IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SIGNATURE SOTHEBY'S INTERNATIONAL REALTY, INC., EXECUTIVE PROPERTY MAINTENANCE, INC., INTRACO CORPORATION, INC., CASITE INTRACO, LLC, BAHASH & COMPANY, LLC, d/b/a HILLSDALE JEWELERS, WILLIAM A. SHORTT, D.D.S. & THERESE F. SHORTT, D.D.S., P.C., d/b/a SHORTT DENTAL, and MIDWEST CARWASH ASSOCIATION, Plaintiffs, v. GRETCHEN E. WHITMER, and ROBERT GORDON, Defendants.	)	Civil No. 1:20-cv-00360-PLM-PJG

STATEMENT OF INTEREST
ON BEHALF OF THE UNITED STATES

The United States of America respectfully files this Statement of Interest, pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case "pending in a court of the United States."

The United States frequently files statements of interest on federal constitutional issues. *See, e.g., Lighthouse Fellowship Church v. Northam*, No. 20-cv-204 (E.D. Va. filed May 3, 2020); *Espinoza v. Montana Dep't of Revenue*, No. DA 17-0492 (Mont. filed Jan. 18, 2018); *Shaw v. Burke*, No. 2:17-cv-02386 (C.D. Cal. filed Oct. 24, 2017); *Uzuegbunam v. Preczewski*, No. 1:16-cv-04658 (N.D. Ga. filed Sept. 26, 2017).

INTRODUCTION

In the midst of the COVID-19 pandemic, the state and federal governments have a shared interest in promoting the best possible public health strategies to combat the virus to protect the people of the United States from harm. But that interest does not justify government restrictions imposed upon its citizens without legal authority. Indeed, action contrary to law is likely to erode public confidence in, and compliance with, legitimate efforts taken to address the COVID-19 pandemic. Moreover, jurisprudence interpreting the Commerce Clause of the United States Constitution prevents States from impairing interstate commerce, including when States act locally. This case accordingly implicates issues of national public importance regarding the interplay between a state's interest in combatting COVID-19, the constitutional protections that protect individual liberties, and the integrity of a cohesive national economy for all 50 States and all Americans.

The facts alleged suggest that Michigan has imposed arbitrary and irrational limits on Plaintiffs that, if established, could violate the Equal Protection Clause of the Fourteenth Amendment. The facts alleged also raise serious questions, particularly at this stage of the State's response to COVID-19, whether the putative local benefit of imposing these restrictions on Plaintiffs' economic activity outweighs the harm to interstate commerce. As the President and many States have recognized, the onerous restrictions on civil liberty that Americans have tolerated to slow the spread of COVID-19 cannot continue forever, and the Constitution will not allow them to do so.

BACKGROUND[1]

This suit is brought by seven Michigan businesses, including Signature Sotheby's International Realty, Inc., ("Sotheby's") a residential brokerage; Executive Property Maintenance, which provides lawn and property maintenance, among other services, to commercial, municipal, and residential clients; Intraco Corporation, Inc., ("Intraco") an exporter of architectural and automotive glass, automotive chemicals, and other goods; Casite Intraco, LLC, ("Casite") which distributes engine oil, fuel additives, and other after-market products for automobiles; Hillsdale Jewelers, a storefront retailer of jewelry that offers jewelry-repair services; Shortt Dental; and Midwest Carwash Association (collectively, "Plaintiffs") against Governor Gretchen Whitmer (the "Governor") and Robert Gordon, the Director of the Michigan Department of Health and Human Services, (the "Director") (collectively, the "State") alleging that the Governor has issued "executive orders that unreasonably and unnecessarily interfere with constitutional rights." ECF 8, ¶¶ 4, 11-19, PageID.87, 89-91. Plaintiffs allege that "[u]nder threat of criminal penalties, they have been forced to close or significantly restrict their businesses" while other businesses have been permitted to stay open if they adhere to social distancing guidance that Plaintiffs could adhere to if allowed to reopen. ECF 8, ¶ 6, PageID.88-89.

