tableware and other materials;
- xvi. Establish maximum capacity;
- xvii. Immediately isolate and seek medical care for any individual who develops symptoms while at work;
- xviii. Contact the local health district about suspected cases or exposures; and
- xix. Shutdown shop/floor for deep sanitation if possible.

22. No limitation on authority. Nothing in this Order shall, in any way, alter or modify any existing legal authority allowing the State or any local health department from ordering (1) any quarantine or isolation that may require an individual to remain inside a particular residential property or medical facility for a limited period of time, including the duration of this public health emergency, or (2) any closure of a specific location for a limited period of time, including the duration of this public health emergency.

23. Savings clause. If any provision of this Order or its application to any person or circumstance is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Order are declared to be severable.

24. Previous Orders superseded. This Order supersedes, only to the extent that it conflicts, and amends any previous Order which conflicts with the provisions of this Order.

25. Dispute Resolution. If any local health department issues a determination under Section 18 of this Order that is in conflict with a determination issued by a different local health department, then the conflict may be submitted to the ODH by either of the local health departments or an entity or person subject to the determination. A Dispute Resolution Commission appointed by the Director of Health shall review the conflict and make a determination as to the application of this Order to the conflict. The decision of the Dispute Resolution Commission shall be final.

26. Duration. This Order shall be effective at 11:59 p.m. on April 30, 2020 and remains in full force and effect until 11:59 p.m. on May 29, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date.

COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.

On January 23, 2020, the Ohio Department of Health issued a Director's Journal Entry making COVID-19 a Class A reportable disease in Ohio.

On January 28, 2020, the Ohio Department of Health hosted the first statewide call with local health departments and healthcare providers regarding COVID-19.

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern.

On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19.

On February 1, 2020, the Ohio Department of Health issued a statewide Health Alert Network to provide local health departments and healthcare providers with updated guidance for COVID-19 and revised Person Under Investigation (PUI) criteria.

On February 3, 2020, the Ohio Department of Health trained over 140 personnel to staff a call center for COVID-19, in the event it was needed.

On February 5, 2020, the Ohio Department of Health began updating and notifying the media of the number of PUIs in Ohio every Tuesday and Thursday.

On February 6, 2020, the Ohio Department of Health updated all agency assistant directors and chiefs of staff on COVID-19 preparedness and status during the Governor's cabinet meeting.

On February 7, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency met to conduct advance planning for COVID-19.

On February 13, 2020, the Ohio Department of Health conducted a Pandemic Tabletop Exercise with State agencies to review responsive actions should there be a pandemic in Ohio.

On February 14, 2020, the Ohio Department of Health held a conference call with health professionals across the state. The purpose of the call was to inform and engage the healthcare community in Ohio. Presentations were provided by the Department of Health, Hamilton County Public Health, and the Ohio State University.

On February 27, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency briefed the directors of State agencies during the Governor's cabinet meeting regarding preparedness and the potential activation of the Emergency Operations Center.

On February 28, 2020, the "Governor DeWine, Health Director Update COVID-19 Prevention and Preparedness Plan" was sent to a broad range of associations representing healthcare, dental, long-term care, K-12 schools, colleges and universities, business, public transit, faith-based organizations, non-profit organizations, and local governments.

On March 2, 2020, the Ohio Department of Health activated a Joint Information Center to coordinate COVID-19 communications.

On March 5, 2020, the Ohio Department of Health hosted the Governor's Summit on COVID-19 Preparedness, a meeting with the Governor, cabinet agency directors, local health department commissioners, and their staff.

On March 6, 2020, the Ohio Department of Health opened a call center to answer questions from the public regarding COVID-19.

On March 9, 2020, testing by the Department of Health confirmed that three (3) patients were positive for COVID-19 in the State of Ohio. This confirms the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio.

On March 9, 2020, the Ohio Emergency Management Agency activated the Emergency Operations Center.

On March 9, 2020, the Governor Declared a State of Emergency in Executive Order 2020-01D.

On March 11, 2020, the head of the World Health Organization declared COVID-19 a pandemic.

On March 11, 2020, testing by the Ohio Department of Health confirmed that one (1) more patient was positive for COVID-19 in the State of Ohio.

On March 11, 2020, the Ohio Departments of Health and Veterans Services issued a Joint Directors' Order to limit access to Ohio nursing homes and similar facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit access to Ohio's jails and detention facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit the sale of food and beverages, liquor, beer and wine to carry-out and delivery only.

On March 15, 2020, the CDC issued Interim Guidance for mass gatherings or large community events, stating that such events that consist of 50 or more people should be cancelled or postponed.

On March 16, 2020 the Ohio Department of Health issued a Director's Order closing polling locations for the March 17, 2020 primary election.

On March 17, 2020 the Ohio Department of Health issued a Director's Order for the management of non-essential surgeries and procedures throughout Ohio.

On March 17, 2020 the Ohio Department of Health issued an Amended Director's Order to limit and/or prohibit mass gatherings and the closure of venues in the State of Ohio.

On March 19, 2020, the Ohio Department of Health issued a Director's Order closing hair salons, nail salons, barber shops, tattoo parlors, body piercing locations, and massage therapy locations.

On March 21, 2020, the Ohio Department of Health issued a Director's Order closing older adult day care services and senior centers.

On March 21, 2020, the Ohio Department of Health issued a Director's Order closing family entertainment centers and internet cafes.

On March 22, 2020, the Ohio Department of Health issued a Director's Order that all persons are to stay at home unless engaged in essential work or activity.

On March 24, 2020, the Ohio Department of Health issued a Director's Order that closed facilities providing child care services.

On March 30, 2020, the Ohio Department of Health issued an Amended Director's Order that closed all K-12 schools in the State of Ohio.

On April 2, 2020, the Ohio Department of Health issued an Amended Director's Order that all persons are to stay at home unless engaged in essential work or activity.

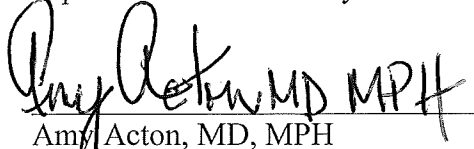
Multiple areas of the United States are experiencing "community spread" of the virus that causes COVID-19. Community spread, defined as the transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to control spread.

The CDC reports that people are most contagious when they are most symptomatic (the sickest) however some spread might be possible before people show symptoms although that is not the main way the virus spreads.

Mass gatherings (10 or more persons) increase the risk of community transmission of the virus COVID-19.

Accordingly, to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population, including the elderly and people with weakened immune systems and chronic medical conditions, I hereby **ORDER** all persons are to continue to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential and Unrestricted Businesses and Operations as set forth in this Order. This Order shall remain in full force and effect until 11:59 p.m. on May 29, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date. To the extent any public official enforcing this Order has questions regarding what

services are prohibited under this Order, the Director of Health hereby delegates to local health departments the authority to answer questions in writing and consistent with this Order.



Amy Acton, MD, MPH
Director of Health

April 30, 2020

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

TANYA RUTNER HARTMAN, *et al.*,

Plaintiffs,

V.

AMY ACTON, *in her official capacity as*
DIRECTOR of the OHIO DEPARTMENT
OF HEALTH,

Defendant.

