SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-093916 08/04/2020

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

MOUNTAINSIDE FITNESS ACQUISITIONS L L C

JOEL E SANNES

v.

DOUGLAS A DUCEY

BRETT W JOHNSON

ANTHONY S VITAGLIANO
TIMOTHY ECKSTEIN
JAMES B REED
ANNI L FOSTER
CRAIG A MORGAN
GREGORY W FALLS
WILLIAM JON-VINCENT LICHVAR
RYAN JAMES REGULA
JUDGE THOMASON

RULING

Plaintiffs Mountainside Fitness Acquisitions, LLC ("Mountainside") and Fitness Alliance, LLC dba EOS Fitness ("EOS") have filed Renewed Applications for Temporary Restraining Orders and Preliminary Injunctions.[1] The Governor of the State of Arizona (the "Governor") filed a Response to the Renewed Applications. Mountainside then filed a Supplement to its Renewed Application. The Court denied the request for a Temporary Restraining Order on July 27, 2020. The Court has considered the evidence submitted in connection with the hearing held on August 3, 2020 and rules as follows on plaintiffs' request for a preliminary injunction.

[1] The parties agreed to treat the "Renewed" Applications as new Applications.

GENERAL BACKGROUND

The general factual background of this dispute is set forth in the Court's July 6 Order. By way of summary, State of Arizona Executive Order 2020-43 ("EO 43"), dated June 29, 2020, provided that "(i)ndoor gyms and fitness clubs or centers" had to "pause operations until at least July 27, 2020." EO 43 continued:

> To receive authorization to reopen, entities shall complete and submit a form as prescribed by the Arizona Department of Health Services that attest the entity is in compliance with guidance issued by ADHS related to COVID-19 business operations. The form shall also be posted in an easily visible public place on the entity's premises. ADHS shall provide information to the public on those entities that have submitted such attestations on its website.

This portion of EO 43 will be referred to as the "Form Provision" and the form referred to in the Form Provision will be referred to as the "Form."

It is undisputed that no Form was available to businesses that were forced to shut down until July 23. In fact, the final attestation Form was not posted on the ADHS website until July 31, 2020.

On July 23, 2020, the Governor issued Executive Order 2020-52 ("EO 52"), which provided that the provisions in EO 43 regarding business "pauses" would remain in effect and would be "reviewed for repeal or revision every two weeks." No mention was made in EO 52 about the Form Provision. (EO 43 and EO 52 are collectively referred to as the "Executive Orders").

The Governor has argued to this Court that the Form Provision provide adequate post-deprivation due process. In a similar case filed in federal court, the Governor represented that there would be an available post-deprivation remedy available soon. The federal court stated, in response to the Governor's representations:

> The June 29, 2020 Executive Order provides that affected businesses may submit a form to ADHS attesting that it is in compliance with guidance issued by ADHS related to COVID-19 business operations. To date, Governor Ducey has failed to provide the affected businesses with such a form. At the Hearing, Governor Ducey's counsel stated that the form was "almost finished" and could be expected "quite soon." As Judge Thomason noted in *Mountainside Fitness*, the lack of timeline to make the

> waiver process available to affected business is suspect. Nonetheless, the failure to make the attestation form available, at this time, does not render the post-deprivation process insufficient, particularly in light of the Governor's representations that one would be forthcoming soon.

Xponential Fitness v. State of Arizona, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, *6 (D. Ariz. July 14, 2020).

On July 15, 2020, the Governor, in response to Mountainside's request for accelerated briefing on the appeal in this very case, told the Arizona Court of Appeals:

> Here, by contrast, the order Mountainside challenges is scheduled to last only until July 27, 2020…Thus, Mountainside's alleged harm could be *eliminated* on July 27, 2020, and it is asking the parties and the Court to scramble and prioritize this matter over all others for relief that could last only two days.

(Governor's Response to Mountainside's Motion to Accelerate Appeal (emphasis in original), Exh. 2 to Mountainside's Renewed Application.)

This Court's July 6 Order found that EO 43 provided on its face sufficient procedural due process because of the Form Provision. The Court also made it very clear that the Form Provision needed to be followed and a Form needed to be provided in a timely manner in order for EO 43 to pass Constitutional muster. The Court noted that "(i)f process is not provided in a reasonably timely fashion, then there really is no process…There must be real post-deprivation process…The Court is greatly concerned about implementation…[I]f the form is not available well in advance of July 27, then the Governor runs the real risk of depriving aggrieved businesses of any real process at all. If meaningful process is not provided, then injunctive relief may ultimately be ordered." (July 6 Order at 7-8.)

As noted above, the draft Form was not available until July 23 and the final version of the Form was not available until July 31. ADHS "draft" requirements for gyms and indoor fitness centers relating to re-opening were published (the "proposed requirements") on July 23. Final requirements were posted on July 31, 2020 (the "requirements").

The Form does not give fitness centers an opportunity to re-open during any mandatory shutdown period. Rather, gyms that fill out the Form must attest that they will remain closed through any mandatory shutdown periods.

Applicants must also attest that they will strictly adhere to all policies and guidelines from the Center for Disease Control ("CDC"), the Arizona Department of Health Services ("ADHS") and the Department of Labor, Occupational Safety and Health Administration ("OSHA"). Even if affected businesses make such an attestation and strictly adhere to ADHS requirements, they are still forced to stay closed during mandatory shutdown periods.

The Form also requires applicants to attest that they will, among other things, implement comprehensive sanitation protocols; operate with reduced occupancy and capacity; ensure that it will monitor for symptoms of illness; ensure that customers and staff use face coverings at all times; provide employees with protective equipment; allow for virtual visits and teleworking when feasible; post physical and/or electronic signage prohibiting individuals who are symptomatic from entering; implement symptom screening for employees and require sick employees to stay home. There are a myriad of other requirements. As such, fitness centers can implement all of these protocols and requirements and still not be allowed to open until the Governor repeals or revises the mandatory shutdown period. Even then, applicants complying with all of the protocols would be required to shut down again if the Governor again so ordered.