On March 23, 2020, the Governor issued Executive Order 2020-21, effective March 24, 2020, which "prohibits all in-person work that the Governor deems 'not necessary to sustain or protect life.' A willful violation of EO 2020-21 is a misdemeanor for which a person can be

[1] The United States submits this statement of interest based on the facts alleged in the amended complaint and reflected in the accompanying exhibits and publicly available sources. The discussion in this statement of interest, in order to be most helpful to the Court, reflects those limitations in force as of May 29, 2020.

imprisoned for up to 90 days and fined up to $500." ECF 8, ¶ 30, PageID.93-94 (citations omitted). On April 2, 2020, the Director issued an Emergency Order that requires every person in Michigan to comply with Executive Order 2020-21; a violation of this order is a misdemeanor punishable by imprisonment for up to six months and a fine of $200, or both, as well as by a civil fine of up to $1,000. ECF 8, ¶¶ 39-41, PageID.95-96.

The Governor subsequently issued a series of orders modifying and extending Executive Order 2020-21 (collectively, the "Orders"). ECF 8, ¶¶ 31, 33, 37, & 38, PageID.94-95. Two of those Orders were issued after Plaintiffs filed an amended complaint—on May 18, 2020, the Governor issued Executive Order 2020-92, and on May 21, 2020, the Governor issued Executive Order 2020-96.

The Orders include Executive Order 2020-59 in which, effective April 24, 2020, the Governor permitted certain workers to leave their homes to perform defined "resumed activit[ies]," including "[w]orkers who process or fulfill remote orders for goods for delivery or curbside pickup," "[w]orkers who perform bicycle maintenance or repair," "[w]orkers for garden stores, nurseries, and lawn care, pest control, and landscaping operations," specified "[m]aintenance workers and groundskeepers," and "[w]orkers for moving or storage operations." *See* Exec. Order No. 2020-59, § 10.

The Governor expanded the list of "resumed activities," effective May 7, 2020, in Executive Order 2020-70 to include the business activities of "workers who perform work that is traditionally and primarily performed outdoors," "workers in the construction industry," and "workers in the real-estate industry." Exec. Order No. 2020-70, § 10. However, "workers in the real-estate industry" were permitted to resume "showings, inspections, appraisals, photography

or videography, or final walk-throughs" only "by appointment" and "limited to no more than four people on the premises at any one time." *Id.* § 10(h).

The Governor further expanded the list of resumed activities, effective May 26, 2020, in Executive Order 2020-96, which permitted, among other activities, "retail activities by appointment, provided that the store is limited to 10 customers at any one time." *See* Exec. Order No. 2020-96, § 11(q).[2] Executive Order 2020-96 also rescinded restrictions on medical and dental procedures effective May 29, 2020, and, effective May 21, 2020, further permitted individuals to "leave their home or place of residence, and travel as necessary . . . [t]o attend a social gathering of no more than 10 people." Exec. Order No. 2020-96, p. 2 & § 8(a)(21). Though they have required Plaintiffs to close or significantly restrict their businesses since March 24, 2020, the Orders have permitted delivery and curbside pickup of recreational marijuana without interruption,[3] and as of May 26, marijuana dispensaries are permitted to operate in person by appointment, *see id.* § 11(q).

Plaintiffs filed the First Amended Complaint on May 11, 2020, raising claims under, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the dormant Commerce Clause.[4] They "seek declaratory relief and a preliminary and permanent injunction against [the Orders] and similarly crafted orders and rules issued in the future."[5] ECF 8, ¶ 21, PageID.92.

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[2] The Governor permitted "retail activities" to resume on May 22, 2020, in Regions 6 and 8 without the "by appointment" restriction, *see* Exec. Order No. 2020-96, § 11(l); Hillsdale Jeweler is located in Region 7, *see id.* § 2(g).

[3] *See* Francis X. Donnelly, "Marijuana sales bloom during COVID-19 outbreak," The Detroit News (Mar. 30, 2020), https://www.detroitnews.com/story/news/local/michigan/2020/03/31/marijuana-sales-skyrocket-covid-19-outbreak/5083310002/.

[4] Five of the plaintiffs initially filed suit on April 28, 2020.