[illegible]

Case No. 2:20-cv-1952

Chief Judge Algenon L. Marbley

**DEFENDANT'S MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General

/s/ Katherine J. Bockbrader

KATHERINE J. BOCKBRADER (0066472)

WILLIAM C. GREENE (0059230)

Assistant Attorneys General

Ohio Attorney General's Office

Health & Human Services Section

30 East Broad Street, 26th Floor

Columbus, OH 43215

Telephone: (614) 466-8600

Facsimile: (866) 805-6094

Katherine.Bockbrader@ohioattorneygeneral.gov

William.Greene@ohioattorneygeneral.gov

Counsel for Defendant Director Amy Acton

Table of Contents

I.	INTRODUCTION	1
II.	BACKGROUND	6
A.	The COVID-19 pandemic.....	6
B.	Tanya Rutner Hartman and Gilded Social, LLC	10
III.	STANDARD OF REVIEW	13
IV.	SUMMARY OF ARGUMENT	14
V.	LAW AND ARGUMENT	18
A,	Plaintiffs lack standing to bring claims on behalf of third parties.	18
B.	The Court lacks jurisdiction of Plaintiffs’ state law claims.....	19
C.	Plaintiffs have no substantial likelihood of success on the merits.....	19
1.	Neither the statute delegating authority to the Ohio Department of Health or Dr. Actons’ amended order is unconstitutionally vague.	19
2.	Dr. Action’s amended order does not violate due process.....	22
3.	Plaintiffs have not demonstrated that they will suffer irreparable injury absent the temporary restraining order.....	32
4.	Granting the injunction would harm third parties and the public interest.....	34
VI.	CONCLUSION.....	36

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Abbott</i> , No. 20-50264, 2020 U.S. App. LEXIS 10893 (5th Cir. Apr. 7, 2020).....	29
<i>Alessandro v. Beshear</i> , E. D. Ky. No. 3:20-cv-00023 (issued April 3, 2020).....	29
<i>Basicomputer Corp. v. Scott</i> , 973 F.2d 507 (6th Cir. 1992)	33
<i>Bell v. Ohio State Univ.</i> , 351 F.3d 240 (6th Cir. 2003)	26
<i>Binford v. Sununu</i> , New Hamp. Sup. Ct. No 217-2020-cv-00152 (issued March 25, 2020)	29
<i>Brautigam v. Pastoor</i> , No. 1:16-cv-1141, 2018 U.S. Dist. LEXIS 139774 (S.D. Ohio Aug. 17, 2018)	32
<i>Brown v. Norwalk City Sch. Dist. Bd. of Educ.</i> , No. 3:10 cv 687, 2011 U.S. LEXIS 135926 (N.D. Ohio Nov. 28, 2011).....	24
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985).....	24
<i>Craigsmiles v. Giles</i> , 312 F.3d 220 (6th Cir. 2002)	31
<i>Damon’s Rests., Inc. v. Eileen K Inc.</i> , 461 F. Supp.2d 607 (S.D. Ohio Nov. 13, 2006)	14
<i>Déjà vu of Cincinnati, LLC v. Union Twp. Bd. Of Trustees</i> , 411 F.3d 777 (6th Cir. 2005) (en banc)	20
<i>Experimental Holdings, Inc. v. Farris</i> , 503 F.3d 514 (6th Cir. 2007)	15, 19
<i>FDIC v. Mallen</i> , 486 U.S. 230 (1988).....	24
<i>Hickox v. Christie</i> , 205 F. Supp. 3d 579 (D.N.J. 2016)	28

<i>Honeywell, Inc. v. Brewer-Garrett Co.</i> , 145 F.3d 1331 (6th Cir. 1998)	14
<i>Ind. Land Co., LLC v. City of Greenwood</i> , 378 F.3d 705 (7th Cir. 2004)	25
<i>J. W. Hampton, Jr., & Co. v. United States</i> , 276 U.S. 394 (1928).....	21
<i>Jacobson v. Commonwealth of Massachusetts</i> , 197 U.S. 11, 25 S.Ct. 358 (1905).....	<i>passim</i>
<i>Kentucky v Graham</i> , 473 U.S. 159 (1985).....	15
<i>Krimstock v. Kelly</i> , 464 F.3d 246 (2d Cir. 2006).....	24
<i>Leary v. Daeschner</i> , 228 F.3d 729 (6th Cir. 2000)	13, 15
<i>Lifter v. Cleveland State Univ.</i> , 707 Fed. Appx 355 (6th Cir. 2017).....	18
<i>Lochner v. New York</i> , 198 U.S. 45 (1905).....	31
<i>Marshall v. Ohio University</i> , No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 31272, 2015 WL 1179955 (S.D. Ohio Mar. 13, 2015).....	13
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. E.F. Hutton & Co.</i> , 403 F. Supp. 336 (E.D. Mich. 1975).....	32
<i>Michael v. Ghee</i> , 498 F.3d 372 (6th Cir. 2007)	21
<i>Minaf v. Geren</i> , 553 U.S. 674 (2008).....	13, 15
<i>Ogden v. Gibbons</i> , 22 U.S. 1, 6 L.Ed. 23 (1824).....	6
<i>Overstreet v. Lexington-Fayette Urban County Gov’t</i> , 305 F.3d 566 (6th Cir. 2002)	13
<i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 465 U.S. 89 (1984).....	19

<i>Performance Unlimited v. Questar Publishers</i> , 52 F.3d 1373 (6th Cir. 1995)	33
<i>Plain Dealer Publ. Co. v. Cleveland Typographical Union</i> , 520 F.2d 1220 (6th Cir. 1975)	14
<i>Platt v. Bd. Of Comm’rs on Grievs. & Discipline of the Ohio Supreme Court</i> , 894 F.3d 235 (6th Cir. 2018)	20
<i>Puckett v. Lexington-Fayette Urban Cnty. Govt.</i> , 833 F.3d 590 (6th Cir. 2016)	26, 27
<i>Simon v. Cook</i> , 261 F. App’x 873 (6th Cir. 2008)	16, 20
<i>Smith v. Jefferson County Bd. of School Comm’rs</i> , 641 F.3d 197 (6th Cir. 2011)	16, 24, 25, 26
<i>Touby v. United States</i> , 500 U.S. 160, 111 S. Ct. 1752 (1991).....	21
<i>Tucker Anthony Realty Corp. v. Schlesinger</i> , 888 F.2d 969 (2nd Cir. 1989).....	32
<i>United States v. James Daniel Good Real Prop.</i> , 510 U.S. 43 (1993).....	24
<i>United States v. Lantaz</i> , No. CR-2-08-015, 2009 U.S. Dist. LEXIS 39653 (S.D. Ohio Apr. 22, 2009)	20
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	15, 18
<i>Williamson v. Lee</i> , 348 U.S. 483 (1955).....	28
<i>Winder v. NRDC, Inc.</i> , 555 U.S. 7 (2008).....	13
<i>Zinerman v. Burch</i> , 494 U.S. 113 (1990).....	24
Statutes	
Ohio Rev. Code 3701.352.....	8, 9, 28
Ohio Revised Code 3701.13	<i>passim</i>
Ohio Revised Code 3701.13 and 3701.352	28

Ohio Revised Code Section 119.0319

Ohio Revised Code Section 3701.1320, 34

Other Authorities

Fourteenth Amendment31

Due Process Clause.....20, 31

Proc. No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).....8

U.S. Constitution Eleventh Amendment.....15, 19, 21

I. INTRODUCTION

The United States Supreme Court held almost 200 years ago that, “[T]he power of States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants . . . is beyond question.” *Ogden v. Gibbons*, 22 U.S. 1, 6 L.Ed. 23 (1824). States may “enact quarantine laws and health laws **of every description.**” *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358 (1905) (emphasis added).

Plaintiffs now challenge this nearly 200 year-old history of federal endorsement of state emergency action and seek to enjoin a lawfully-issued order of the Ohio Department of Health, which expires on May 1, 2020, so that their bridal shop can immediately supplement its online business with in-person dress fittings, sales, and social activities. The Court should deny Plaintiffs’ request. Plaintiffs lack standing to raise several of their claims and the Court lacks jurisdiction over Plaintiffs’ state-law claims. Plaintiffs’ remaining claims fail to pass the four-part test applicable to requests for injunctive relief. They have no likelihood success on the merits, Plaintiffs have failed to present more than the most conclusory evidence of an irreparable injury, let alone clear and convincing evidence. Finally, the risk of harm to third parties and the public is so great that Plaintiffs have not even attempted to argue that those factors support the issuance of an injunction.

For these reasons, the Court should deny Plaintiffs’ request for a temporary restraining order.

II. BACKGROUND

A. The COVID-19 pandemic

The novel coronavirus named COVID-19, which is caused by a new strain of coronavirus that had not been previously identified in humans, is a respiratory disease that can result in serious

illness or death.¹ First identified in Wuhan, China in late 2019, COVID-19 has since spread across the globe with rapid speed, reaching almost every nation and all 50 of the United States.² The rapid spread is due to the virus being easily transmissible and transmissible by asymptomatic carriers, which means that infected people can spread the virus without knowing it.³ The virus has an incubation period of up to 14 days, during which “[i]nfected individuals produce a large quantity of virus . . . , are mobile, and carry on usual activities, contributing to the spread of infection.”⁴ The virus can remain on surfaces for many days, and patients may remain infectious for weeks after their symptoms subside.⁵

On March 11, 2020, the World Health Organization (WHO) officially declared COVID-19 to be a pandemic.⁶ “A pandemic is a global outbreak of disease.”⁷ Pandemics result from the emergence of new viruses, as the lack of “pre-existing immunity” facilitates worldwide spread. *Id.* Over the past century, four pandemics have occurred as a result of influenza viruses, but this is the first known pandemic to be caused by a coronavirus. *Id.*

¹ Centers for Disease Control and Prevention, What You Need to Know About Coronavirus Disease 2019 (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

² WORLD HEALTH ORGANIZATION, ROLLING UPDATES ON CORONAVIRUS DISEASE (COVID-19), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (last updated April 3, 2020).

³ WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – 73, (April 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2.

⁴ David L. Heymann, *COVID-19: What is Next for Public Health?*, 395 THE LANCET 542, 543 (2020).

⁵ WORLD HEALTH ORGANIZATION, Q&A ON CORONAVIRUSES (*COVID-19*), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

⁶ WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION REPORT – 51, (March 11, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf?sfvrsn=1ba62e57_10.

⁷ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Situation Summary, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>

On March 13, 2020, U.S. President Donald Trump declared a national emergency due to the outbreak of COVID-19 in the United States, citing the WHO's pandemic designation and 1,645 cases in the United States.⁸ As of March 31, 2020, less than three weeks after the declaration of national emergency, the Center for Disease Control ("CDC") reported COVID-19 exists in every state in the U.S. with 186,101 cases and 2,860 deaths.⁹ As of April 14, 2020, the CDC reported in the U.S. 632,548 cases and 31,071 deaths.¹⁰ The World Health Organization reports that as of April 16, 2020 worldwide there are 2,034,802 confirmed cases, 135,163 confirmed deaths.¹¹

An Ohio statute, Ohio Revised Code 3701.13, gives the Director of the Ohio Department of Health very broad authority during health crises like the COVID-19 one:

The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established.

* * *

The department may make special or standing orders or rules...for preventing the spread of contagious or infectious diseases[.]

Ohio Rev. Code 3701.13. And violations of such orders are prohibited:

No person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.

Ohio Rev. Code 3701.352.

⁸ Proc. No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

⁹ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in U.S., <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

¹⁰ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in U.S., <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

¹¹ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

As provided in these statutes, Ohio Department of Health Director Dr. Amy Acton has issued multiple orders to mitigate the spread of COVID-19.¹² The relevant order here is the Amended Stay at Home Order issued on April 2, 2020 (“Amended Order”). Ex. 1 to Compl. These mitigation efforts decreased the spread of the COVID-19 in Ohio. Without mitigation, it was projected that Ohio would have had 62,000 cases per day by March 23, 2020.¹³ However, due to these orders, as of April 16, 2020, Ohio has 8,239 total confirmed cases, 2,331 hospitalizations, and 389 confirmed deaths.¹⁴ Approximately 29% of confirmed cases result in hospitalizations and approximately 4% of confirmed cases result in death. *Id.* Due to Ohio’s early and extensive mitigation efforts, has fewer confirmed COVID-19 cases and fewer confirmed COVID-19 deaths than neighboring states.¹⁵ The Amended Order will expire on May 1, 2020, and the Governor has announced plans to lift restrictions on non-essential businesses beginning on that date. *See* archives, April 16, 2020 press conference <https://ohiochannel.org/collections/governor-mike-dewine>.

¹² Declaration of Brian Fowler at ¶ 4.

¹³ Declaration of Brian Fowler at ¶ 3.

¹⁴ Declaration of Brian Fowler at ¶ 2.

¹⁵ Washington Post, Did Ohio get it right, early intervention, Preparation for pandemic may pay off, https://www.washingtonpost.com/national/health-science/did-ohio-get-it-right-early-intervention-preparation-for-pandemic-may-pay-off/2020/04/09/7570bfea-7a4f-11ea-9bee-c5bf9d2e3288_story.html

There are a total of 46 states have also ordered non-essential businesses to close.¹⁶ In addition to Ohio, this includes South Carolina,¹⁷ New York,¹⁸ Connecticut,¹⁹ Pennsylvania,²⁰ Kentucky,²¹ and Michigan.²²

B. Tanya Rutner Hartman and Gilded Social, LLC

Tanya Rutner Hartman owns and operates Gilded Social, L.L.C. (“Gilded Social”), which is a dress shop located in Columbus, Ohio. (Compl. ¶¶9-10.) Gilded Social was incorporated with the Ohio Secretary of State on November 28, 2017. (*Id.* at ¶10; Ex. A, <https://bizimage.ohiosos.gov/api/image/pdf/201733201788> (Ohio Secretary of State, Gilded Social’s Articles of Incorporation)). It is a for-profit limited liability company. (Ex. A.) Gilded Social opened for business on March 1, 2018. (Ex. B, <https://www.facebook.com/events/1482349955220998/> (Facebook Grand Opening Celebration).) Gilded Social has three employees: Mrs. Hartman, a director of sales, and a director of operations. (Ex. C, <https://www.shopgildedsocial.com/about.>)

¹⁶ ABC News, Here are the states that have shutdown nonessential businesses, <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806>

¹⁷ South Carolina Office of the Governor Henry McMaster, Gov. Henry McMasters Orders Non-Essential Businesses Closed Throughout S.C.,

¹⁸ Governor Andrew M. Cuomo press release, Gov. Cuomo Issues Guidance on Essential Services Under The “New York State on Pause” Executive Order, <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>

¹⁹ Ct.gov Connecticut’s Official State Website, Suspension of non-essential in-person business operations, <https://portal.ct.gov/Coronavirus/Pages/Suspension-of-Non-Essential-In-Person-Business-Operations>

²⁰ Fox 29 News Philadelphia, Wolf Orders Shutdown of all Non-Essential Businesses in Pennsylvania, <https://www.fox29.com/news/wolf-orders-shutdown-of-all-non-essential-businesses-in-pennsylvania>

²¹ Louisville Courier Journal, Gov. Beshear orders “nonessential retail businesses to close. What that includes, <https://www.courier-journal.com/story/news/local/2020/03/22/kentucky-coronavirus-beshear-orders-nonessential-businesses-close/2895931001/>

²² Michigan.gov The Office of Gretchen Whitmer, Executive Order 2020-21 (COVID-19), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html

Gilded Social is located on the second floor of 65 East Gay Street, Columbus, Ohio. (Ex. D, <https://www.shopgildedsocial.com/>.) Its space includes a small waiting room, several dressing rooms, a common lounge space, storage space for its more than 1,200 samples. (Ex. E, [https://www.shopgildedsocial.com/space-rental-inquiry-form?rq=rental](https://www.shopgildedsocial.com/space-rental-inquiry-form?rq=rental;).; Ex. I, <https://www.shopgildedsocial.com/blog/so-youve-scheduled-your-initial-dress-shopping-appointment>; Ex. J, <https://www.shopgildedsocial.com/the-top-ten-reasons-why-you-should-buy-with-us>.)

Gilded Social sells special order dresses that can be ordered in-store or online. Gilded Social's designers' collection can be viewed on its website, Instagram page, and its designers' websites. Ex. I; Ex. M, <https://www.shopgildedsocial.com/blog/what-to-know-before-you-come-in-to-purchase-your-bridesmaid-dress>. Gilded Social's website provides the following advice to its customers regarding the deadline for ordering:

- Brides with September, October, and November 2020 weddings cannot and should not wait until the end of this restricted period to order their bridesmaids' dresses! As such, we are committed to continuing our order process in the most flexible way possible.
 - Please Note: If the deadline for ordering your dress for an upcoming Fall wedding is between now and the end of April, don't miss it!. The deadlines are calculated to ensure that the dress arrives in plenty of time for the wedding and delaying ordering during this restricted period may jeopardize that.

(Ex. L.) Despite this April deadline, Gilded Social acknowledges that designers' estimated ship dates are typically 12-14 weeks out. (Ex. L.)