When EO 43 was issued, there had been 73,908 diagnosed cases of COVID-19 and 1,588 deaths in Arizona. As of July 23, when EO 52 was issued, there were 152,944 diagnosed cases and 3,063 deaths. The weekly Arizona State Report issued by the White House Task Force, as of July 19 (the "July 19 White House Report"), identified all but two Arizona counties in the "red zone," which means there were new cases above 100 per 100,000 population and a diagnostic test positivity result above 10%. The July 19 White House Report also noted that new cases were down 13.6% for the prior week and deaths were up approximately 70%.

The July 19 White House Report included a recommendation that bars and gyms remain closed. No explanation is provided as to why gyms that follow all safety protocols required by the ADHS should remain closed.

ADDITIONAL EVIDENCE

The Court allowed the parties to submit additional evidence for the August 3 hearing via declaration.[2] The declarations are summarized as follows.

[2] Witnesses who provided declarations were made available for cross-examination at the August 3 hearing. Dr. Cara Christ, Dr. Jeffrey Singer, Mr. Will Humble, Dr. Marjorie Bessel, General Michael McGuire and Lauren Bouton were examined at the hearing.

Mountainside

1. Will Humble. Mr. Humble is the Executive Director of the Arizona Public Health Association. He was the Director of ADHS from 2009-2015. Mr. Humble reviewed the "Requirements for Indoor Gyms and Fitness Clubs/Centers-Latest Updated: July 22, 2020" ("proposed requirements"). Mr. Humble opined that, if implemented by a fitness facility, the proposed requirements would be sufficient to make the facility as safe as any other ordinary business operating pursuant to observance of Arizona COVID-19 safety protocols, such as a home improvement retail store or a grocery store. In fact, the proposed requirements are very specific and more stringent than the standards applied to other commercial businesses. Mr. Humble also stated that a fitness facility offers no particular risk of COVID-19 transmission if it has a COVID-19 industrial hygiene and mitigation plan. Mr. Humble then went through the steps that he believed a center would need to follow to comply with such a plan. Mr. Humble expressed his disagreement with the Governor's alleged reliance on a study regarding COVID-19 transmission coming out of a fitness dance class in South Korea. Mr. Humble also pointed out the differences in risk transmission at bars and nightclubs with fitness centers. Fitness centers following the proposed requirements pose far less risk of COVID-19 transmission than bars and nightclubs. Rather, they pose a similar or even lower, risk than retail and grocery stores.
   Mr. Humble also submitted a rebuttal to the declarations of Dr. Jeremy Phillip Feldman, Dr. Cara Christ, Dr. Luis Manuel Tumialan, Dr. Andrew Carroll, Dr. Paloma Beamer, Major General Michael McGuire, Michael Wisehart and Sandra Watson. According to Humble, the declarations of those witnesses do not establish that fitness centers following the proposed requirements pose a greater risk of COVID-19 transmission than other businesses allowed to remain open, such as retail stores, restaurants and nail salons.
2. Blair McHaney. Ms. McHaney is the president and CEO of MXM, a company that uses statistical data from the fitness industry to provide feedback to fitness centers and health clubs regarding member experiences. Based on information she admitted was anecdotal, McHaney found that the ratio of "check ins" to positive reports at fitness centers was a rate of .005%. The evidence led McHaney to conclude that none of the positive reported cases arose inside a fitness facility. Ms. McHaney also concluded that the general nature of the fitness industry already provides a healthy environment. She also believes that fitness centers that were open during the COVID crisis emphasized safety in order to retain members.

3. Dr. Jeffrey Singer, M.D. Dr. Singer is board certified in general surgery. He is a principal at Valley Surgical Clinics, Ltd. He is also a fellow at the Cato Institute and a visiting fellow at the Goldwater Institute. He has reviewed ADHS proposed requirements. In Dr. Singer's opinion, the proposed requirements, if followed, would significantly reduce the risk of transmission of infectious diseases, such that centers that follow the requirements would not pose any greater risk of transmission than other commercial businesses, such as retail centers. He also believes that regular exercise is generally beneficial to health.
4. J. Lindsay Cook. Mr. Cook is the president of the American Industrial Hygiene Association ("AIHA"). He is a consultant in environmental, health and safety areas. Cook has reviewed ADHS proposed requirements. He has concluded that the proposed requirements are more protective against COVID-19 transmission than the guidelines recommended by either the AIHA or the CDC. Fitness centers that follow ADHS proposed requirements pose no more risk than businesses generally. Mr. Cook opined that ADHS proposed requirements adequately address the interests of physical distancing and covering mouths and noses.
5. Dr. Thomas Fuller, Sc.D. Dr. Fuller is the president elect of the International Occupational Hygiene Association ("IOHA"). He is a professor in occupational safety and health at Illinois State University. He has reviewed ADHS proposed requirements. He concluded that, if requirements are properly implemented, fitness centers such as Mountainside are no more of a threat to the spread of COVID-19 than any other business of similar size. Dr. Fuller is also of the view that ventilation systems used in larger fitness centers significantly help clean the air of viruses, making such fitness centers safer than businesses that do not use such ventilations systems.

   Dr. Fuller also submitted a rebuttal to Dr. Cara Christ's declaration. Dr. Fuller states there is no peer-reviewed study showing that fitness centers pose an increased risk of airborne viral transmission, although it may be reasonable to hypothesize that unregulated fitness centers that do not follow the proposed requirements could pose an increased risk. He notes that the South Korean study cited by Dr. Christ did not involve safety protocols, such as wearing masks and social distancing.
6. Randy Karr. Mr. Karr is a founder of the California Fitness Alliance ("CFA"). He is also the CEO of California Family Fitness, which operates 19 fitness centers in California. Karr submitted a July 21, 2020 press release purporting to report the results of CFA's member surveys comparing the number of visits to fitness centers to the number of fitness centers where members tested positive for COVID-19. The press release reports that no cases of COVID-19 have been traced to California fitness centers.

