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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OPEN OUR OREGON, DA CIELO LLC, THE MOUNT HOOD MIXER SHOP, INC., UNDER THE SKIN TATTOO LLC, BRYANT LLC, KUEBLER'S FURNITURE, INC., KATHY SALDANA, as an individual; MICHELE KARPONTINIS, as an individual; and DAVID PARSON, as an individual,,

Plaintiffs,

v.

KATE BROWN, in her official capacity as the Governor of the State of Oregon, LILLIAN SHIRLEY, in her official capacity as Public Health Director of the State of Oregon,,

Defendants.

Case No. 6:20-cv-00773-MC

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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LR 7-1 COMPLIANCE

Counsel for defendants Governor Brown and Dr. Lillian Shirley communicated regarding the matters that are the subject of this motion by e-mail on May 15, 2020. Plaintiffs and defendants agree they are not able to resolve this matter without the assistance of the Court. Defendants have complied with their obligations under LR 7-1.

MOTION TO DISMISS

Defendants Governor Kate Brown and Dr. Lillian Shirley move to dismiss this action on the ground that it is moot, Executive Order 20-07 and Executive Order 20-12 having been rescinded, and on the ground that the Complaint fails to state a claim as to which relief can be granted. This motion is brought pursuant to Fed. R. Civ. P. 12(b)(1) and (6) and is based on the following *Memorandum in Support of Motion to Dismiss.*[1]

MEMORANDUM OF LAW

INTRODUCTION

Viruses do not pay attention to county lines. Viruses do not care whether you are in a bar, choir practice, or a tattoo parlor. The United States has learned this the hard way over the past several months. In the last 90 days, more people have died from COVID-19 in the United States than died in all of the Korean War or the Vietnam War.

Plaintiffs demand a truly extraordinary remedy: a judicial declaration nullifying the steps the Governor has taken to protect Oregonians using emergency powers that governors have exercised, without controversy, for decades. They make this demand at a moment when Oregon is experiencing one of the greatest crises in its history, and at a moment when the Governor is making difficult choices to prevent mass illness and death and to keep the people of Oregon safe.

[1] In the Court's May 19, 2020 Opinion and Order, Docket No. 28, the Court referenced potential state law claims. Defendants are unaware of any state law claims raised in this action but, regardless, as these are claims against Governor Brown and Director Shirley in their official capacities, they are claims against the State itself, and as such, any state law claims are not justiciable in federal court, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

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And, ironically, they demand this extraordinary relief just after the Governor announced she would significantly relax the restrictions across Oregon, which she has now done.

The Executive Orders issued by Governor Brown are not designed to hinder any specific commercial activity any more than any other activity that, by the mere act of gathering in large numbers and/or in close contact, puts lives at risk. They are designed to keep Oregonians alive and to stop the spread of COVID-19. And they have been working. In large part because of the Governor's Executive Orders, the deaths in Oregon have been tragic, but *relatively* limited, so far, to 144 out of 3,801 confirmed cases.[2] Indeed, they have worked so well that the Governor has slowly—based on the advice of public health experts—released some of the restrictions in her early Executive Orders. Most significantly for purposes of this case, on May 14, 2020, Governor Brown rescinded the two Executive Orders that are the subject of this lawsuit. New Executive Order 20-25[3] permits the resumption of much commercial activity throughout Oregon, including operation of all but two businesses run by the business entities and individuals who are plaintiffs in this case.

This is a case brought to invalidate the emergency orders at the core of Oregon's fight against COVID-19. It is premised on the idea that plaintiffs—owners and operators of small businesses—are unduly and unconstitutionally suppressed from engaging in their trades. But plaintiffs give virtually no weight to the world-wide magnitude of the crisis nor to the significant risks of health impacts and death that would be created by the immediate overturning of carefully considered science-based orders.

Defendants do not minimize the impact of the steps necessary to battle COVID-19, and do not dismiss the economic harm that may be caused by the international, national, and state-level public health measures imposed to help curb the disease. Plaintiffs may disagree with the

[2] https://govstatus.egov.com/OR-OHA-COVID-19 (Last accessed May 20, 2020).

[3] The discussion in this Memorandum assumes that Executive Order 20-25 will still be in effect. This assumption may change depending on the status of *Elkhorn Baptist Church v. Brown*, Baker Co. Cir. Ct. Case No. 20CV17482.