Gilded Social also has hundreds of sample size and consignment dresses available for purchase in its store. (Ex. H, <https://www.shopgildedsocial.com/sample-sale-dress-index>; Ex. J, <https://www.shopgildedsocial.com/the-top-ten-reasons-why-you-should-buy-with-us>.) Dresses can be marked for pick up and held until Gilded Social reopens, or it will ship the items to its

customers. (Ex. H.) Special order dresses can be purchased in store or online. (Ex. J.) Additionally, for its sample size and consignment dresses, Gilded Social offers a Home Try On service. (Ex. H, <https://www.shopgildedsocial.com/sample-sale-dress-index>.) Gilded Social will deliver three customer-chosen dresses to its customer and wait while the customer tries them on. (*Id.*) The customer can purchase any of the three dresses and the delivery is free. (*Id.*) If the customer doesn't want any of the dresses, they are charged a \$25 delivery fee that can be used toward a future purchase. (*Id.*)

Appointments can be made for a bride and members of her bridal party. (Ex. G, <https://www.shopgildedsocial.com/praise>). Customers are encouraged to "bring a little bubbly to celebrate." (Ex. I.) Appointments are 90 minutes and are "often ... scheduled back-to-back." (*Id.*) Since it does not "have a large waiting area," Gilded Social recommends that if customers arrive early they "have a quick beverage or snack" at a neighboring restaurant. (Ex. I, <https://www.shopgildedsocial.com/blog/so-youve-scheduled-your-initial-dress-shopping-appointment>.)

In addition to selling dresses, Gilded Social has an online shop where its customers can purchase gift cards and accessories such as emergency kit, lint removing sheets, oil blotting tissues, jewelry (such as earrings, bracelets, and necklaces), cocktail mixers, cocktail kits, bottle openers, candlesticks and confetti poppers. (Ex. P; Ex. K, <https://www.shopgildedsocial.com/gift-card-order-form>.)

Gilded Social also rents out its space for wedding day preparations. (Ex. E, <https://www.shopgildedsocial.com/space-rental-inquiry-form>.) Space rentals include a make-your-own-mimosa bar, and Gilded Social's staff helps with set up, hosting, and clean up. (*Id.*) Brides can bring their own wedding professionals to the space, such as wedding planners, hair and

makeup artists, photographers, and videographers. (Ex. E, <https://www.shopgildedsocial.com/space-rental-inquiry-form>.) The pre-wedding party can bring food and beverages or Gilded Social will arrange for a neighboring business to cater the event. (*Id.*)

Gilded Social holds events throughout the year. It has a sample sale scheduled for May 6, 2020 through May 17, 2020. Ex. O, <https://www.shopgildedsocial.com/events>. Plaintiffs' Verified Complaint states that it is an appointment-only business, but its website states that no appointments are needed during the sample sale. *Id.*

III. STANDARD OF REVIEW

The issuance of a temporary restraining order is an extraordinary and drastic remedy, which may only be awarded upon a clear showing that the movant is entitled to such relief. *Winder v. NRDC, Inc.*, 555 U.S. 7, 22 (2008), citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). As such, the party seeking such a remedy must clearly establish that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the issuance of a temporary restraining order would not cause substantial harm to others; and (4) the injunction is in the public interest. *See Minaf v. Geren*, 553 U.S. 674, 689-90 (2008). *See also Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

The movant also bears the burden of establishing the entitlement to a temporary restraining order “an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.” *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (emphasis in original). The party seeking a preliminary injunction must establish its entitlement by clear and convincing evidence. *Marshall v. Ohio University*, No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 31272, at *10 2015 WL 1179955

(S.D. Ohio Mar. 13, 2015), *citing Overstreet; Honeywell, Inc. v. Brewer-Garrett Co.*, 145 F.3d 1331 (6th Cir. 1998). To meet its burden, the movant’s evidence “must more than outweigh the [opposing] evidence,” but must also “persuade the court that [the] claims are highly probable.” *Damon’s Rests., Inc. v. Eileen K Inc.*, 461 F. Supp.2d 607, 621 (S.D. Ohio Nov. 13, 2006).

In this case, Plaintiffs have failed to establish a clear showing that these four factors are met. In particular, Plaintiffs have failed to establish it has any significant likelihood of succeeding on the merits of their case against Health Director Dr. Amy Acton, much less demonstrate the “strong showing of probable success at trial” that is required. *Plain Dealer Publ. Co. v. Cleveland Typographical Union*, 520 F.2d 1220, 1223 (6th Cir. 1975). They also cannot satisfy the remaining three factors. For these reasons, Plaintiffs’ Motion for Temporary Restraining Order must be denied.

IV. SUMMARY OF ARGUMENT

Given the clear and officially declared public health emergency presented by the COVID-19 virus, Defendant, Dr. Amy Acton, Director of the Ohio Department of Health, exercising her broad public-health-related statutory powers, issued orders aimed at slowing the spread of this pernicious disease to protect the public health by saving lives, most directly by preventing our healthcare system from being overwhelmed by the spike in cases that experts predicted would occur absent aggressive, widespread mitigation efforts. Ohio’s mitigation efforts have been deemed very successful thus far.

Plaintiffs, a Columbus-based dress shop (with an established online presence) and its owner, have sued Dr. Acton, seeking, among other things, to enjoin the continued enforcement of those orders. Plaintiffs, arguing that now is a critical season in the wedding industry, wrongly arguing that they have been deprived of their right to due process—namely, a hearing to challenge

the claimed deprivation of the right to operate their business in the usual manner during this public health crisis. They claim that they would be able to open their storefront safely and in compliance with certain protective measures, even though their advertised methods of doing business would seem to make that questionable. Plaintiffs also incorrectly claim that Dr. Acton's orders are void for vagueness, even though Plaintiffs concede that they understand how the orders apply to them. Further, Plaintiffs improperly seek money damages against the state of Ohio, despite the fact that such damages are barred by the Eleventh Amendment to the U.S. Constitution. See *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).

Of immediate concern is Plaintiffs' motion for a temporary restraining order. The Court should deny the motion, as Plaintiffs fail to meet the test for a temporary restraining order by any standard, much less by the required clear and convincing evidence. Plaintiffs try to vindicate claimed rights of *other* people and businesses, but they lack standing to succeed in that attempt, and therefore the Court could not grant relief to Plaintiffs on that basis. See *Warth v. Seldin*, 422 U.S. 490, 449 (1975). Nor does the Court have jurisdiction over Plaintiffs' state-law claims or—as noted above—over their claims for money damages. See *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520-21 (6th Cir. 2007); *Kentucky v. Graham*, *supra*. Finally, Plaintiffs fail the four-part test for a temporary restraining order on any of their other claims. They cannot establish a likelihood of success on the merits, irreparable harm caused by the orders, or a public benefit or lack of harm to third parties if their motion were granted. See *Minaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000) (discussing the elements for a temporary restraining order).

Plaintiffs cannot successfully show that Dr. Acton's statutory authority or orders are void for vagueness. They admit that they understand their position with respect to the orders, which means they know how to conform their conduct to the law. *Simon v. Cook*, 261 F. App'x 873, 882 (6th Cir. 2008).

Plaintiffs also cannot successfully demonstrate that they are entitled to a hearing based on a deprivation of a property interest, as they claim. Dr. Acton's generally-applicable orders are legislative acts, and as such they do not even arguably trigger due-process hearing rights. See *Smith v. Jefferson County Bd. of School Comm'rs*, 641 F.3d 197, 216 (6th Cir. 2011). Regardless, there is no right to operate a business in Ohio free of any inconvenient constraints. Whatever right Plaintiffs enjoy under Ohio law (the source of any claimed property interests relevant here) necessarily comes with the limitations that are embedded (and apparent) in Ohio law itself. Given the public health emergency and the authority vested in Dr. Acton by the General Assembly, the effects of Dr. Acton's orders on Plaintiffs' business do not infringe on any constitutionally-protected property interest enjoyed by Plaintiffs.

The upshot of Plaintiffs' theory is that Ohio can *never* take aggressive, disease-mitigation actions that will have a temporary negative effect on Ohioans' normal ways of living and doing business, regardless of how necessary those actions might be to preserve lives and protect public safety in general. Obviously, there would be no way Ohio could offer a hearing to every non-essential business in Ohio (or even to a modest percentage of Ohio's considerable population of business owners).

Nor have Plaintiffs supported their bare assertions of likely irreparable harm from Dr. Acton's orders. They offer no evidence that allowing the orders to remain in effect for another two weeks will cause their business to suffer in light of the general changes made by Ohio's population

in postponing weddings. Plaintiffs have not provided any evidence about their economic situation, much less tied that evidence to their status as a non-essential business. Nor have they shown why they could not be sufficiently sustained by their considerable online services, which include available video contact with customers. Plaintiffs have thus failed to carry their burden on the irreparable-injury prong of the test for a temporary restraining order.