The Governor

1. Dr. Jeremy Feldman, M.D. Dr. Feldman is a pulmonary, critical care and neuro-critical care specialist. He has worked regularly with those who have contracted the COVID-19 virus. Dr. Feldman stated that the epidemic curve began to change in May-June of 2020, which coincided with the reopening of the State. Numbers began to rise even more by the end of June. The largest number of positive results were in the 20 to 40 year age range. Dr. Feldman opined that gyms and fitness center are high risks because heavy workout activity causes droplets to be transmitted farther and in greater quantities. The indoor environment means that this increase in droplets poses a more significant risk. Dr. Feldman opined that indoor health facilities represent an unnecessarily high risk. He felt this was the case even without proof that fitness centers have caused an outbreak. The doctor believed that closure of fitness centers was "of the utmost necessity." Dr. Feldman also stated that he believed that plaintiffs' arguments that there is no risk or minimal risk with re-opening health facilities to be specious and/or downright reckless. Dr. Feldman believes that the decision to close fitness centers was sound and rational.
   Dr. Feldman also submitted a rebuttal to the declaration of Mr. Humble. Dr. Feldman agreed that the South Korean study was not the best or sole support of the Executive Orders. However, the decision temporarily closing fitness facilities was absolutely necessary based on community spread. He cited a study based on the transmission of COVID-19 on the Diamond Princess Cruise Ship, which supports the theory that aerosols are important in the transmission of the virus. Mr. Humble allegedly has no medical or scientific data showing that indoor fitness facilities pose no or limited risk. Although six feet of social distancing is known to be appropriate for non-exercise activities, it is not known how much distance is required during exercise, but it is unlikely that six feet is enough.
   Dr. Feldman also rebutted Ms. McHaney's declaration. He noted that the data cited by McHaney was not published or peer reviewed. Moreover, the data was flawed because there was no information about how many customers were included or the community prevalence of COVID-19.
   Dr. Feldman rebutted Dr. Singer's declaration stating Dr. Singer claimed no special knowledge of COVID-19.
   He also rebutted Dr. Fuller's declaration, pointing out that Dr. Fuller did not cite any meaningful peer reviewed data, but merely asserted that modern ventilation systems can eliminate the virus in a room during exercise. He said that Dr. Fuller's claims about the efficiency of ventilation systems were exaggerated.
   Dr. Feldman rebutted Mr. Cook's declaration, pointing out that there have been recent reports from Major League Baseball of rapid spread of the virus among

players, coaches and staff, causing baseball to step-up coronavirus protocols. He also cited outbreaks experienced by sports teams of several universities.

2. Dr. Cara Christ. Dr. Christ is the Director of ADHS. She is an infectious disease epidemiologist. According to Dr. Christ, COVID-19 is known to spread mainly through respiratory droplets produced when an infected person coughs, sneezes, talks or even breathes. Physical activity results in more exerted breathing, which increases the output of viral respiratory droplets. Indoor spaces such as gyms increase the likelihood of individuals breathing in these respiratory droplets. Intense physical activity in confined spaces increases the risk of infection. A South Korean study reveals that intense physical exercise in densely populated sports facilities could increase the risk of COVID-19 infection. Dr. Christ stated that gyms and fitness centers pose threats because physical exertion in closed environments results in increased release and spread of infectious droplets. She does not believe that indoor ventilation systems change the analysis. Certain physical activities make wearing masks difficult. Dr. Christ opined that the nature of indoor gyms makes management of COVID-19 difficult. Users of fitness centers tend to stay for longer periods and return multiple times per week. Other states have identified gyms as high risk. ADHS has concluded that indoor gym and fitness centers are high risk. The only high risk activity not presently subject to mandatory compliance with ADHS guidance are casinos operated on sovereign tribal lands. Dr. Christ also discussed the attestation process for reopening. When deemed safe to re-open, gyms can attest to following the best practices deemed necessary by ADHS to minimize the spread of the virus. Dr. Christ opined that the Executive Orders were necessary to prevent Arizona from facing an even larger increase in COVID-19 illness.

   Dr. Christ submitted another declaration to clarify or rebut certain statements or opinions in Mountainside's declarations. She stated that the ADHS requirements, while necessary, are "not a failsafe that alone will (or ever could) prevent" community spread of COVID-19 at the levels seen in Arizona. She opined that indoor gyms and other high-risk activities must cease "because that is the most effective way to slow" community spread. Dr. Christ stated that the ADHS requirements "alone are not sufficient to lower Community Spread to acceptable levels."[3] Dr. Christ cited the White House COVID-19 Task Force Guidance ("White House Guidance"), updated as of July 26, 2020. The White House Guidance continued to recommend that Arizona "[c]ontinue bar and gym closures in hot spot counties." Ten of Arizona's 15 counties were identified as "hot spots." The White House Guidance did not address whether gyms could open if following

[3] During her testimony on August 3, Dr. Christ testified that she did not believe that it was prudent for fitness centers to open, even if operating under the ADHS requirements. She cited concerns about the level of physical activity, breathing heavily and demographics (young adults exercise more and they are often asymptomatic) as reasons why fitness centers are still dangerous, even if patrons are acting responsibly and wearing masks.

strict ADHS guidelines. Dr. Christ cited additional articles/studies concerning spread of the virus in indoor recreational facilities.

In addressing Mr. Humble's declaration, Dr. Christ noted that Mr. Humble is not a doctor or epidemiologist. She stated that her opinions are based on much more than the South Korean study.

Dr. Christ stated that the data Ms. McHaney relied on is untested and unreliable.

3. Dr. Luis Manuel Tumialan. Dr. Tumialan is a board certified neurologist. He is the lead physician on the HonorHealth COVID-19 Mitigation Task Force. According to Dr. Tumialan, any form of meaningful exercise increases respiratory rate and tidal volume, both of which are especially germane in the transmission of COVID-19. Exercise escalates the mechanism of transmission of the virus. The doctor opined that people exercising need more than six feet of social distancing. Dr. Tumialan also stated that the very nature of exercise creates a greater risk for transmission. The doctor opined that the Executive Orders were not only rational, but necessary.
4. Dr. Andrew J. P. Carroll, M.D. Dr. Carroll is a primary care physician. He has provided frontline care to COVID-19 patients. Dr. Carroll stated that indoor fitness centers involve particular risks because of indoor enclosed spaces, heavy exercise resulting in increased respiratory droplets, close proximity of equipment, use and sharing of equipment, common restrooms and showers, and significant HVAC ventilation needs. Dr. Carroll supported the implementation of the Executive Orders.