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Governor's choice to take difficult, decisive action to curb this pandemic, which, unchecked, would have resulted in both widespread illness and death and also economic impact here in Oregon. But they are incorrect to say it lacks support in the framework of the United States Constitution. Plaintiffs have not suffered from cognizable deprivations of due process or equal protection and have not been subject to seizures or takings.

The action should be dismissed with prejudice.

FACTS[4]

In mere months, the infectious coronavirus disease 2019 (COVID-19) has infected 4,801,202 people and caused the deaths of 318,935 people worldwide.[5] In the United States alone, COVID-19 has caused the deaths of 94,170 people to date.[6] Oregon's Governor, Kate Brown, was one of the first leaders in the nation to recognize the scope of the threat and react accordingly. On March 8, 2020, Governor Brown declared a state of emergency pursuant to ORS 401.165.[7] Since then, she has issued a series of Executive Orders designed to stop the spread of the virus, protect Oregonians from its impacts, and preserve medical capacity and equipment.

Of significance here, on March 17, 2020, Governor Brown issued Executive Order 20-07,[8] which prohibited on-premises consumption of food and drink at restaurants and taverns and

[4] Defendants have cited herein to a number of documents such as the Governor's Executive Orders, and to highly respected and authoritative sources relating to the world-wide COVID-19 crisis, such as those from the World Health Organization and the tracking information from the University of Washington. None of these citations is to material that cannot be "accurately or readily ascertained," and so defendants request the Court take judicial notice of these facts. Fed. R. Evid. 201(b).

[5] World Health Organization, https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last accessed May 20, 2020).

[6] University of Washington Institute for Health Metrics and Evaluation, https://COVID19.healthdata.org/projections (last accessed May, 19, 2020).

[7] Oregon Executive Order 20-03 at 1, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-03.pdf.

[8] Oregon Executive Order 20-07, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-07.pdf.

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prohibited gatherings of more than 25 people. By that time, the World Health Organization had declared COVID-19 a global pandemic, the National Basketball Association and other major sports leagues had suspended their seasons already in progress, the NCAA had cancelled spring tournaments,[9] and governors across the nation closed schools.[10] Rather than order social distancing at that point, though, the Governor recommended that Oregonians maintain physical distance between themselves and other people to reduce transmission of the virus.[11]

After a beautiful March weekend that drew crowds of people to the Oregon Coast, Columbia River Gorge, and Smith Rock State Park, among other locations, where Oregonians did not adhere to the recommended physical distancing guidelines, the Governor took stronger action to slow transmission.[12] Specifically, on March 23, 2020, the Governor issued Executive Order 20-12, which banned non-essential social gatherings, closed certain businesses, and required social distancing.[13] By that time, cases of COVID-19 in Oregon had increased from at least 14 as of the date Governor Brown first declared an emergency to at least 161 with five deaths.[14] Confirmed cases continued to increase sharply across the country, and by March 26,

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[9] https://www.ncaa.com/live-updates/basketball-men/d1/ncaa-cancels-mens-and-womens-basketball-championships-due.

[10] *E.g.*, https://www.cnn.com/2020/03/23/us/us-schools-extend-closing-coronavirus/index.html; https://azgovernor.gov/governor/news/2020/03/governor-ducey-superintendent-hoffman-announce-extension-school-closures; https://www.journalgazette.net/news/local/20200403/governor-closes-schools-for-year https://governor.iowa.gov/press-release/iowa-schools-to-extend-closures-through-end-of-school-year-schools-will-continue; https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year/; https://www.governor.wa.gov/news-media/inslee-extends-school-closures-rest-2019-20-school-year.

[11] Governor Kate Brown Statement on First Oregon COVID-19 Fatality, March 16, 2020 (available at https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36188); Governor Kate Brown Announces New Statewide Actions on COVID-19, March 16, 2020 (available at https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36192).

[12] Oregon Executive Order 20-12 at 2, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-12.pdf.

[13] Oregon Executive Order 20-12 at 3, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-12.pdf.

[14] *Id*. at 2.

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the United States had reportedly surpassed China for having the most confirmed cases of COVID-19 of any country in the world.[15]

For the next several weeks, the Governor continued to take action to slow the spread and blunt the economic impact of the COVID-19 virus. For example, she issued a moratorium on evictions from residential and non-residential properties due to nonpayment of rent.[16] She issued an Executive Order preventing garnishment of federal CARES Act Recovery Rebate payments so Oregonians can use those funds, as intended, to pay for essential needs.[17] And she continued the suspension of in-person instruction in primary and secondary schools as well as colleges and universities.[18] All the while, case counts continued to rise—although more slowly than they otherwise would have.