[5] Plaintiffs allege that the issues raised in this lawsuit "are novel, and they will not be rendered moot if the executive order is lifted before the Court issues judgment" because they "are capable

ARGUMENT

I. Constitutional Rights Are Preserved During a Public Health Crisis

The Orders at issue implicate a national issue about constitutional rights in the time of a pandemic. The federal government, the District of Columbia, and all 50 States have declared states of emergency and taken essential steps to contain the spread of the COVID-19 pandemic.[6] And more recently, President Trump "unveiled Guidelines for Opening Up America Again, a three-phased approach based on the advice of public health experts" to "help state and local officials when reopening their economies, getting people back to work, and continuing to protect American lives."[7]

The Constitution does not hobble States from taking necessary, temporary measures to meet a genuine emergency. According to the Supreme Court, "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905). In *Jacobson*, for example, the Supreme Court explained that "[a]n American citizen arriving at an American port" who had traveled to a region with yellow fever "may yet, in some circumstances, be held in quarantine against his will." *Id.*

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of repetition and are of such importance that they cannot evade judicial review." ECF 8, ¶ 10, PageID.88.

[6] *See, e.g.*, Presidential Proclamation, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337 (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ (last visited May 28, 2020).

[7] Guidelines: Opening Up America Again (Apr. 16, 2020), https://www.whitehouse.gov/openingamerica/ (last visited May 28, 2020).

For that reason, courts generally review state action taken to preserve public health during a pandemic under a deferential standard of review. *See, e.g.*, *Jacobson*, 197 U.S. at 28 ("Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case.").

But that deferential standard of review is not an abdication of judicial review. Even in the context of a pandemic, state actions undertaken pursuant to the police power are subject to important limitations. *See Jacobson*, 197 U.S. at 31, 38-39; *Robinson v. Attorney Gen.*, 957 F.3d. 1171, 1179 (11th Cir. 2020) ("[J]ust as constitutional rights have limits, so too does a state's power to issue executive orders limiting such rights in times of emergency."). That is, even during a pandemic, state actions undertaken in service of the public health cannot clearly infringe constitutional rights. Thus, "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Jacobson*, 197 U.S. at 31.

State action may impermissibly deviate from having a "real or substantial relation" to the public health if it is "exercised in particular circumstances and in reference to particular persons" in "an arbitrary, unreasonable manner." *Id*. at 28. For example, rules that allow recreational marijuana dispensaries to operate, but not flower shops, may be a sign that state action is impermissibly arbitrary and bears "no real or substantial relation" to its proffered public health end.

A State also may exceed the bounds of its police power when it "go[es] so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *Id.* (upholding Massachusetts' mandatory vaccination requirement in part because smallpox was "prevalent and increasing at Cambridge"). Although "the day is gone when th[e Supreme] Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought," the Supreme Court still requires that a law be "rationally related to the public health and welfare." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488-89 (1955).

II. Arbitrary and Irrational Economic Regulations Violate the Equal Protection Clause

A. State action that regulates economic activity in a discriminatory manner violates the Equal Protection Clause unless there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001). "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985); *see also United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 536-38 (1973) (holding that "the classification here in issue is not only 'imprecise' it is wholly without any rational basis").

The Supreme Court's decision in *City of Cleburne* illustrates how such arbitrariness or irrationality may be identified. There, the Supreme Court struck down a zoning ordinance that required a special use permit for the Featherston home, a home for individuals with disabilities, but did not require a special use permit "for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals,

sanitariums, nursing homes for convalescents or the aged . . . , private clubs or fraternal orders, and other specified uses." *City of Cleburne*, 473 U.S. at 447. While acknowledging that individuals with intellectual disabilities have unique needs, the Supreme Court explained that "this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." *Id*. at 448. The Supreme Court therefore concluded that "the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests." *Id*.

To be sure, rational basis affords States significant deference in regulating economic activity, and economic distinctions often survive it. *See, e.g.*, *Lee Optical of Oklahoma Inc.*, 348 U.S. at 488-89 (upholding a classification that made it unlawful for a person not a licensed ophthalmologist or optometrist to fit or duplicate lenses without a prescription). However, Plaintiffs have identified what appear to be arbitrary distinctions among business and activities in the State of Michigan that lack a rational basis.