Finally, it is clear that granting the requested injunction would harm third parties and the public interest, and that it would do so in ways that unquestionably outweigh any temporary drop in business experienced by Plaintiffs. Plaintiffs do not even address these prongs of the test for a temporary restraining order, and it is easy to see why. It hardly needs to be said that a fast-spreading, severe, and often fatal illness that not only directly threatens many lives but also indirectly threatens others by having the potential to overwhelm the healthcare system makes it imperative that Ohio be able to slow down the spread of COVID-19. Indeed, regarding Plaintiffs' understandable economic worries, it would be awfully difficult for Ohio's businesses to survive if large numbers of Ohioans became sick over a short period.

For these reasons, as further explained below, the Court should deny Plaintiffs' motion for a temporary restraining order.

V. LAW AND ARGUMENT

A. Plaintiffs lack standing to bring claims on behalf of third parties.

Plaintiffs seek: 1) a declaration that the order is unconstitutional “as applied to a class of Ohio businesses not previously subject” to regulation by the Ohio Department of Health; 2) an injunction prohibiting actions against “a class of similarly situated business owners[;]” and 3) an injunction prohibiting action against unspecified “others.” *See* Complaint, pp. 13-14. These claims fail because Plaintiffs lack standing to seek relief on behalf of unrelated third parties. A “plaintiff generally must assert his own rights and legal interests, and cannot sue to protect the rights of third parties. *Warth v. Seldin*, 422 U.S. 490, 449 (1975); *Lifter v. Cleveland State Univ.*, 707 Fed. Appx 355, 365 (6th Cir. 2017).

Although there are exceptions to this general prohibition about asserting the rights of third parties, those exceptions are not met here. In order for an individual²³ to sue on behalf of another, she must prove a close relationship between herself and the third party whose rights she is asserting, and a hinderance preventing the third party from raising her own claim. *Lifter*, 707 Fed. Appx. at 365. Plaintiffs have not even alleged these elements and the allegations indicate they could never be met. Plaintiffs could never credibly allege a “close relationship” between themselves and every other business in Ohio not previously subject to regulation by the Ohio Department of Health, “similarly situated” businesses, or “others.” The first two relationships are necessarily arm’s-length business relationships and the third is so nebulous as to be meaningless in this context.

For these reasons, the Court should not award relief to any third party not before the Court.

²³ Because Plaintiffs are not, and could not credibly, assert organization standing, we have not addressed that issue. Obviously, organizational standing presents separate issues, with a separate body of case law that is inapplicable here.

B. The Court lacks jurisdiction of Plaintiffs' state law claims.

This Court lacks jurisdiction over Plaintiffs' state law claims and claims for damages due to sovereign immunity. The Eleventh Amendment precludes a federal court from ruling against a State or its officials on the basis of state law. *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520-21 (6th Cir. 2007). “[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Plaintiffs' Complaint includes allegations that are violations of state, rather than federal law. Plaintiffs assert a claim of a violation of due process under both the United States and Ohio Constitution. Compl. at 7. Plaintiffs also allege that Dr. Acton failed to comply with the procedure for emergency rules under Ohio Revised Code Section 119.03. Compl. ¶ 30. Much of Plaintiffs' motion discusses assertions that Dr. Acton improperly infringed on the Ohio General Assembly's legislative authority. Pls.' Mot. at 12-13. To the extent that Plaintiff alleges that Dr. Acton lacks statutory authority to implement the Amended Order or failed to comply with Ohio law, Plaintiffs have alleged a state law claim over which this Court has no jurisdiction.

C. Plaintiffs have no substantial likelihood of success on the merits

Plaintiffs claim that the Dr. Acton's order is unconstitutional because it is vague and violates procedural due process, and impermissibly delegates authority to the Ohio Department of Health. All of these claims fail on their merits.

1. Neither the statute delegating authority to the Ohio Department of Health or Dr. Acton's Amended Order is unconstitutionally vague.

The Department of Health's determination of a business' "essentiality" is not vague merely because Plaintiffs disagree with the decision. Complaint, ¶42 (ECF 1). “ '[A] law fails to meet

the requirements of the Due Process Clause if it so vague and standardless that it leaves the public uncertain as to the conduct it prohibits....’ ” *Simon v. Cook*, 261 F. App’x 873, 882 (6th Cir. 2008) (quoting *Giacco v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)). “A statute is void for vagueness if it does not give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement.” *United States v. Lantaz*, No. CR-2-08-015, 2009 U.S. Dist. LEXIS 39653 (S.D. Ohio Apr. 22, 2009) (citing *United States v. Halter*, 259 F. App’x 738 (6th Cir. 2008)). Here, Plaintiffs allege that both the underlying statute, Ohio Revised Code Section 3701.13, and the Director’s Amended Order are vague. Complaint, ¶¶42-46 (Amended Order) (ECF 1); Complaint, ¶¶47-49 (statute) (ECF 1).

In assessing vagueness, a court must look to the words of the statute itself. *Platt v. Bd. Of Comm’rs on Grievs. & Discipline of the Ohio Supreme Court*, 894 F.3d 235, 247 (6th Cir. 2018). If a word’s common meaning “ ‘provides adequate notice of the prohibited conduct, the statute’s failure to define the term will not render the statute void for vagueness.’ ” *Id.* (quoting *United States v. Hollern*, 366 F. App’x 609, 612 (6th Cir. 2010)). And, “where the challenged language ‘is commonly used in both legal and common parlance,’ it will often be ‘sufficiently clear so that a reasonable person can understand its meaning.’ ” *Id.* (citing *Déjà vu of Cincinnati, LLC v. Union Twp. Bd. Of Trustees*, 411 F.3d 777, 798 (6th Cir. 2005) (en banc)).

The language of the Ohio Revised Code 3701.13 sufficiently clear. It states that the “department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established.” Ohio Rev. Code 3701.13. The department of health “may make special or standing Amended Orders * * * for preventing the spread of contagious or infectious diseases.”

Id. Plaintiffs point to nothing in the statute that is vague, such that a person of ordinary intelligence cannot determine the authority of the Director regarding quarantines.

Instead, Plaintiffs contend that the broad authority granted to the Department of Health in Ohio Revised Code 3701.13 as the “ultimate authority” over quarantine Amended Orders is an improper delegation of legislative authority to another branch of government, the Executive Branch. Plaintiffs asserts federal and state claims here, but the General Assembly’s authority to delegate is governed by the Ohio Constitution, not the United States Constitution. *Michael v. Ghee*, 498 F.3d 372, 375 (6th Cir. 2007). To the extent Plaintiffs are asserting a violation of the Ohio Constitution, her claim is barred by the Eleventh Amendment, as discussed above. Even if the claim were not barred, the nondelegation doctrine does not prevent legislatures from seeking assistance, within proper limits, from other branches of government. *Touby v. United States*, 500 U.S. 160, 164, 111 S. Ct. 1752, 1755 (1991). Nor does a legislature violate the nondelegation doctrine “merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.” *Id.* Instead, the legislature must simply provide an “intelligible principle to which the person or body authorized to [act] is directed to conform.” *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

Here, Plaintiffs claim that the delegation of “ultimate authority in matters of quarantine and isolation” to the Director of Health renders Ohio Revised Code 3701.13 unconstitutional. Complaint, ¶ 47 (ECF 1). The General Assembly granted such authority so that the Director could act quickly to preserve the life and health of people and to prevent the spread of contagious disease. Ohio Rev. Code 3701.13. There can be no real contention that the standards in Ohio Rev. Code 3701.13 don’t include an “intelligible principle” that limits the Director’s authority in an emergency situation.

Plaintiffs also allege that the Amended Order is vague. This argument fails because Plaintiffs are not arguing that they cannot determine whether the order applies to them. Plaintiffs simply disagree with the conclusion that their business is non-essential. The Amended Order does not provide a “definition” of essential businesses (e.g., “a business that is necessary for people to survive”) that Plaintiffs must interpret; rather it provides a detailed list of the businesses that are considered Essential Business Operations (grocery stores, hardware stores, gas stations, etc.). Ex. 2 to Comp., Amended Order at 5-8. Clothing stores are not listed.

It seems apparent that Plaintiffs have determined they are not an Essential Business Operation under the Amended Order. When their attorney contacted the local health department, his email stated that his client, who owns a bridal shop, “is not classified as ‘essential’ by the Health Department’s Order, but would like to operate, or present evidence that it could safely operate.” See Ex. 3 to Comp. In other words, Plaintiffs simply think it’s unfair that bridal stores were not listed in the Amended Order. Plaintiffs have determined which side of the line they are on—they just do not agree with where it was drawn. The problem is not an issue of vagueness. For these reasons, Plaintiffs’ void for vagueness argument is not likely to succeed.