On April 27, 2020, Governor Brown began the process of re-opening the state. She first issued Executive Order 20-22, which allowed the resumption of non-urgent health care procedures.[19] On May 1, 2020, as Governor Brown issued Executive Order 20-24 extending the state of emergency, she also announced the going-forward plans for COVID-19 testing and contact tracing, two foundational elements in the framework for reopening Oregon safely.[20] On May 5, Governor Brown announced the limited reopening of state outdoor recreational areas, and on May 7, before plaintiffs filed this case, Governor Brown announced that she would begin

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[15] McNeil, Jr., Donald G. (March 26, 2020). "The U.S. Now Leads the World in Confirmed Coronavirus Cases—Following a series of missteps, the nation is now the epicenter of the pandemic". *The New York Times*.

[16] Oregon Executive Order 20-13, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-13.pdf.

[17] Executive Order, 20-18, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-18.pdf.

[18] Executive Order 20-20, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-20.pdf; Executive Order 20-17; https://www.oregon.gov/gov/Documents/executive_orders/eo_20-17.pdf.

[19] Executive Order 20-22, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-22.pdf.

[20] Executive Order 20-24, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-24.pdf; https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36528.

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a phased process of reopening parts of the Oregon economy that had been closed or limited to slow the spread of COVID-19.[21]

Then, on May 14, 2020, Governor Brown issued Executive Order 20-25.[22] That order rescinded the two Executive Orders that are the subject of this lawsuit. It loosened some restrictions that had been in place statewide, including by allowing retail businesses to open while conforming to physical distancing guidelines. And it set up a structure to reopen the Oregon economy using a phased approach that would be implemented based on local conditions. *Id.* As of May 15, 2020, in fact, all but five counties were approved by the State to transition to "Phase I" under Executive Order 20-25. Only Clackamas, Marion, Multnomah, Polk and Washington Counties are not currently in Phase I.[23] Phase I counties are permitted to open nearly all businesses as long as physical distancing measures are adhered to. Limitations remain in Phase I counties, but none are complained of in this suit.

The plaintiffs in this action are (1) a political action organization in Hood River County; (2) a hair salon in Multnomah County; (3) a bar in Douglas County; (4) a group of liquor stores in Hood River and Wasco Counties (5) a tattoo studio in Hood River County; (6) a furniture store in Marion County; (7) the owner of two bars in Malheur County, (8) the owner of a lingerie store in Douglas County; and (9) a gym owner in Washington County. Complaint ¶¶ 1-9. The business plaintiffs were limited in their activities under Executive Order 20-12, but they were not all prevented from operating. Bars and restaurants were never forced to cease operations. They were only forced to cease on-premises consumption. Moreover, all plaintiff businesses, save the hair salon and the gym (which are in counties that have not met criteria to enter Phase I reopening), are free to resume operations, within health guidelines, as of May 15. Even the

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[21] https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36553; https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36579.

[22] Executive Order 20-25, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-25.pdf.

[23] https://govstatus.egov.com/reopening-oregon#countyStatuses.

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plaintiffs who operate restaurants and bars are permitted to begin on-premises consumption as long as physical distancing and other guidelines are met. As for the plaintiff salon and gym owner, who are not permitted to operate their gym and nail salon businesses, the complaint alleges neither that they are licensed by the State nor that they have requested any process related to the actions by defendants.

STANDARDS ON MOTION TO DISMISS

The Court's review is limited to the face of the complaint, documents referenced by the complaint and matters of which the court may take judicial notice. *Levine v. Diamamthuset, Inc*., 950 F.2d 1478, 1483 (9th Cir. 1991); *In re Stac Elecs. Sec. Litig*., 89 F.3d 1399, 1405 n.4 (9th Cir. 1996)*; MGIC Indem. Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir. 1986). A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984) (citing 2A J. Moore, Moore's Fed. Practice ¶12.08 at 2271 (2d ed. 1982)). When a court considers a motion to dismiss, all allegations of the complaint are construed in the plaintiff's favor. *Sun Savings & Loan Ass'n v. Dierdorff,* 825 F.2d 187, 191 (9th Cir. 1987).