   In his rebuttal declaration, Dr. Carroll stated that one out of every five Arizonans tested is positive for COVID-19. With 3,454 deaths, the mortality rate in Arizona is roughly 1 out of 2,100. The number of deaths will continue to grow. Fitness centers pose a greater risk than other establishments, such as grocery stores, because people are increasing their heart rates and respiration as they exercise. He was critical of the data cited by McHeney and claimed that she was disingenuous and trying to minimize the significance of the pandemic.
5. Dr. Paloma Beamer, Ph. D. Dr. Beamer is an environmental engineer and is a professor at the University of Arizona. She is the president of the International Society of Exposure Science. Dr. Beamer teaches exposure assessment and controls of occupational exposure. During times of high physical exertion, exhalation rates increase and it becomes more likely that an infected person could propel droplets of all sizes at a much further distance and at greater acceleration. In addition, people who are exercising take in a larger volume of air and therefore inhale a greater number of viruses. Dr. Beamer opined that gyms should remain closed until community transmission decreases and the World Health Organization updates its guidance on airborne transmission so that ADHS guidance for gyms can be updated.

Dr. Beamer stated in her rebuttal declaration that the reopening of the gyms coinciding with an increase in positive cases was no coincidence. The widespread community transmission warrants the reclosing of fitness centers because younger asymptomatic carriers frequent them.

6. Major General Michael T. McGuire. General McGuire is an adjutant general for the Arizona National Guard and the Director of the Arizona Department of Emergency and Military Affairs. He leads the Division of Emergency Management's response to the COVID-19 pandemic. General McGuire provided a discussion of the pandemic and the mobilization of the Arizona National Guard in addressing the pandemic. Although he gave no specific information on fitness centers, he opined that the limitations placed on Arizonans by the Governor's "collective" executive orders are appropriately limited in scope and critical to reducing the spread of COVID-19.
7. Michael Wisehart- Mr. Wisehart is the Director of the Arizona Department of Economic Security ("DES"). Mr. Wisehart discussed the financial ramifications of the pandemic. He offered nothing directly relevant to the issues before the Court.
8. Sandra Watson. Ms. Watson is the President and CEO of the Arizona Commerce Authority. Ms. Watson is familiar with the state and federal government's economic response to the COVID-19 crisis, as well as the direct economic relief available to small businesses and impacted individuals. She opined that the Executive Orders are consistent with federal guidance and actions taken by other states and countries. She also believed that the various executive orders issued by the Governor have been balanced to maintain economic viability while ensuring the public health. Ms. Watson discussed the financial aid and loan programs available to impacted businesses.
9. Jessica Rigler. Ms. Rigler is the Assistant Director of the Division of Public Health Preparedness at ADHS. She discussed, like many others, the increased risk in COVID-19 transmission in indoor fitness centers. Ms. Rigler opined that Mountainside's initial failure to abide by EO 43 caused a serious threat to public health and welfare by exacerbating the spread of COVID-19.
10. Lauren Bouton. Ms. Bouton is the Director of Community and Stakeholder Engagement for the Office of the Governor. She has been involved with a series of meetings with fitness club and gym owners and operators "to solicit feedback on how the State could best implement practices to not only protect Arizonans from contracting and spreading the virus, but also ensuring businesses operate safely in the future." On July 16, 2020, Ms. Bouton sent to the relevant "stakeholders" ADHS' draft requirements and draft attestation form. She stated that the Governor's Office has received a significant amount of data from the fitness industry. According to Bouton, the Governor's office and ADHS have worked diligently to ensure all relevant information is considered in decision-making.

11. Dr. Marjorie Bessel. Dr. Bessel is the Chief Clinical Officer at Banner Health. She has been the emergency operations center director for Banner's planning, response and execution of COVID-19 activities. Dr. Bessel discussed the virus and its highly contagious nature. While her declaration stated that Banner Health supported the need to close businesses such as bars, nightclubs and gyms, the vast majority of her declaration discussed the dangers of bars. No meaningful information was provided on fitness centers.[4]
12. Rodger Lurie. Mr. Lurie is a Scottsdale resident and was a Mountainside patron. He has tested positive for COVID-19. He was told that one employee of Mountainside "had the virus." He speculates that he contracted the virus at Mountainside.

LEGAL ANALYSIS

The operative questions before the Court presently are whether plaintiffs' Constitutionally-protected post-deprivation procedural due process rights and substantive due process rights have been violated. In assessing whether injunctive relief is proper, the Court must assess the probability of success on merits. As part of that analysis, the Court first addresses whether the case involves a Constitutionally-protected property interest and whether the Governor's actions were legislative or quasi-legislative, issues not previously fully addressed by the Court.

I. PROBABILITY OF SUCCESS ON THE MERITS

A. *Do Gyms Have A Constitutionally-Protected Property Interest To Conduct Business?*

Property interests are not created by the state or federal Constitutions. Rather, they are created and defined by state law that secures certain benefits and supports claims of entitlement to those benefits. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (assistant professor under contract had no property interest in having his contract renewed). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

Arizona law does recognize a property interest in conducting business. For example, Arizona allows claims for damages for interference with contracts and business expectancies.

[4] During her testimony on August 3, Dr. Bessel indicated that she had concerns about fitness centers being open at the present time, even if operating in conformity with the requirements. To be fair to plaintiffs, this testimony does not appear to have been in Dr. Bessel's declaration.

Miller v. Hehlen, 209 Ariz. 462, ¶ 32 (App. 2005). Arizona also looks unfavorably on restrictive covenants and favors free enterprise. *Orca Communications Unlimited, LLC v. Noder*, 233 Ariz. 411 (App. 2013) (decision affirmed and ordered depublished on other grounds). Plaintiffs certainly have a protected interest in continuing their businesses. *See Barr v. Johnson*, 777 Fed. Appx. 298, 303 (11th Cir. 2019) (business suddenly closed down by city official "successfully demonstrate[d]" an actionable procedural due process claim); *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611-612 (6th Cir. 2006) ("due process protects an interest in the continued operation of an existing business").

The Governor relies on *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). In *Florida Prepaid*, the Supreme Court stated: "The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment. But business in the sense of the activity of doing business, or the activity of making a profit, is not property in the ordinary sense—and it is only that, and not any business asset, which is impinged upon by a competitor's false advertising." *Id.* The issue in *Florida Prepaid* was whether the state could be sued for false advertising. The Supreme Court found that plaintiff had no right to be free from a business competitor's false advertising about its own product. The case did not involve a business shutdown.