2. Dr. Action’s amended order does not violate due process.

Plaintiffs’ due process claim is also unlikely to succeed. When faced with a public health crisis—such as the deadly COVID-19 pandemic currently expanding not just across the U.S. but across the whole world—States have broad powers to issue orders aimed at mitigating the spread of the disease. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905). Because such orders will often need to be issued both quickly and in an abundance of caution, of necessity they need not be perfect or perfectly precise in their impacts. These types of orders will be struck down only if they have “no real or substantial relation” to protecting public health. *Id.* at 31.

There were multiple reports of devastation wrought by the COVID-19 disease on individuals afflicted with it. Ohio officials also saw the projected high rate of community transmission in Ohio in the absence of government-ordered mitigation efforts. See footnote 13, above. Ohio officials saw modeling showing that, unmitigated, the fast spread of COVID-19 was capable of completely overwhelming available healthcare facilities, making it impossible to provide adequate care to those who contract it—and Ohio officials learned that many healthcare workers in hard-hit locations had become ill themselves while trying to care for their highly-contagious patients. See Fowler declaration at ¶¶ 2, 3. Ohio’s modeling predicted that the same would happen in Ohio if steps were not taken to mitigate the spread and “flatten the curve” (i.e., prevent an overwhelming spike in cases). See Fowler declaration ¶¶ 2,3,4. The federal government itself declared a national public health emergency on January 31, 2020. (Amended Order at 11, Ex. 2 to Compl.) The World Health Organization declared COVID-19 a pandemic on March 11, 2020. (Amended Order at 12, Ex. 2 to Compl.)

In response to this dire situation, Dr. Acton issued orders under the authority of Ohio Revised Code 3701.13. The orders were issued to in an attempt to slow the spread of COVID-19 so that fewer people in Ohio would get sick and so that the healthcare facilities would not be so overwhelmed that even *more* people would die simply due to inadequate or unavailable medical attention. See Fowler declaration at ¶¶ 3. Among other things, the Director’s orders prohibited large gatherings; required schools to close temporarily; required businesses deemed nonessential to close temporarily; and required essential business that remained open to operate with certain safety precautions to protect the health of the employees and customers and, ultimately, the public (by reducing the spread of the virus). See Amended Order at 1, 9, 13. Many Ohioans began working from home. Various courts issued orders to address the situation. Hearings and oral arguments

were postponed or even canceled, and *even speedy-trial rights* were temporarily suspended by this Court, and other courts, in light of the health crisis. See S. D. Ohio Gen. Order No. 20-05 (issued March 20, 2020); *see also* <https://www.paulhastings.com/about-us/advice-for-businesses-in-dealing-with-the-expanding-coronavirus-events/u.s.-court-closings-cancellations-and-restrictions-due-to-covid-19>.

Plaintiffs were not entitled to a due process hearing. The cases that Plaintiffs cite requiring a hearing involve individual deprivations of liberty or property interests, such as termination of employment or seizure of property. (Pls. Mot. at 9-10.) *See Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006) (seized vehicle); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993) (criminal forfeiture of real estate); *FDIC v. Mallen*, 486 U.S. 230, 242 (1988) (suspending director of bank); *Zinerman v. Burch*, 494 U.S. 113, 125-26 (1990) (admission to mental hospital); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985) (termination of employment). No individual action has been taken against Plaintiffs, however. Rather, a statewide order was issued of general application to all Ohioans. No property was seized from Plaintiffs and no individual determination was made about their rights. No due process hearing right arises from this type of general action.

The Sixth Circuit has held that “[n]o notice or hearing is required before legislative action.” *Smith v. Jefferson County Bd. of School Comm’rs*, 641 F.3d 197, 216 (6th Cir. 2011); *see also Brown v. Norwalk City Sch. Dist. Bd. of Educ.*, No. 3:10 cv 687, 2011 U.S. LEXIS 135926, at *8 (N.D. Ohio Nov. 28, 2011) (statute and rules prohibiting employment of a felon did not give rise to hearing rights). In *Brown*, the district court held that an employee was not entitled to a hearing when he lost his job because of newly enacted statutes and rules that prohibited employment of a felon. *See* 2011 U.S. LEXIS 135926, at *8. The court found that the law was one of general

application, and that no hearing rights arise from a legislative action. The Amended Order is similarly of general application. Although the Amended Order is not a statute, in this context, the Sixth Circuit has made clear that a “legislative action” need not be a statute, or an action of a state legislature.

The Sixth Circuit in *Smith* rejected “formalistic distinctions” between legislative, adjudicatory, or administrative actions. *See* 641 F.3d at 216. Rather, the court held that the determination of whether an act is legislative depends on the nature of the act. *Id.* (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)). The determination turns on the type of decision and whether it is of general application. “[L]egislation normally is general in its scope rather than targeted on a specific individual.” *Id.* at 216 (citing *Ind. Land Co., LLC v. City of Greenwood*, 378 F.3d 705, 710 (7th Cir. 2004)).

In *Smith*, the action at issue was a decision by a school board to eliminate an alternative school. *Id.* The court found this decision to be legislative in nature. *Id.* The court noted that the school board made a generally applicable budgetary decision after weighing its priorities. *Id.* at 217. Similarly, Dr. Acton weighed the danger from the spread of COVID-19 with the need of Ohioans to obtain necessary goods and services, and issued an order designating essential and non-essential businesses. The Amended Order is an action of general application, not an action targeted to a specific individual.

When a governmental action is of general application, “its generality provides a safeguard that is a substitute for procedural protections. The greater the number of people burdened by a proposed law, the easier it is to mobilize political resistance,” and the more likely it is that the government will react to opposition to the action. *Ind. Land Co.*, 378 F.3d at 710. Accordingly, no notice and hearing are necessary.

Although the Amended Order is not a statute or rule, Ohioans still have the opportunity to influence the State's response to the COVID-19 pandemic. The General Assembly created the statute giving the Director of ODH the authority to enact laws in response to a public health emergency. Ohio's General Assembly also passed comprehensive legislation, H. B. 197, in response to the COVID-19 pandemic and the economic consequences of the Amended Order. Ohioans can influence the legislature's decisions about its response to the pandemic. Dr. Acton is appointed by the Governor, and he could take appropriate action if he did not agree with her decisions. Ohioans can put political pressure on the Governor to direct or encourage Dr. Acton to rescind or modify her orders. Indeed, some Ohioans have loudly protested the State's pandemic restrictions. The Governor has made clear in daily press conferences, however, that he supported the Amended Order. *See* archives, <https://ohiochannel.org/collections/governor-mike-dewine>.

The Amended Order is a legislative act of general application. Most property interests entitled to procedural due process may be restricted or even abolished by the legislature. *Bell v. Ohio State Univ.*, 351 F.3d 240, 250 (6th Cir. 2003). A State can make general policy decisions to restrict certain categories of businesses without affording a right to due process to every business affected. *Smith*, 641 F.3d at 216. The Amended Order is an order of general application and does not give rise to any due process right to a hearing. This Court should therefore reject Plaintiffs' due process claim.

Even if the Amended Order were not a legislative act, Plaintiffs still would not be entitled to a due-process hearing. Procedural due process is the right to notice and a meaningful opportunity to be heard. *See, e.g., Puckett v. Lexington-Fayette Urban Cnty. Govt.*, 833 F.3d 590, 606 (6th Cir. 2016). A person claiming a property interest is, constitutionally speaking, entitled to notice and a hearing regarding any deprivation only if she has a *constitutionally-protected* property interest.

See *id.* at 604-605. Such property interests are derived, not from the Constitution, but from independent sources of law, such as state law. See *id.* at 605. Therefore, whatever property interest Plaintiffs claim to have that might entitle them to a hearing would—in this case—have to be a property interest derived from Ohio law.

The property interest Plaintiffs appear to assert here is the right to conduct their business as usual even during a public health emergency like the COVID-19 pandemic, free from any temporary restrictions issued by the Director of the Ohio Department of Health. See, *e.g.*, Complaint at ¶ 63. It is this claimed right that Plaintiffs must believe they have been deprived of, because no one permanently shut their business down, and the Director's orders were issued only because it was an effective way to slow down this deadly pandemic and prevent our healthcare system from being overwhelmed (and thus unable to respond effectively to the needs of very sick Ohioans).