While the Court may accept all "well-pleaded" factual allegations, it should ignore legal conclusions. Bare allegations that a government official, "knew of, condoned, and willfully and maliciously agreed" to violate a plaintiff's constitutional rights for improper purpose are not entitled to the assumption of truth. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1951 (2009); *Harlow v. Fitzgerald,* 457 U.S. 800, 817-818, 102 S. Ct. 2727 (1982) (bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery). It is the conclusory nature of the allegations that "disentitles them to the presumption of truth." *Iqbal,* 129 S. Ct. at 1951. Under this standard, plaintiff has failed to state a claim for relief.

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ARGUMENT

I. As Executive Orders 20-07 and 20-12 have been rescinded, this case is moot.

A. The State is starting to re-open and there is no basis to conclude it will be closed again, rendering the complaint moot.

Generally, an action is mooted when the issues presented are no longer live and, therefore, the plaintiffs lack a legally cognizable interest for which the courts can grant a remedy. *Alaska Center for the Environment v. U.S. Forest Service*¸189 F.3d 851, 854 (9th Cir. 1999). In this situation, the matter is moot. The entire claim for relief is a request for equitable remedies to be applied to Governor Brown's Executive Orders 20-07 and 20-12. Both of those orders, however, were rescinded by the issuance of Executive Order 20-25 on May 14, 2020.

There is an exception to the mootness doctrine. It exists where an issue is "capable of repetition yet evading review." This is a limited exception that applies "only to extraordinary circumstances where (1) the duration of the challenged action is too short to be fully litigated before it ceases; and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again." *American Rivers v. National Marine Fisheries Service*, 126 F.3d 1118, 1123 (9th Cir. 1997).

There may be speculative hyperbole, but there is no reason to believe that plaintiffs will be subjected to the same action again. Although it is entirely possible there may be another wave of COVID-19, perhaps next winter, it is not a foregone conclusion that the Governor would take the same steps. The situation will presumably be quite different. More information will be available about how and where the virus spreads and what is most effective to combat it, which may lead to a different approach. Testing likely will be more widely available. Contract tracing likely will be in place. Promising therapeutics may have emerged. Progress on a vaccine may have occurred, perhaps even resulting in distribution of a vaccine. Although some of these musings are speculative, so, too, are plaintiffs. The burden of showing "capable of repetition" is upon them. Speculation is insufficient. As to contentions that the Governor will re-institute

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identical restraints on businesses at an unknown time in the future based on an unknown recurrence of disease, such contentions are not facts and they are not proof.

It also should be noted that even if the Court were inclined to give credence to plaintiffs' allegations, this is not the kind of "exceptional situation" in which "future repetitions of the controversy will necessarily evade review as well." *Protectmarriage.com Yes on 8 v. Bowen*, 752 F.3d 827, 836-37 (9th Cir. 2014). If, hypothetically, a new closure order were issued next December under new circumstances, a new suit specific to the wording of such an order and specific to the facts on the ground as of that date would not evade review.

The current situation does not fit within the "capable of repetition" exception to mootness.

B. Most of the plaintiffs must be dismissed as they are no longer impacted.

Regardless, of the eight plaintiffs, six should be dismissed from this action. The relief plaintiffs demand in their Complaint will not benefit them. Plaintiffs seek to enjoin the enforcement of Executive Orders 20-07 and 20-12 "insofar as those orders forbid the operation of Oregon businesses." Complaint, *prayer*. Six of the plaintiffs are not forbidden by any Executive Order from operating their businesses.

Open Our Oregon is based in Hood River County. Complaint ¶ 1. It does not allege that it is engaged in commerce of any type. The Complaint is vague about what activities Open Our Oregon actually engages in (beyond filing this lawsuit), and it does not describe in any particular how any business it might be engaged in has been impacted by the Governor's Executive Orders. Indeed, it would appear to have no reason to exist *but for* those Executive Orders.

Ms. Bryant operates a bar and grill in Yoncalla, Oregon. Complaint ¶ 3. Pursuant to Executive Order 20-07, she was never prohibited from offering food and drink for off-site consumption.[24] In any event, effective May 15, 2020, and as a result of Executive Order 20-25,

[24] Executive Order 20-07 at 2, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-07.pdf.

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she has been authorized to re-open that business for in-premises consumption in compliance with Oregon Health Authority guidelines.