Responding to a pandemic is clearly a legitimate governmental purpose, but a pandemic does not justify any and all governmental action. As noted above, the Supreme Court has exhorted courts to correct action that is "beyond all question, a plain, palpable" violation of equal protection principles or "so arbitrary and oppressive" as to justify judicial intervention "to prevent wrong and oppression." *Jacobson*, 197 U.S. at 31 & 38; *see also In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020) (same). Thus, if the Orders restrict Plaintiffs' businesses in an arbitrary or irrational manner, or are so arbitrary and oppressive that judicial action is necessary to prevent wrong and oppression, the Court should strike down the restrictions.

B. Here, Plaintiffs have made an initial showing that the Orders arbitrarily and oppressively limit their business operations by prohibiting and restricting Plaintiffs' business operations while permitting similarly situated businesses to continue to operate, or to operate with lesser restrictions, and permitting social gatherings of as many as ten people.

To begin, Plaintiff Midwest Carwash Association, Inc., alleges that members have been forced by the Order to close all staffed car washes "even though each [is] able and uniquely qualified to operate exterior washes safely and without risk to the public." ECF 8, ¶ 17, PageID.91. The "[e]xterior-only carwash operations can safely operate with limited staff to sanitize wash equipment, and can restrict payment to online or by an outside worker, wearing a safety mask." *Id*. Yet the Governor has not allowed them to operate since March 24, 2020, while allowing retail establishments to welcome customers who will interact directly with employees and likely come into contact with other customers. *See* Exec. Order No. 2020-96, § 11(q).

It is hard to conceive of a rational basis for permitting retail establishments, including marijuana dispensaries, to welcome customers who will interact directly with employees and likely come into contact with other customers while prohibiting car washes from providing exterior washes purchased online with the customer separated from the employee by a closed car window. The permitted activities seem to pose an equal, if not greater, risk of personal contact than Plaintiffs' proposed business activities. And the business activities of retail establishments as an entire category seem no more essential to daily life than service establishments like the car wash plaintiffs.

The Orders also raise concerns about arbitrariness with respect to the restrictions imposed on face-to-face interactions of businesses like Plaintiffs Intraco and Casite. These plaintiffs are

engaged in export and distribution activities that rely heavily on face-to-face relationships with current and prospective clients. ECF 8, ¶¶ 13-14, PageID.89-90. The Orders, however, prohibit such face-to-face interactions because Intraco and Casite are not exempt from the general prohibitions. In contrast, the Orders permit real-estate workers, workers at motor vehicle dealerships, and workers performing retail activities to meet with customers in person. *See* Exec. Order No. 2020-96, § 11. Consequently, individuals can meet with a real-estate agent or a car salesman, but they cannot meet with employees of Intraco or Casite, even by appointment. As in *City of Cleburne*, the record does not reveal that Plaintiffs' proposed activities would pose any special threat to the City's legitimate interests in addressing COVID-19, at least based on the activities that the City itself has decided its interests can tolerate. Nor, as noted above, is it apparent that the now- permitted in-person business activities are somehow more essential at this point than Plaintiffs' business activities.

The Orders also draw apparently arbitrary distinctions between businesses permitted to operate by appointment and those permitted to operate for walk-ins as well as between businesses with customer limits and those without such limits. Plaintiff Sotheby's, for example, can operate only by appointment with a limit of no more than four people on the premises at any one time. *See* Exec. Order No. 2020-96, § 11(g); *see also* Exec. Order No. 2020-59, § 10. Plaintiff Hillsdale Jewelers can operate only by appointment with a limit of only ten customers at any one time. *See* Exec. Order No. 2020-96, § 11(q). But the "by appointment" and customer limit restrictions do not apply to shops that perform bicycle maintenance or repair or to auto supply stores, pet supply stores, garden stores, or hardware stores, Exec. Order No. 2020-96, §§ 10(f) & 11(b) & (c), and the customer limit restrictions do not apply to motor vehicle dealerships. *Id.* § 11(p).