Plaintiffs do not have a constitutionally-protected right to operate free of orders like the ones referenced in the Complaint. In Ohio, businesses necessarily operate within the regulatory framework put in place by the General Assembly. They are subject to many limitations found in Ohio statutes. They must adhere to any applicable sanitation laws, licensing laws, tax laws, zoning laws, and health laws, just to name a few.

As noted above, Ohio Revised Code 3701.13, gives the Director of the Ohio Department of Health very broad authority:

The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established.

* * *

The department may make special or standing orders or rules...for preventing the spread of contagious or infectious diseases[.]

Ohio Rev. Code 3701.13. And violations of such orders are prohibited pursuant to Ohio Revised Code 3701.352.

Because any right Plaintiffs have to run their business is based on Ohio law, that right is subject to any accompanying limitations placed on that right by Ohio law. As discussed above, the Health Department statutes, Ohio Revised Code 3701.13 and 3701.352, are such limitations, and Plaintiffs take their business-operation rights subject to those restrictions. The Supreme Court has recognized that states have broad authority to regulate professions even in the absence of a public health emergency. *See Williamson v. Lee*, 348 U.S. 483, 487 (1955). Plaintiffs do not possess an absolute right to operate their business however they normally do regardless of orders issued by the Director under Ohio Revised Code 3701.13.

“The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.”

Jacobson, 197 U.S. at 26-27, quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890).

Even where there is an arguable due-process right, the right is not absolute. “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Hickox v. Christie*, 205 F. Supp. 3d 579, 601 (D.N.J. 2016) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 334-345 (1976)). “[U]nder the pressure of great dangers,” liberty may be reasonably restricted “as the safety of the general public may demand.” *Jacobson*, 197 U.S. at 29.

In *Jacobson*, the Supreme Court upheld a mandatory vaccination law. *Id.* The Court explained that the “liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. . . . Rather, a

community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27 (internal quotations omitted).

In the midst of this pandemic, courts have recognized the broad authority and need for states to issue public health orders in response to the threat of COVID-19. In *In re Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893, *4 (5th Cir. Apr. 7, 2020), the Fifth Circuit upheld the State of Texas’s public health order issued in response to the COVID-19 pandemic. The *Abbott* court held, “That settled rule allows the state to restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home.” *Id.* The court held that the district court erred in granting a TRO against the State and substituting the district court’s judgment regarding the efficacy of the State’s order. *Id.* *Abbott* held that, “[i]t is no part of the function of a court’ to decide which measures are ‘likely to be the most effective for the protection of the public against disease.’” *Id.* (quoting *Jacobson*, 197 U.S. at 30). Other courts have also declined to enjoin state’s responses to the COVID-19 epidemic. *See, e.g., Alessandro v. Beshear*, E. D. Ky. No. 3:20-cv-00023 (issued April 3, 2020); *Binford v. Sununu*, New Hamp. Sup. Ct. No 217-2020-cv-00152 (issued March 25, 2020).

Plaintiffs allege that the Director’s orders violate their procedural due process rights because they are given no right to a hearing to challenge the order to temporarily restrict their business. (Compl. ¶ 64.) According to Plaintiffs, they are entitled to a post-deprivation hearing.²⁴ (Compl. ¶ 63.) Plaintiffs need a hearing, they claim, in order to have the opportunity to prove that Gilded Social is “essential” after all and/or can operate safely by implementing crowd control,

²⁴ Plaintiffs also complain that it is not fair that, if a hearing were provided, they would bear the burden of showing that they are essential business. (Pls. Mot. at 10-12.) As discussed above, Ohio law provides no hearing here, so it is odd to debate the merits of a proceeding that does not exist. However, if the State brought a civil or criminal action against Plaintiffs, the State would have the burden of proof.

social distancing, and cleaning regimens. (Compl. ¶ 63.) Plaintiffs assert that they have the means to implement these methods, and they also claim that they are actually “essential” after all because, at this time of year, many people planning weddings must order their wedding dresses in order to have them by September and October, which are—according to Plaintiffs—popular months for weddings.²⁵ (Compl. ¶ 70.) Plaintiffs also claim to be essential because they, their employees, and their landlord derive significant financial benefit from the business generated by Gilded Social. (Comp. ¶ 77.)

Plaintiffs’ theory is simply unworkable, not to mention incorrect. Their claims about Gilded Social’s value are undoubtedly true of thousands, if not tens of thousands, of Ohio businesses and business owners. Nearly any given business exists to serve customers and provide a living for its owner(s), and many businesses and industries are seasonal. Plaintiffs assert that they and every other nonessential business is entitled to a post-deprivation hearing to challenge the temporary closure of its operations. But obviously that would be physically impossible. Plaintiffs’ theory, then, is really a theory that a State is simply not permitted to issue blanket orders temporarily closing businesses (or taking other action that negatively impacts business), because Ohio does not have the resources to provide a hearing to every non-essential business in Ohio.

Plaintiffs say that they are seeking to vindicate merely their right to “operat[e] a business” or “[earn] a living.” (Compl. ¶ 53.) They go on to compare the Director’s orders to an order revoking an entity’s permit to do business or permanently shutting down a particular business. See *id.* at ¶ 54-57. But the Director has not revoked any permits or ordered businesses to be closed permanently, nor has she prohibited Plaintiffs from operating online or generally earning a living.

²⁵ Plaintiffs invoke the constitutional right to marriage and seem to imply that it applies here. Compl. ¶ 72. Plaintiffs have no standing to raise other individuals’ right to marry. Moreover, people can get married without purchasing a dress from Plaintiffs or visiting their storefront.

The orders are a *temporary* measure to save lives. They are not singling out Plaintiffs in order to punish them.

The orders have general application, and *they will work only if they are applied as widely as possible*. If businesses and owners across the State could potentially carve thousands of Swiss-cheese holes in the Director’s reasonable attempts to “flatten the curve,” the likely result would be a spike in cases, an overwhelmed healthcare system, and many Ohio deaths that could have been avoided. This is exactly why the Director has the authority to issue the orders that she did. Her authority is necessary in times like this, when there is a great and serious danger to the public that, in the opinions of medical and other scientific experts, only well-enforced, widely-applicable physical-distancing orders will mitigate.

It is hard to avoid hearing in Plaintiffs’ argument faint echoes of a now-discredited case decided 105 years ago today: *Lochner v. New York*, 198 U.S. 45 (1905). Without saying so expressly, the plaintiffs are claiming a *substantive* right to operate their business without being burdened by state laws *they judge* too extreme—a right found nowhere in the Constitution. But the “Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” *Id.* at 75 (Holmes, J., dissenting). Nor does it entitle every business to emergency orders perfectly tailored to their liking. To rule for the plaintiffs would mark “a return to *Lochner*,” and an approach to constitutional adjudication in which courts “elevate [their] economic theory” and public-health policy “over of that of legislative bodies.” *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002).

One final point. *Even if* the State violated the Due Process Clause by failing to provide a hearing on the essential nature of businesses, the remedy for that would be a narrow injunction creating a right to a hearing. So even if the plaintiffs were correct on their due-process claim, they

would not be entitled to the relief they seek: an order invalidating the Amended Order in its entirety.

For these reasons, Plaintiffs are unlikely to succeed on their due process claims.

3. Plaintiffs have not demonstrated that they will suffer irreparable injury absent the temporary restraining order.

To demonstrate show an irreparable injury Plaintiffs must “exhibit a non-compensable injury for which there is no legal measure of damages.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. E.F. Hutton & Co.*, 403 F. Supp. 336, 343 (E.D. Mich. 1975) (citations omitted). And the harm must be “‘actual and imminent,’ and not merely remote or speculative.” *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2nd Cir. 1989); *see also Brautigam v. Pastoor*, No. 1:16-cv-1141, 2018 U.S. Dist. LEXIS 139774, *20-21 (S.D. Ohio Aug. 17, 2018) *citing Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006).

Plaintiffs allege two forms of irreparable injury: 1) the deprivation of Plaintiffs’ constitutional rights; and 2) the “virtual certainty” of the closure or bankruptcy of Gilded Social. *See Plaintiff’s Memo (Doc. 2)*, p. 16. Both of these claims fail.