Plaintiff Mount Hood Mixer Shop, Inc. runs liquor stores. Complaint ¶ 4. Mount Hood Mixer Shop retail locations are in Hood River and Wasco Counties, both Phase I counties, and they are now unquestionably able to operate. Complaint ¶ 4. At no point, in fact, did the Governor order liquor stores to close.

Plaintiff Under the Skin Tattoo LLC operates in Hood River County. Complaint ¶ 5. Because Hood River County is a Phase I county, the tattoo shop can re-open under the guidelines issued by the Oregon Health Authority.

Kathy Saldana owns two bars in Malheur County. Complaint ¶ 7. Her establishment was never closed for off-site consumption, and she now has the authority to resume on-premises service within Oregon Health Authority guidelines.

Like Ms. Saldana, Michele Karpontinis is a small businessperson, in her case the operator of a lingerie store in Douglas County. Complaint ¶ 8. Given that Douglas County is a Phase I county, nothing in Governor Brown's current Executive Orders prevents Ms. Karpontinis from re-opening her store.

Finally, even though Kuebler's Furniture is in Marion County, which is not one of the 31 re-opened counties, Executive Order 20-25 allows standalone furniture stores to re-open, if desired, statewide. Executive Order 20-25 at 7; Complaint ¶ 6.

Given that there are no requests for damages in the Complaint, but only for prospective relief, the presence of these six parties as parties to this case is no longer appropriate.

In sum, *no* plaintiff still has a claim under Executive Orders 20-07and 20-12. And only two could arguably maintain claims even if Executive Order 20-25 were considered.

Regardless, none of the plaintiffs have properly alleged a loss of a liberty interest, have alleged that they applied for and were denied process, or have alleged a claim under the Equal Protection Clause or Fourth or Fifth Amendments.

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II. Plaintiffs have no cognizable right of substantive due process.

"The concept of 'substantive due process,' * * * forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty." *Nunez v. City of Los Angeles,* 147 F.3d 867, 871 (9th Cir. 1998) (quoting *United States v. Salerno,* 481 U.S. 739, 746 (1987)). The Supreme Court has repeatedly noted that the doctrine is limited to the vindication of the most fundamental liberty interests. *See, e.g., Albright v. Oliver*, 510 U.S. 266, 272 (1994) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right of bodily integrity."); *Reno v. Flores,* 507 U.S. 292, 302 (1993) (substantive due process "forbids the government to infringe certain 'fundamental' liberty interests); *Michael H. v. Gerald D.,* 491 U.S. 110, 122 (1989) (substantive due process requires that the asserted right be fundamental and traditionally protected by our society).

The allegations by plaintiffs do not rise to the level of recognized "fundamental" rights. The Complaint is devoid of any assertion that any plaintiff has completely lost the ability to conduct their business in light of the re-opening that is taking place.[25] In any event, a "business" is not protected by substantive due process.[26] In order to find such a violation, plaintiffs would need to allege and prove that they have been unable to pursue their *professions* and that this

[25] Plaintiff have submitted declarations, which are not part of the record on the motion to dismiss. That said, if the Court reviews them, it will see they support defendants' position. Indeed, they speak of being "able to operate under reasonable safety protocols." Schudel Dec. ¶ 3. Mr. Parson says he is "ready and willing to operate," as does Ms. Karapontinis and Ms. Saldana. Parson Dec. ¶ 5; Karapontinis Dec ¶ 5; Saldana Dec. ¶ 5. Mr. Dawson of Under the Skin Tattoo states "I could get my business started again." Dawson Dec. ¶ 5. Mr. Freeman of the Mount Hood Mixer Shop only alleges he has "suffered a substantial loss of business and have reduced hours and employment." Freeman Dec. ¶ 2. Ms. Bryan does allege, using the future tense, that she "stand[s] to lose the entire business," Bryant Dec. ¶ 3, but does not state that such an occurrence has come about as yet.

[26] Licenses issued by government are sometimes considered the subjects of due process, *e.g., Gambee v. Williams*, 971 F. Supp. 474, 477 (D. Or. 1997), however in this case, no license was impacted. The bars at issue were allowed to continue to serve for external consumption. And while Da Cielo, LLC is a plaintiff in this action, its owner is not. Salons are not licensed; beauticians are. ORS 690.005-.225. It is not alleged that any of the bars' licenses were suspended or any specific action taken against them, and it is not alleged that the salon owner's license was the subject of any action.