The Governor reads *Florida Prepaid* too broadly. The Supreme Court in *Florida Prepaid* actually said that goodwill is a property interest. Goodwill of a business includes "the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets." *Black's Law Dictionary* (11th ed. 2019). If a business could not sell goods or services and earn an income, it obviously could have no goodwill. As such, a forced government shutdown of more than a short duration involves the taking of a property interest.

The Governor also cites *In re Premier Auto. Services, Inc*., 492 F.3d 274 (4th Cir. 2007), which held that a holdover tenant on state-owned land did not have the right to compel a new lease. A holding that a tenant was not entitled to a new lease is a far cry from holding that an operational business has no property interest in continuing to operate and generating revenue.

According to the Governor, a governmental body forcing a business to shut down for absolutely no reason cannot be a Constitutional violation because no property interest is implicated. This is incorrect. The operations of a business and the ability to earn income from that business are clearly property interests.

The Court previously found that a short shutdown might not implicate a protected property interest. At the same time, it is evident that the government forcing a business to shut down indefinitely, to the point where it might not be able to survive, implicates a property interest. An

ongoing revenue stream, and the goodwill attendant thereto, is certainly a property interest. There is no legal or logical support for the proposition that a permanent or long-term forced shutdown of a business does not involve a Constitutionally-protected property interest.

B. Are the Executive Orders Legislative, Quasi-Legislative or Administrative?

The salient body of law does not appear to have contemplated emergency orders that would shut down businesses for months at a time. This is unprecedented.

The Executive Orders here mandate the shutdown of certain businesses. This is not a situation where all businesses are ordered to cease operations. It is also not a situation where all non-essential businesses are ordered to be shut down. Rather, certain specific businesses have been targeted. In addition to fitness centers, certain types of bars, indoor movie theatres and water parks were ordered closed. A very small percentage of Arizona businesses are currently ordered to be shut down.

Due process rights do not attach to legislative and quasi-legislative acts. An act is legislative if it applies to "general conduct binding upon many persons." *Brown v, Winter*, 50 F. Supp. 804, 806 (W.D. Wis. 1943). If the act "is one in which a 'relatively small number of persons [are] concerned, who [are] exceptionally affected, in each case upon individual grounds,' then the process is adjudicatory and due process rights attach*." Blocktree Properties LLC v. Pub. Util. Dist. No. 2*, 380 F. Supp. 3d 1102, 1121 (E.D. Wash. 2019).

A relatively small number of businesses are affected by the Executive Orders. The determination of which businesses would have to shut down was determined on an individual, business-by-business, basis. Indeed, the Governor admitted that the decision to shut down was made based on characteristics of specific businesses.

At least two courts have recently held that post-deprivation due process rights attach to executive orders closing businesses in an effort to stop the spread of COVID-19. *See Benner v. Wolf*, __ F. Supp. 3d__, 2020 WL 2564920, *5 (M.D. Pa. May 21, 2020); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 898 (Pa. 2020). These decisions support the conclusion that orders targeting selected businesses are not legislative in nature.

In *Best Supplement Guide, LLC v. Newsom,* 2020 WL 2615022 (E.D. Cal. May 22, 2020), cited by the Governor, the court stated:

> [G]overnmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing; general notice

> as provided by law is sufficient." Plaintiffs do not allege the current gym closures are targeted at individual gym owners or particular facilities. Rather, the State and County orders prohibit the operation of all gyms and workout facilities within their respective jurisdictions.

Id. at *5 (internal citations omitted). The question in *Best Supplement* was whether the county "should have afforded [the gym owners] some sort of legal process *prior* to enacting and threatening to enforce their stay at home orders." *Id*. (emphasis added). The court did not address whether the gyms should be afforded post-deprivation process. As discussed below, the court in *Hartman v. Acton*, __ F. Supp. 3d __, 2020 WL 1932896 (S.D. Ohio April 21, 2020), noted that no hearing at all is required in the circumstances involve a generally applicable law or order. The EOs here are not generally applicable orders.

Hartman, 2020 WL 1932896, at *7, also cited by the Governor, involved an order from the Ohio Department of Health director ordering closure of *all* "non-essential" businesses for one month from April 2, 2020 to May 1, 2020. The court stated:

> Usually, due process requires that a hearing be conducted before a deprivation of a property or liberty interest occurs. A post-deprivation hearing is sufficient, however, when "a government official reasonably believed that immediate action was necessary to eliminate an emergency situation." *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 485–86 (6th Cir. 2014). *A hearing is not required at all, however, in those circumstances where the State has issued a generally applicable law or order. See Neinast v. Bd. of Trustees of Columbus Metro. Library*, 346 F.3d 585, 596–97 (6th Cir. 2003) ("Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard.").

Id. (emphasis added). The Executive Orders at issue here, however, are not generally applicable orders directed at all non-essential businesses. Rather, they are targeted at specific businesses.

The court in *Hartman* further stated:

> The Supreme Court of the United States has long observed that the rights of an individual affected by a law of general applicability "are protected in the only way that they can be in a complex society, by [the affected individual's] power, immediate or remote, over those who make the rule." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915); *see also Logan v. Zimmerman Brush Co.,*

> 455 U.S. 422, 433, 102 S. Ct. 1148, 71 L.Ed.2d 265 (1982) (noting that an individual's due process rights are not violated by a law of general applicability since "the legislative determination provides all the process that is due."). The Supreme Court has determined that this exception to due process applies even to agency action—so long as the agency's actions are prescriptive or legislative as opposed to adjudicative. *See United States v. Florida East Coast Ry.*, 410 U.S. 224, 93 S. Ct. 810, 35 L.Ed.2d 223 (1973) (determining that no due process right to hearing was triggered by agency action where it was applicable "across the board to all common carriers" and "no effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances.").

Id. at *8. Thus, the *Hartman* court concluded that "[t]he State's Order directing non-essential businesses to cease operating their physical locations did not violate Plaintiffs' due process rights because the Director's Order was a generally applicable order affecting thousands of businesses, and not a decision targeting an individual or single business." *Id.* The court further stated that the plaintiff was not entitled to a post-deprivation hearing because the order was not "targeted to a particular individual, business, and/or fundamental right." *Id.* at *9.