Plaintiffs’ claims regarding the deprivation of its constitutional rights fail for the reasons discussed above. Their claims regarding the closure or bankruptcy of Gilded Social fail because Plaintiff has produced no evidence other than bare assertions that allowing Dr. Acton’s orders to remain in effect for an additional 14 days will result in the harm claimed or that any drop-off in its business is due to Dr. Actions’ orders and not other factors, such as society’s willingness to postpone or downsize weddings due to the pandemic. Further, Gilded Social has already been subject to Dr. Acton’s orders declaring it non-essential for 25 days and the harm Plaintiffs allege has not yet come to pass. Plaintiffs have produced no evidence explaining why that harm will occur within the next 14 days. They have not provided any evidence of the expenses that the

business has incurred, the effect that Dr. Acton's orders have had on its revenues, the business' cash reserves or credit, or the terms of the credit line that allegedly underwrite the Gilded Social. Plaintiffs' website indicates that they are able to provide considerable services online, and that they are actively engaged in providing virtual appointments, video chats, and shipping products, (which they are permitted to do under the Amended Order) yet Plaintiff has provided no evidence about the economics of those activities.

This lack of evidence distinguishes this case from the authorities cited by Plaintiffs. In *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373 (6th Cir. 1995) the court granted a preliminary injunction based on un rebutted evidence about the dollar-value of the plaintiff's lost revenue, the percentage of that loss as a share of the plaintiff's biennial revenues, and the dollar-value of withheld royalties. *See Performance Unlimited*, 52 F.3d at 1381. The case did not state that the "inability to operate a business for an unknown period of time constitutes irreparable harm," as Plaintiffs claim. *See Plaintiffs' Memo* (Doc. 2), p. 16. The second case Plaintiffs cite, *Basicomputer Corp. v. Scott*, 973 F.2d 507 (6th Cir. 1992) was another preliminary injunction case, decided after development of an evidentiary record at a hearing. *Id.* at 512. It granted an injunction because the plaintiff was able to show that the breaching of non-competition and confidentiality covenants caused damages that were difficult to compute. In this case, there is virtually no evidentiary record and no evidence to review. Plaintiffs could have introduced evidence to support their claims, but have chosen not to do so.

A plaintiff's failure to carry its evidentiary burden at this stage of the proceedings should always result in the denial of the requested relief, but particularly when, as here, Plaintiffs have had nearly a month to draft their pleadings, and Defendants have had only 24 hours to respond.

4. Granting the injunction would harm third parties and the public interest.

If there were ever a case where the harm to third parties and the public interest required denial of an injunction, this is it. On the one hand, Plaintiffs assert a need to have employees, customers, and (presumably) suppliers physically present in their store so that people can “shop for their wedding attire immediately” to get their dresses in time for fall weddings. *See* Complaint, ¶70. On the other hand, Dr. Acton has exercised her authority under Ohio Revised Code Section 3701.13 to temporarily restrict certain activities to help stop the spread of a deadly disease and save the lives of citizens of the state. There should be no question as to which interest is more important.

The COVID-19 virus is a deadly infectious disease. At the time this was written, the virus had infected at least 8,239 people in Ohio and killed 373.²⁶ Nationally, the toll is much higher. There were 632,220 confirmed cases and 26,930 deaths at the time this was written.²⁷ If current trends continue, 20 more Ohioans will die by the time the Court reads this memorandum and more than 60 will die by the time the Court hears argument in this case on Monday.²⁸ Nationally, over 30,000 more people will be infected by Monday and there will be a correspondingly tragic number of deaths. The virus has an incubation period of up to 14 days, during which “[i]nfected individuals produce a large quantity of virus . . . , are mobile, and carry on usual activities, contributing to the spread of infection.”²⁹ The virus can remain on surfaces for many days, and patients may remain

²⁶ *See* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home> (last visited April 16, 2020).

²⁷ *See* <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited April 16, 2020).

²⁸ *See* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home> (last visited April 16, 2020).

²⁹ David L. Heymann, *COVID-19: What is Next for Public Health?*, 395 THE LANCET 542, 543 (2020).

infectious for weeks after their symptoms subside.³⁰ Because no one who has not contracted the virus is immune and there is no vaccine, literally every single person in the state could be infected. Dr. Acton's orders are necessary to prevent an explosion of disease that could overwhelm the state's health care system and greatly increase the death toll. The Ohio Department of Health estimates that Ohio would have seen a peak of 62,000 new COVID-19 cases per day³¹ without the Director's orders. One need only look at reports from other states and other countries to see what even a smaller outbreak would look like. This is why Dr. Acton and Governor DeWine have repeatedly emphasized the need for temporary business closures and social distancing. *See* Archived Covid-19 Updates, available at <https://www.ohiochannel.org/collections/governor-mike-dewine> (last visited April 17, 2020).

Plaintiffs have presented no evidence or made any allegation challenging any of the harms discussed above. Their memo in support of their Motion makes no attempt to balance the harms to the public and third parties against the harm to Plaintiffs. And although Plaintiffs' pleadings do not discuss it, their website provides extensive details on how their business can operate while complying with the Director's orders. Plaintiffs currently operates an on-line store selling jewelry, accessories, and dresses.³² Plaintiffs also sell gift cards, offer virtual appointments, video chats with customers, and shipment of sample to customers' homes.³³ Plaintiffs deliver gowns to customers' houses to try them on and schedule video chats to help customers "properly try

³⁰ WORLD HEALTH ORGANIZATION, Q&A ON CORONAVIRUSES (*COVID-19*), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

³¹ *See* <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/forecast-model> (last visited April 17, 2020).

³² *See* Ex. P, Gilded Social website, at <https://www.shopgildedsocial.com/online-shop> (last visited April 17, 2020); Ex. H, <https://www.shopgildedsocial.com/sample-sale-dress-index> (last visited April 17, 2020).

³³ *See* Ex. N, Gilded Social website, at <https://www.shopgildedsocial.com/schedule-a-virtual-appointment> (last visited April 17, 2020).

[clothes] on and answer any questions.”³⁴ Plaintiffs’ website states that these and other measures “will help us stay afloat during this critical time in our history.”³⁵

Plaintiffs have attempted to minimize the impact of enjoining Dr. Acton’s order by stating their business is by appointment only, so they can minimize the number of people in their store. *See* Complaint, ¶78. But it is clear that Plaintiffs do not intend to do this. Their website advertises that from May 6, 2020, to May 17, 2020, they are holding a Sample Sale, with “no appointment necessary.”³⁶ Plaintiffs’ website also invites not only customers, but wedding planners/coordinators, hair artists, makeup artists, photographers, and “others.”³⁷ Customers and others are encouraged to bring their “Gilded Tribe,” as well as food and beverages.³⁸ This conduct poses a significant risk to the public of illness, death, and collapse of the healthcare system. The risk far outweighs the burden on Plaintiffs to be subject to the Amended Order until May 1, 2020.

VI. CONCLUSION

Balancing the temporary restraining order factors results in a determination that Plaintiffs have failed to meet their burden and establish that they are entitled to a temporary restraining order. For all of the foregoing reasons, Plaintiffs’ motion should be denied and their claims should be dismissed accordingly.

³⁴ *Id.*

³⁵ *See* Gilded Social Website, at <https://www.shopgildedsocial.com/schedule-a-virtual-appointment> (last visited April 17, 2020).

³⁶ *See* Gilded Social website <https://www.shopgildedsocial.com/events> (last visited April 17, 2020).

³⁷ *See* Gilded Social website, at <https://www.shopgildedsocial.com/space-rental-inquiry-form> (last visited April 17, 2020).

³⁸ *See* Gilded Social website, at <https://www.shopgildedsocial.com/pre-wedding-space-rentals> (last visited April 17, 2020).

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General

/s/ Katherine J. Bockbrader
KATHERINE J. BOCKBRADER (0066472)
WILLIAM C. GREENE (0059230)
Assistant Attorneys General
Ohio Attorney General's Office
Health & Human Services Section
30 East Broad Street, 26th Floor
Columbus, OH 43215
Telephone: (614) 466-8600
Facsimile: (866) 805-6094
Katherine.Bockbrader@ohioattorneygeneral.gov
William.Greene@ohioattorneygeneral.gov

Counsel for Defendant Director Amy Acton

CERTIFICATE OF SERVICE

This certifies that the foregoing Defendant's Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order was filed electronically on April 17, 2020. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Katherine Bockbrader
Assistant Attorney General