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inability was due to arbitrary and unreasonable government action. In *Federal Deposit Insurance Corporation v. Henderson*, 940 F.2d 465 (9th Cir. 1991), the court held that a plaintiff could sustain a substantive due process claim that she was unable to pursue the *occupation* of her choice if she showed (1) that she was unable to pursue a job in his profession, and (2) that the inability was due to arbitrary and unreasonable government action. *Id*. at 474. However, this is not alleged by any of the plaintiffs.

In a recent decision, a federal court in Ohio rejected a claim very similar to the ones at bar. In *Hartman v. Acton*, 2020 WL 1932896 (S.D. Ohio Apr. 21, 2020), plaintiff, owner of a bridal shop, sued because her store was closed due to Ohio's stay at home order. Among the claims she asserted was a violation of her due process. The Court rejected her claim, noting that even if there is a property interest in an ongoing business, it is not an "'*unfettered* freedom' and was still subject to a state's regulatory framework." *Id.* at *7 (*citing Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611-12 (6th Cir. 2006)). Plaintiffs here do not sufficiently attach their alleged substantive due process right to the circumstances in which they find themselves.

It should also be noted that plaintiffs' assertion in their application for injunction that the current circumstances "shock the conscious" [sic], Application at 24, is their own subjective argument not backed up by any comparisons to situations in which courts have found that standard to be met. The standard derives from *Rochin v. California*, 342 U.S. 165 (1952), and frequently requires a deliberate intent to cause harm. *E.g.*, *Porter v. Osborne*, 546 F.3d 1131 (9th Cir. 2008). While it is admittedly difficult to find a factual parallel to the instant situation unless one goes back to blackouts and curfews during World War II or curfews during riots in the 1960s, it is clear that plaintiffs can have no support for their unfounded belief that the Governor and Dr. Lillian were acting in any way other than what they believed to be in the best interests of the state and its citizens. That most of the states in the United States took similar steps is the clearest demonstration that Oregon has not acted intemperately or unusually. Indeed, by early

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April, *every* state save for North Dakota, South Dakota, Nebraska and Arkansas had closed non-essential businesses.[27]

There is no violation of any right of substantive due process under these circumstances.

III. Plaintiffs have not had their right to procedural due process circumscribed.

Plaintiffs suggest that their right of procedural due process has been violated. They are incorrect.

A procedural due process claim has three elements: "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th Cir. 2008); *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). To establish a due-process violation, plaintiff must first prove a deprivation of a constitutionally protected right. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148 (1982). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976).

An individual may be liable under Section 1983 on a procedural due process theory if the complaining party has a property or liberty interest meriting constitutional protection. *Wheaton v. Webb-Petett*, 931 F.2d 613, 615 (9th Cir. 1991). Alleged violations of state law are insufficient to sustain a Section 1983 action because a plaintiff must demonstrate a violation of a clearly established *federal* right. *Sweaney v. Ada County*, 119 F.3d 1385, 1391 (9th Cir. 1997).

Plaintiffs do not identify what liberty or property interest has been denied. There appears to be an argument that "many" of the plaintiffs hold business licenses from the State. Application at 26. *Which* plaintiffs are not identified in the Complaint.[28] The Supreme Court has long recognized the power of states "to enact quarantine laws and health laws of every

[27] https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806. ABC News, April 3, 2020.

[28] Again, the owner of Da Cielo, LLC may be a licensed beautician, but she is not a party; Da Cielo, LLC is but the salon itself has no licensure requirement. Plaintiffs do not allege that action has been taken relative to the maintenance of the bars' liquor licenses.

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description" pursuant to their police power. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905) (upholding constitutionality of state law mandating vaccination of all adults and noting "that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety"). In *Jacobson*, the Supreme Court reiterated the fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state." *Id*. at 26. It is beyond argument that the Governor's Executive Orders have been related to stemming the spread of the virus.

Alternatively, defendants assume plaintiffs claim as their interest a "right" to operate their businesses. But such property interests are created by state law, and plaintiffs — collectively or individually — have not pointed to such a state-created entitlement. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

Regardless, even if such a right exists, it is not now and never has been absolute. The right to operate a business, to whatever extent it exists, is not an "unfettered freedom." *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 611-12 (6th Cir. 2006). A person (or business) affected by a law of general applicability has no due process right to a hearing because a law's generality "provides a safeguard that is a substitute for procedural protection." *Indian Land Co., LLC, v. City of Greenwood*, 478 F.3d 705, 710 (7th Cir. 2004); *see also Bi Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441, 445 (1915); *United States v. Florida East Coast Ry.*, 410 U.S. 294 (1973).