Of course, here the Executive Orders are directed at particular businesses and sectors. As such, the rationale from *Hartman* does not apply. In fact, the rationale from *Hartman* supports the conclusion that the EOs are not legislative in fashion.

EO 43 actually demonstrates on its face that lack of legislative action here. The Governor understood that the ultimate determination of whether an affected business could reopen had to be on a case-by-case basis.[5] That led to the Form Provision. Despite a general fitness industry shutdown for a limited period of time, the ultimate determination of whether a business could open was going to be based on the safety protocols put in place by each business. The fact that the Governor has, at this time, deprived businesses of the ability to utilize the Form process does not detract from the notion that the determination of what specific businesses would be closed for more than a short period would be done on a case-by-case basis.

Of course, some executive agencies engage in quasi-legislative functions to which no procedural due process rights attach. This case, however, involves no such thing. Rather, this case involves the Governor issuing an order that impacts certain selected businesses in very severe

[5] Notably, Executive Order 2020-09, which closed *all* non-essential businesses, did not have a Form Provision or similar procedure for reopening.

ways. This is clearly not a legislative function. Indeed, if it were it would likely be a violation of the separation of powers doctrine.[6]

The Executive Orders are not legislative or quasi-legislative. Rather, they affect only a small amount of businesses. Plaintiffs are likely to prevail on this issue.

C. Has Adequate Due Process Been Provided?

Procedural due process does not completely disappear in time of hardship. *Benner v. Wolf*, 2020 WL 2564920, at *5. The *Benner* decision upheld shutdown orders by the Governor of Pennsylvania. The court made it clear, however, that some post-deprivation process was required. *Id.* While the procedural due process need not reach perfection, it does need to "achieve adequacy." *Id; see also Friends of Danny DeVito v. Wolf*, 227 A.3d at 898 (waiver procedure satisfied due process).

It appears as if the Form Provision and the attestation process will provide adequate due process, when available. That process, however, does not even begin until after the shutdown order is lifted. Prior to that time, no process is provided. Further, once reopening is permitted, the applicant must attest, as a condition of reopening, that it will shut down again, without notice or opportunity to be heard, should the Governor order another shutdown.[7]

During the July 27 hearing, it was evident the Governor's counsel recognized that there was a potential procedural due process problem. Indeed, counsel argued that adequate due process was provided during the time of the shutdown, but was unable to explain what that process consisted of. When asked what process was provided, counsel said that "if anybody disagrees [with the shutdown order] and they have medical testimony, they have some other guidance, some other statements, whatever it might be…then they are able to review…" It is not clear what "review" counsel was referring to. In response to the Court's follow up question, counsel said that if affected businesses "disagreed" with the Governor's shutdown order, they could point to their own "rational basis" and that the "judiciary" makes the determination.

This entire discussion was confusing. It was clear, however, that the Governor's counsel was not able to explain what due process was actually available during the shutdown period. In fact, there is nothing in the Executive Orders, as currently being implemented, that provides for

[6] The issues framed before this Court do not extend to the general powers of the Governor to issue emergency orders. Clearly, however, the Governor, even in emergencies, cannot assume the role of the legislature and start issuing orders targeted at specific businesses with long lasting ramifications.

[7] During her testimony on August 3, Dr. Christ confirmed that no process will be provided until some undetermined future date. She testified that fitness centers could not petition to reopen until COVID-19 numbers have decreased to some undefined amount.

any review of the Governor's shutdown decision or review of any fitness center's request to reopen. The Executive Orders also do not allow affected businesses an opportunity to present their own "rational basis," as argued by counsel.

Of course, the Court is the ultimate safeguard and makes the determination as to whether the Executive Orders have a rational basis. The notion that a party can come to court to seek relief certainly does not mean, however, that the Executive Orders provide adequate post-deprivation due process. On the contrary, if the Court is the only source of due process, then the Executive Orders themselves clearly do not provide for due process.

Executive Order 2020-14, dealing with the moratorium of evictions, has an explicit judicial bypass provision. Such a provision provides an adversely affected party an express opportunity to be heard and ensure that its Constitutional rights are protected. The Executive Orders here contain no similar judicial bypass mechanism. No explanation has been provided as to why the Executive Orders at issue here do not have such a procedural provision.

While the Form and the requirements have been made available, they provide no process until the mandatory shut down order is lifted. As such, any due process is illusory.

It is in fact the duty of this Court to ensure that affected businesses receive an opportunity to be heard in a meaningful way. Not allowing businesses any due process until the Governor decides, in his discretion, to end mandatory shutdown periods, deprives these businesses of any meaningful due process. In fact, under EO 52, the Governor can simply continue to extend the shutdown periods for two weeks at a time indefinitely, depriving fitness centers any opportunity to be heard.[8]

It is not presently possible to determine when the shutdown period will end and the Form attestation process can begin. EO 52 continued the shutdown for an additional two weeks. It will, in all likelihood, be continued thereafter, possibly for the foreseeable future. Indeed, the Governor maintains the right to continue the shutdown period indefinitely, without providing any opportunity for any gym to reopen, even if the gym is following every possible safety protocol from State and federal authorities. Yet, the only process provided is after the mandatory shutdown period ends. In fact, EO 52 does not mention the Form Provision at all. There clearly has not been adequate process.

[8] The Court is not, in any way, suggesting that the Governor has extended or will extend the shutdown period arbitrarily. It is the risk of arbitrary governmental action, however, that necessitates meaningful due process of law.

The Governor and ADHS have clearly stated that fitness centers will be allowed to open if they are following the requirements, but just not yet. According to the plaintiffs, there is no meaningful difference between operating under the safety protocols today and operating under same protocols at whatever time in the future the Governor says the fitness centers can reopen. If they are operating safely, so they contend, then they are operating safely, whether that is presently or at some time to be determined over the ensuing weeks or months. Yet, the Executive Orders provide no mechanism for the plaintiffs to be heard on whether they can operate safely presently.

Once the mandatory shutdown periods end, the fitness centers will be able to submit the Form. Until that time, however, there is no process. The failure of the Executive Orders to provide any process before the shutdown period end violates plaintiffs' Constitutionally-protected rights to procedural due process.