Consequently, the Orders permit an individual to go to a bicycle shop to repair a bike without an appointment; however, they criminalize going to a jewelry store without an appointment. *See id.* § 11(b) & (q). It is permissible to buy a Carhartt jacket at a local hardware store. But it is a crime to buy the identical jacket inside a Carhartt store without making an appointment. *See id.* §§ 10(f) & 11(q). It is hard to conceive of a rational basis for imposing these restrictions on Sotheby's and Hillsdale Jewelers and declining to impose them on bicycle shops, auto supply stores, pet supply stores, hardware stores, garden stores, and motor vehicle dealerships, where customers will have comparable interactions with, and exposure to, employees and other customers.

Not only do the Orders impose these disparate restrictions on at least some of Plaintiffs' businesses, they limit their businesses (and thereby livelihood) while permitting social gatherings of as many as ten people. The examples of arbitrary situations created by the Orders are numerous. Staffed car washes are prohibited from operating entirely; however, a group of ten people may organize a community car wash for their neighbors. Running a community car wash is permitted under the Orders, but running a staffed car wash is a crime subject to imprisonment.

While States are entitled to some deference in responding to a pandemic, they are not entitled to engage in arbitrary or oppressive action. For the reasons outlined above, Plaintiffs have identified what appear to be arbitrary distinctions among businesses and activities in the State of Michigan, distinctions that are having severe economic consequences on Plaintiffs and others. Unless the State or this Court is able to identify a rational basis for the Orders' disparate treatment of similarly situated businesses and gatherings, Plaintiffs will succeed on their claims. A pandemic does not excuse arbitrary or irrational action that causes such harm, and this Court should not hesitate to remedy it.

III. State Actions That Impose Undue Burdens on Interstate Commerce Are Prohibited

A. Congress has the power "[t]o regulate Commerce . . . among the several States." Art. I § 8, cl. 3. The Constitution's Commerce Clause "reflect[s] a central concern of the Framers that . . . the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (citation omitted). The Supreme Court has thus held that the Commerce Clause "imposes limitations on the States absent congressional action." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018). "Congress has left it to the courts to formulate the rules to preserve the free flow of interstate commerce." *Id.* at 2090 (internal quotations and citation omitted).

"Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Id.* at 2090-91.

This case involves this second principle, namely, whether the Orders impose "undue burdens on interstate commerce." *See* ECF 8, ¶ 72, PageID.102 ("Although the Dormant Commerce Clause is usually invoked to challenge protectionist laws that favor in-state businesses over out-of-state business, the Clause has a broader function: to guarantee for all citizens the right to access and participate in interstate commerce."). Under this principle, actions by a State that "regulat[e] even-handedly to effectuate a *legitimate local* public *interest* . . . will be upheld *unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits*." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added and citation omitted) (invalidating an Arizona statute requiring Arizona-grown

cantaloupes to advertise their state or origin on each package); *see also Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 783 (1945) (holding that "examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation" such that a law regulating the capacity and length of trains was invalid); *Am. Bev. Ass'n v. Snyder*, 735 F.3d 362, 375-76 (6th Cir. 2013) (holding that the requirement that returnable containers have a unique-to-Michigan mark violated the dormant Commerce Clause because it impermissibly regulated interstate commerce by controlling conduct beyond the State of Michigan).

A court must first determine if the challenged action furthers "a legitimate local purpose." *Pike*, 397 U.S. at 142. Then, "the question becomes one of degree" and "the extent of the burden [on interstate commerce] that will be tolerated . . . depend[s] on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

B. To determine whether the Orders unduly burden interstate commerce, this Court must carefully evaluate both the putative benefits of the Orders under the totality of the circumstances and the burdens on interstate commerce that they impose.

First, whether the Orders "effectuate a legitimate local public interest," *Pike*, 397 U.S. at 142, depends both on a careful evaluation of their purpose, and the fit between Michigan's actions and that purpose. The United States does not dispute the importance of appropriate, informed public health responses to COVID-19. "But the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion). To the contrary, "[r]egulations designed for that salutary purpose . . . may further the purpose so

marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Id.*

Here, a careful analysis of the Orders suggests that the current restrictions, in late-May 2020, may not effectuate a legitimate local public interest, even if they once did. The amended complaint alleges that the objective of the Orders was "to 'flatten the curve' so as to avoid overwhelming the State's hospitals and healthcare centers, not to eradicate the [COVID-19] virus." ECF 8, ¶ 2, PageID.86. It further alleges, citing information Plaintiffs claim reflects infection rates and confirmed COVID-19 cases in Michigan, that "[o]bjective data and reporting shows that the curve was flattened during the first week of April 2020." ECF 8, ¶ 2, PageID.86; *see also* ECF 8, ¶ 3, PageID.87. If true, and absent some further justification by Michigan, in the balancing called for under *Pike*, these facts would tend to lower the degree of permissible burden on interstate commerce at this time. *See Pike*, 397 U.S. at 142 (explaining that "the extent of the burden that will be tolerated . . . depend[s] on the nature of the local interest involved").

Moreover, as Part II above explains, that there are serious questions as to whether the Orders are drawing rational and non-arbitrary lines among businesses and activities that may bring people into contact with each other. Even if the extent of deprivations currently in force could be justified in the abstract, Michigan cannot establish a legitimate local interest if its response—in terms of what is permitted and what is prohibited—is irrational.

Second, the Court must determine if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The amended complaint here alleges specific ways in which each plaintiff's participation in interstate commerce has been impaired. For example, "[a]pproximately 15-20% of Sotheby's annual business involves customers who buy and sell homes in Michigan while located outside of

Michigan" and they allege that, at least prior to May 7, they were "wholly prevented . . . from seeking work and clients located outside of Michigan." ECF 8, ¶ 73(a), PageID.102. Hillsdale Jewelers alleges a 99% drop in revenue generally due to the Orders and claims that they "have prevented and continue to prevent [it] from importing precious metals and stones to create custom jewelry." ECF 8, ¶ 73(d), PageID.103. "Intraco is a major diversified exporter of architectural and automotive glass, automotive chemicals, and other goods." ECF 8, ¶ 13, PageID.89-90. "Casite engages in foreign, interstate, and intrastate commerce" and "distributes engine oil, fuel additives, and other after-market products for automobiles." ECF 8, ¶ 14, PageID.90. Intraco and Casite each allege that the Orders prevent them "from using [their] offices to conduct the face-to-face meetings that are necessary to establish new relationships and maintain existing relationships with vendors and customers located inside and outside of Michigan."[8] EFC 8, ¶ 73(b) & (c), PageID.102. Intraco and Casite allege that, as a result of the Orders, their revenue has dropped by 20% and 30%, respectively. EFC 8, ¶ 73(b) & (c), PageID.102.

If the foregoing impairments of interstate commerce are established, particularly in light the current data about the COVID-19 response in Michigan, Plaintiffs may be able to establish a constitutional violation under the Commerce Clause.

[8] It would be no answer for Michigan to argue that in *Compagnie Francaise de Navigation a Vapeur v. La State Bd. of Health*, 186 U.S. 380, 387-88 (1902), the Supreme Court upheld the quarantine of passengers on a vessel "for days or for weeks" to prevent the spread of infectious or contagious diseases. The magnitude of the imposition on commerce involved there pales in comparison to the impositions brought about by state orders in response to COVID-19. *See, e.g.*, ECF 8, ¶ 1, PageID.86 (alleging that "Governor Whitmer has issued executive orders that have shuttered civil society, placed 10 million people under house arrest, and taken jobs away from nearly 1.2 million people").

CONCLUSION

The United States respectfully requests that the Court consider the arguments set forth above in evaluating this case. The facts alleged suggest that the State has arbitrarily and irrationally imposed limits on Plaintiffs not imposed on other businesses or social gatherings. If demonstrated to be irrational and arbitrary, the Orders would violate the Equal Protection Clause. The facts alleged also suggest that Michigan's Orders may be unduly burdening interstate commerce in violation of the Commerce Clause.

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Respectfully submitted,

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

MATTHEW SCHNEIDER
United States Attorney
Eastern District of Michigan

HILARY F. PINION
Attorney

s/ANDREW BYERLY BIRGE
Andrew B. Birge
United States Attorney
Western District of Michigan
330 Ionia Avenue, N.W.
Grand Rapids, MI
(616) 456-2404 telephone
E-mail: Andrew.Birge@usdoj.gov

Counsel for the United States of America