Because plaintiffs do not identify a properly qualifying denied interest, and because the Executive Orders were unarguably laws of general application, plaintiffs do not show a cognizable deprivation.

Finally, plaintiffs fail to show a lack of any process to which they are entitled.

The essence of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). "[W]hat procedures the

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Due Process Clause requires in any given case is a function of context." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998). Due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Due process permits post-deprivation process "where a State must act quickly or it would be impractical to provide pre-deprivation process * * *." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).

Plaintiffs do not identify the process they believe should have occurred. With one exception, they do not allege they ever approached government to seek any kind of process. This situation is clearly not one where government has taken a specific action against a specific business, such as proposing to cancel a liquor license. It would appear that plaintiffs are suggesting that the State owes *every* business in Oregon a hearing because of the pandemic. That is obviously not feasible. It is also not required under procedural due process. *Hartman v. Acton*¸ 2020 WL 1932896 (S.D. Ohio Apr. 21, 2020), *7-8, 10.

IV. Governor Brown's Executive Orders comport with the Equal Protection Clause.

Plaintiffs assert that the Governor's rescinded Executive Orders 20-7 and 20-12 violate the Equal Protection Clause by making distinctions in treatment among different types of businesses. Plaintiffs have suggested that this Court apply a "strict scrutiny" analysis to the issues before it. But this would be error; there is no basis for the application of strict scrutiny. Plaintiffs also claim the distinctions are arbitrary. They are not. The Executive Orders make distinctions based on the level of risk posed by the interactions the businesses require or that are typical during their operation. The distinctions made are rationally related to a governmental interest and comport with the Equal Protection Clause.

"The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). This test is "highly deferential" to the government. *Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 (11th Cir. 2002). The

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general rule gives way only "when a statute classifies by race, alienage, or national origin" or when it infringes a fundamental right. *City of Cleburne*, 473 U.S. at 440; *see, e.g., F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) (holding that in the "social and economic policy" realm, a classification that "neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). It is only then that strict scrutiny applies. Such a claim is not presented here. Plaintiffs do not allege that they were discriminated against on the basis of their membership in a protected class or on the basis of a fundamental right.

The Executive Orders easily satisfy rational basis review. They were expressly designed to reduce the spread of COVID-19 in Oregon. The orders make rational distinctions between businesses because different types of businesses pose different types and degrees of risk. The only two of plaintiffs' businesses still prevented from operating—the gym and hair salon—are still closed for science-based public health reasons. Hair salons provide services that require relatively long-term close physical contact between customer and service provider. The risk of transmission is greater than the risk posed in retail establishments that require only brief encounters and no physical contact. A similar basis informs the distinction between gyms and other businesses. These distinctions are rationally based on current science and public health knowledge.

Under rational basis review, the State's "choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data" particularly where it "must necessarily engage in a process of line-drawing." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315-16 (1993). Here, however, the State's choice actually is supported by public health evidence. The Governor's goal in issuing her Executive Orders relating to COVID-19 was and is to protect the lives and health of Oregonians by stemming the spread of the pandemic ravaging much of the planet. The decisions the Governor has made—

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and continues to make—to keep Oregonians safe are rationally related to this goal. Accordingly, the rational basis review test is satisfied and plaintiffs' Equal Protection claims fail.

V. There has been no violation of the Fourth Amendment and no "taking" under the Fifth Amendment.

Plaintiffs argue that Executive Orders 20-07 and 20-12 have effected both an unreasonable seizure of their property under the Fourth Amendment and a taking without just compensation under the Fifth Amendment. They are wrong.