EO 43 provides:

> To receive authorization to reopen, entities shall complete and submit a form as prescribed by the Arizona Department of Health Services that attest the entity is in compliance with guidance issued by ADHS related to COVID-19 business operations. The form shall also be posted in an easily visible public place on the entity's premises. ADHS shall provide information to the public on those entities that have submitted such attestations on its website.

The Court previously found that EO 43 did provide for adequate post-deprivation due process because of this Form Provision. As now implemented, however, no due process is provided during the mandatory shut down period.

The Court orders that EO 43 be enforced according to its terms. Fitness centers must be allowed to complete and submit some type of form or application to receive authorization to reopen. Of course, the attestation form can mandate compliance with the requirements. However, it cannot require fitness centers to attest that they agree to be shut down during any mandatory shutdown period.

The Court rules only that fitness centers and gyms are Constitutionally entitled to some mechanism for petitioning for reopening. They must have some meaningful opportunity to be heard.

It is not the Court's function to dictate how this process will be structured or implemented. It is also not the Court's function to ascertain how any application to reopen will be resolved.[9] As long as fair and meaningful process is provided, ADHS certainly has the discretion to deny individual applications.

As noted in the July 6 Order, the Court is mindful that the process should not be so extensive or complicated that it taxes an already overtaxed system. The process for applying to re-open does not have to be complicated and can be as simple and straightforward as the Governor or ADHS want it to be.[10]

Plaintiffs should have already been provided with an opportunity to apply for reopening. The fitness centers are still closed. As such, time is of the essence. The system for applying to reopen needs to be put in place promptly. In order to ensure that the procedural due process rights of plaintiffs are protected, the process for reopening must be implemented within one week from the date of this Order.[11]

D. Do The Executive Orders Comport With Substantive Due Process?

Under the rational basis test, a court will uphold a law "if it has any conceivable rational basis to further a legitimate governmental interest." *Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 555 (1981). A governmental act will be upheld so long as "any set of facts…rationally justifies" the law. *Id*. at 556. The Court previously found that EO 43 passed this very low threshold test. There certainly is a rational basis for shutting down gyms and fitness centers for a period of time.

Plaintiffs, however, claim that the issue is presently not whether there is a rational basis for shutting down fitness centers. Rather, plaintiffs claim the issue is whether there is a rational basis for not allowing fitness centers willing to follow the requirements to open immediately.

[9] The Court understands that the process that will be implemented after the mandatory shutdown period ends is one that will be essentially automatic. In other words, once the proper attestation is made, the applicant will be allowed to reopen. The process that the Court is ruling must be provided during the shutdown period certainly does not have to result in automatic reopening if the proper form is filled out. It would be appropriate for the Governor or ADHS to have some discretion in dealing with applications to reopen. At the same time, the Court is very mindful of the concern that case-by-case review of applications could be taxing on the system.

[10] Of course, the process put in place must be one that operates in a timely fashion. The Court is not in a position to dictate how quickly the process moves along. Rather, the Court must assume that all interested parties act in good faith and that the process will be one that moves with deliberate speed. Fitness centers have already been closed for several months this year, and it is imperative that their Constitutional rights be respected.

[11] Of course, if the mandatory shut down is terminated in the near future, the entire discussion about procedural due process before the shutdown period ends becomes moot.

At times, plaintiffs have also characterized the issue as whether there is a rational basis for concluding that fitness centers following all of the requirements pose a greater danger to public health than many other businesses, such as retail stores, grocery stores and nail salons, who are presently open with little or no oversight on their safety precautions. Indeed, evidence submitted by plaintiffs' witnesses, including Mr. Humble, compared the unfairness of keeping fitness centers complying with the requirements closed with other businesses that remain open.[12]

As noted above, there is clearly a rational basis for concluding that fitness centers should shut down for a period of time. Whether one agrees or disagrees with the decision to shut down the gyms, there is more than a rational basis for the conclusion to do so.

The Court certainly does not believe that the Governor is required to justify the decision to keep fitness centers willing to follow the requirements closed based on comparing the safety of those operations to other businesses that are permitted to remain open, such as retail and grocery stores.[13] Indeed, that might be an impossible task. Since the pandemic started, the Governor has had to make numerous decisions affecting many different businesses and industries. Many subjective factors had to be considered in making these decisions. For example, the Governor has had to consider the "essential" nature of certain businesses and balance the necessity of the business with the public health danger attendant to that business remaining open. As such, it is not as simple as contending that fitness centers following the requirements are as safe or safer than other businesses that are not required to follow strict safety protocols. Rather, other factors may have been considered in deciding whether businesses, such as grocery stores, remain open. As such, the Court does not believe that the appropriate analysis involves comparing the safety of fitness centers that are willing to comply with the requirements with the safety of other businesses. Rather, the Governor only has to show that there was a rational basis for the decision to keep fitness centers and gyms that are willing to follow the requirements closed.

The Governor is elected by the people to make these decisions. It is not this Court's function to second-guess the Governor's public health policy decisions, which involve the balancing of many different factors and considerations.

The Executive Orders pass the rational basis test, even if barely so. It is true that the Governor has provided little evidence that any fitness center following all of the rigid protocols in the requirements poses any significant danger. Of course, the Governor is not necessarily required

[12] During the hearing, counsel for Mountainside conceded that the Governor does not have to show specifically that fitness centers willing to follow the requirements pose a greater danger than other specific businesses.

[13] As noted above, counsel for Mountainside seemed to concede that point during the August 3 hearing. Nonetheless, as also noted above, some of the plaintiffs' witnesses have presented evidence comparing the unfairness of shutting down fitness centers willing to follow the requirements to other businesses that remain open.

to provide hard, scientific data to support his decision. There only has to be a rational basis for the Governor's decision.

The question about whether the Executive Orders have a rational basis was put to the Governor's counsel during the July 27 hearing. Counsel argued that the Executive Orders were rational because the Governor was following advice from various advisors. The Governor is certainly relying on exceptionally qualified medical advisors. These advisors, in particular Dr. Christ, have advised the Governor that fitness centers should remain shut down for the time being, even if following the requirements. The Governor is not making arbitrary decisions based on whim. Relying on advisors such as Dr. Christ does provide a rational basis for the Executive Orders and continuing shutdown period.