A. No Fourth Amendment claim is properly asserted here.

Plaintiffs' Fourth Amendment claim fails for two reasons. First, in this situation, as plaintiffs have implicitly acknowledged, a Fourth Amendment claim does not lie. (Plaintiffs' Application, p. 31 (*citing Sinaloa Lake Owners Assn. v. Simi Valley*, 882 F.2d 1398, 1411 (9th Cir. 1989), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)). In *Sinaloa Lake Owners Assn.*, the plaintiff asserted Fourth and Fifth Amendment claims against the city for breaching a private dam and destroying the lake behind it. The Ninth Circuit held that the asserted Fourth Amendment claim was "in fact, a taking claim which is properly asserted under the fifth amendment." *Id*. It upheld the entry of judgment on the pleadings in favor of the city on the Fourth Amendment claim. *Id*. Similarly here, the asserted Fourth Amendment claim for "seizure" of the plaintiffs' businesses does not state a claim under §1983 for violation of the Fourth Amendment.

Also, no seizure occurred. A seizure occurs under the Fourth Amendment when "there is some meaningful interference with an individual's possessory interests in that property." *United States v Jacobsen*, 466 U.S. 109, 113 (1984). Plaintiffs cannot meet that standard. Plaintiffs do not allege that the State changed the locks on any place of business. Business owners remained and continue to remain in possession of their property under Executive Orders 20-07 and 20-12 and under the currently-effective Executive Order 20-25. Executive Order 20-12 only "prohibit[ed] the operation" of specific types of businesses "for which close personal contact is difficult or impossible to avoid." (p. 4, ¶ 2). The orders did not prohibit business owners from

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entering their property and did not prohibit other uses of the business property. And not all of the plaintiffs' businesses were prohibited from operating under rescinded Executive Order 20-12. Restaurants, taverns bars and similar establishments were never prohibited from operating completely. No Fourth Amendment seizure of any place of business owned or operated by any of the plaintiffs occurred. The Fourth Amendment claim fails and should be dismissed.

B. There has been no taking in violation of the Fifth Amendment.

Plaintiffs contend their business property was taken by the Governor's rescinded Executive Orders. They are wrong for several reasons. Notably, they cite only World War II-era authorities in which the United States military formally condemned and then physically occupied several properties during the war. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). But those cases, unlike this one, involved physical occupation. And *whether* a taking occurred was undisputed. The only question was the compensation due.

Fifth Amendment takings jurisprudence has evolved in the more than 70 years since those cases were decided. Precedents involving physical takings are not controlling in the regulatory taking context. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002) (so stating and declining to find a 32-month moratorium on development to be a *per se* taking). Although it is unclear whether plaintiffs assert a *per se* taking or taking under the *Penn Central* factors, there is clearly no *per se* taking here. *Per se* takings are limited to "permanent physical invasions" or complete deprivations of "all economically beneficial use" of private property. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 531 (9th Cir. 2019) (internal citations omitted). Neither has occurred here.

Therefore, the balancing test in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) applies. Application of the factors here cannot support a Fifth Amendment claim under the facts alleged. The factors are the "economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations,"

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and "the character of the government action." *Id*. at 124. Although the plaintiffs allege—and the State cannot deny—that the restrictions in business activity have caused a negative economic impact, the restrictions are temporary and are to a large degree being slowly removed. And significantly, the character of the government action justifies the temporary limitation of business activity. The Governor's Executive Orders are designed to protect the health and lives of Oregonians in the midst of a global pandemic. The exercise of the Governor's police power during this time is fully justified and consistent with the Fifth Amendment. No taking has occurred under these circumstances.

In any event, plaintiffs' claim for injunctive relief must fail. The Fifth Amendment does not prohibit government from taking private property; it only requires that just compensation be paid if a taking is found to have occurred. The claim fails and should be dismissed for all these reasons.

CONCLUSION

The Governor is committed to protecting the citizens of Oregon. The steps she has taken have been working. Oregon has seen one of the lowest rates of death from COVID-19 in the nation *not* because the risk was not real, but because the Governor acted before the crisis fully hit our state, and our people rose to the occasion, which significantly reduced the potential for people to be exposed to the virus. That plaintiffs may have customers willing—during a pandemic—and confident enough in the business's safety to come back to their businesses at all is in major part due to the steps taken by the Governor and the collective sacrifices of Oregonians. There are no shortcuts out of this pandemic. The careful, data-driven approach that

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has served Oregon well in controlling this pandemic should be allowed to continue to drive the gradual, phased reopening currently underway.

For the foregoing reasons, Governor Brown's and Dr. Lillian's motion to dismiss should be granted.

DATED May 21, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 21, 2020, I served the foregoing MOTION TO DISMISS AND MEMORANDUM IN SUPPORT upon the parties hereto by the method indicated below, and addressed to the following:

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