It is certainly true that the evidence presented to the Court provides very little specific information on the dangers of fitness centers following the requirements. The Court has carefully looked at all of the declarations provided to this Court. The only declaration that comes close to addressing the operative question is at pages 2 and 3 of Dr. Christ's rebuttal declaration. There Dr. Christ states that even gyms following the strict ADHS requirements should not reopen because the requirements are not a "failsafe" that will prevent transmission. Requiring that fitness centers have a "failsafe" against virus transmission seems to be a nearly impossible standard. Yet, once again, the standard to pass Constitutional muster is very low. The Governor is not required to provide detailed specifics on whether fitness centers following the requirements continue to pose safety risks.

Dr. Christ and Dr. Bessel did testify at the hearing that the requirements do not provide a sufficient basis for reopening at the present time, even if other businesses are allowed to remain open. Dr. Christ made it very clear that she believed that gyms were still too dangerous to open, even if complying with the requirements. This Court is singularly not in a position to second-guess the wisdom of the Governor's advisors. It is certainly not the Court's function to determine if Dr. Christ's position on whether fitness centers following the requirements pose a danger and should not be allowed to open is the correct position or if she studied the issue carefully enough.

The Governor relied in his papers significantly on the White House Task Force recommendation that gyms remain closed.[14] There is no suggestion, however, that the White House Task Force considered whether fitness centers who follow all of the rigid protocols in the Form and the ADHS requirements should remain closed. Moreover, the Governor is not following all of the White House Task Force recommendations; the Governor provides no explanation as to why he is following this recommendation and not others. Once again, however, the Governor does

[14] During oral argument on July 27, counsel for the Governor minimized the importance of the White House Task Force recommendations, arguing that the decisions being made were "Arizona-centric."

not have to answer every conceivable question and explain every decision made in detail. Rather, the White House Task Force is just one source of information relied on by the Governor's advisors in making the decisions in question.

This is not an area where there are currently peer reviewed scientific studies. The studies that have been done have little reliability and are anecdotal in nature. Much is not yet known about the coronavirus. The coronavirus has not been around long enough for the development of reliable scientific studies. As such, the Governor has to rely on the judgment and experience of professionals such as Dr. Christ. Following her advice comports with Constitutional due process.

Any Arizonan is very much aware that most businesses are open. Many of these businesses, such as restaurants and grocery stores, are often quite crowded. While most businesses seem to be trying to operate safely, there are few, if any, mandatory governmental safety protocols applicable to most businesses. Indeed, there is not even a State-wide mask policy. As such, there are many businesses operating in this State with no mandated protocols, such as social distancing, mask wearing, crowd control and the like. Yet, these businesses are up and running, potentially exposing the public to illness. Fitness centers, willing to ensure that their centers are not crowded and are operating safely, however, have to remain closed. It is very understandable that fitness center operators feel like they are being unfairly singled out.

For example, the papers submitted by the Governor talk a lot about the dangers of bars being open. Yet, the majority of bars, those that serve food, remain open. One could certainly argue that there does not appear to be any rational basis for allowing the vast majority of bars (those offering food) to remain open, while fitness centers with safety precautions must remain closed. Once again, however, the Governor is only required to show that there is a rational basis for the decision to require fitness centers which are following the requirements to remain closed at the present time. The Governor has made such a showing.

Plaintiffs have provided expert testimony confirming that fitness centers that are following the various protocols are able to operate safely. The Governor has very little to rebut that position. Again, however, very little is required. The question is not who is right and who is wrong. The wisdom of the Executive Orders is not the salient question. Rather, the question is only whether there is some rational basis. There is.

The Court agrees with the Governor's position that his decision complies with substantive due process because he is following the recommendations of others, including top-notch medical

people. The Governor is not required to provide specific data to support his decision. As such, the Executive Orders comport with substantive due process.[15]

II. IRREPARABLE INJURY

Certainly, a short shutdown may not result in irreparable injury. However, we are no longer dealing with a short temporary business interruption.[16] Rather, the Governor's orders have resulted in an extended shutdown with no end in sight. Affected businesses are now in danger of being forced to close permanently. In fact, it is unrealistic to think that fitness centers that have been forced to close for weeks and months on end will be able to resume operations. Shutdown orders across the country have resulted in thousands, if not millions, of business failures. These impacted businesses are clearly facing permanent closure. Closed businesses impact not just the owners, but also the livelihood of the thousands of individuals they employ.[17] No injury could be more irreparable than being forced out of business.[18] Plaintiffs have shown the possibility of irreparable injury.

III. BALANCE OF HARDSHIPS

As the Court previously ruled, a short shutdown in order to stem the tide of COVID-19, while resulting in significant hardship to plaintiffs, did not outweigh the public health interest behind EO 43. There is very little credible scientific data supporting the notion that fitness centers operating with necessary safety protocols pose a danger or that shutting down well run gyms has a significant public health benefit. Yet, fitness centers and gyms have been closed for weeks without any due process whatsoever. Plaintiffs' Constitutional right to due process has been violated. As such, the balance of hardships now tilts in plaintiffs' favor and entitles them to some post-deprivation process.

[15] Of course, the fact that the Court finds that the Executive Orders comport with substantive due process does not mean that aggrieved fitness centers are not entitled to a meaningful opportunity to be heard, as discussed above.
[16] Pursuant to Executive Order 2020-09, gyms were ordered to suspend operations from March 20 to May 20, 2020. Thus, to date, gyms have been shut down for the vast majority of the past four plus months. Clearly, most businesses forced to close for such long periods would not be able to continue in business at all.
[17] The Court is certainly aware that various government aid programs have been put in place to help businesses and employees. However, these temporary programs are no substitute for sustained employment now and after the pandemic has ended.
[18] Moreover, the Governor likely enjoys immunity from civil damages, rendering the damage done to plaintiffs left without an adequate remedy. *See* A.R.S § 12-820.01 (providing absolute immunity to state officials in acting in their official capacity); *Kentucky v. Graham*, 473 U.S. 159, 169 ("[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court.").

DISPOSITION

The Executive Orders, as implemented, violate procedural due process. As set forth above, fitness centers must be provided a prompt opportunity to apply for reopening. The process for doing so must be in place within one week from the date of entry of this Order. The Executive Orders, however, do not violate substantive due process.