The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLINT DIDIER, *et al.*,

Plaintiffs,

v.

GOVERNOR JAY INSLEE, in his capacity as Governor of the State of Washington,

Defendant.

No. 3:20-cv-05408-BHS

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The nation's death toll from the coronavirus pandemic now exceeds 130,000, including more than 1,300 people in Washington State. The state continues to confirm hundreds of new cases every day, including an all-time high of 728 just last week. To slow the spread of this unprecedented virus, after taking a series of less aggressive steps, Governor Jay Inslee exercised his emergency powers to require Washingtonians to stay home except for certain defined activities. This "Stay Home, Stay Healthy" order was one of many state executive actions employing the single public health tool available to mitigate the transmission of a highly contagious and potentially fatal virus, in the absence of a vaccine, cure, or widespread testing. The state is now pursuing a careful, phased approach to reopening.

Asserting falsely that these mitigation measures are "[b]ased on now discredited models that claimed a pandemic was arising in the United States," Plaintiffs—political activists and business owners—move for a preliminary injunction prohibiting the Governor from enforcing any of these measures. This Court should deny the motion. First, Plaintiffs lack standing for this pre-enforcement challenge: none have identified any current or planned action that would violate the Proclamations, and all of the business owner Plaintiffs are currently permitted to operate under the phased reopening. Second, Plaintiffs fail to establish a likelihood of success on the merits. Although they raise a free assembly claim, they do not even allege that the restrictions are anything other than content-neutral time, place, and manner regulations. Plaintiffs' takings claim is unripe under well settled law. Plaintiffs also fail to establish the constitutional level of arbitrariness necessary for their due process claim to succeed. Finally, Plaintiffs do not even address irreparable harm, the balance of equities, or the public interest. Both the balance of equities and the public interest weigh strongly against enjoining mitigation strategies that will slow the spread of the virus and permit the economic recovery that Plaintiffs seek.[1]

[1] Plaintiffs filed a "reply," supporting declaration, and exhibits on July 6, 2020, Dkt. # 16, 17, on the deadline for the filing of the Governor's response (*see* LCR 7(d)(3)) and before the response was filed. The Court

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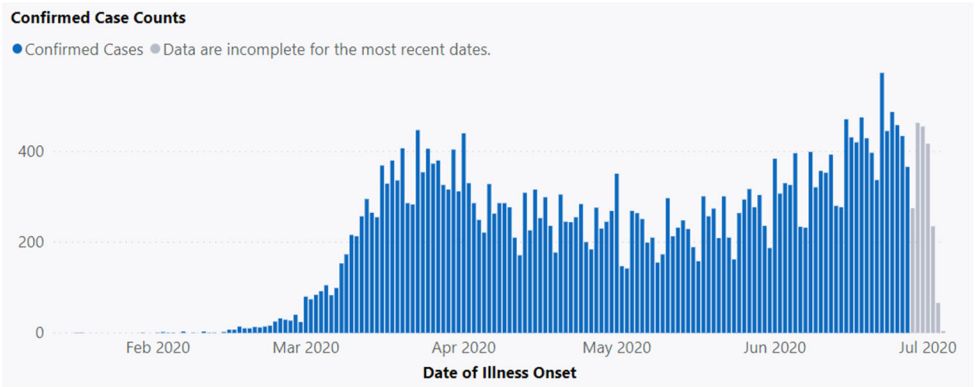
II. FACTUAL BACKGROUND

A. COVID-19 and the Outbreak in Washington

The SARS-CoV-2 virus, which causes COVID-19, is highly contagious and potentially fatal. Declaration of Dr. Kathy Lofy (Lofy Decl.) ¶¶ 6-7. Seniors and persons with medical conditions are most vulnerable to complications and death. *Id.* ¶ 7. COVID-19 spreads primarily through close person-to-person contact via respiratory droplets produced when an infected person coughs, sneezes, or talks. *Id.* ¶ 6. There is a lag of at least several days from when a person contracts the virus and the onset of symptoms.[2] In many cases, persons with COVID-19 never experience symptoms, so an infected person may spread it unknowingly. *Id.*

On January 21, 2020, the Washington State Department of Health (DOH) announced a case of COVID-19 in Snohomish County, believed then to be the first case in the United States. *Id.* ¶ 4. Additional cases emerged here the next month, including a cluster at a Kirkland nursing home, *id.*, and through March new cases increased dramatically, as Figure 1 illustrates.

Figure 1: Washington State COVID-19 Epidemiologic Curve, July 4, 2020[3]



should strike or decline to consider these unauthorized filings, which improperly supplement arguments made in Plaintiffs' Motion and offer new argument and evidence that could have been, but was not, raised in the Motion.

[2] *See, e.g.*, Monica Gandhi et al., *Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19*, N.E. J. of Med., Apr. 24, 2020, https://www.nejm.org/doi/full/10.1056/NEJMe2009758.

[3] Wash. State Dep't of Health, *COVID-19 Data Dashboard* (data as of July 4, 2020), https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/DataDashboard. DOH notes on the Epidemiological Counts Tab that "[i]llnesses from the last 4 to 7 days may not yet be reported."

B. Washington State's Early Response to COVID-19

On February 29, the Governor issued Proclamation 20-05, declaring a State of Emergency due to COVID-19 and directing implementation of the state's emergency plans. Declaration of David Postman (Postman Decl.) ¶ 4, Ex. 1; *see* Wash Rev. Code 38.52.050. The State's mitigation measures, adopted through amendatory proclamations,[4] grew stricter as cases and deaths accelerated. Postman Decl. ¶ 5. They included: prohibiting gatherings of 250 people or more—and, later, 50 or more; permitting smaller gatherings only if individuals complied with CDC and DOH guidelines; closing schools, colleges, and universities; and prohibiting gatherings of any size in "public venues," including restaurants, gyms, faith-based organizations, and any "other similar venues." *Id*. ¶¶ 6-14; Lofy Decl. ¶ 10. Despite Washington's early and aggressive mitigation strategies, in mid-March the state had the nation's highest absolute number of COVID-19 cases (and the highest or among the highest per capita). Lofy Decl. ¶ 13.

C. The Governor's Stay Home Proclamation

On March 23, the Governor issued Proclamation 20-25 (the Stay Home Proclamation), declaring that "the worldwide COVID-19 pandemic . . . remains a public disaster." Postman Decl., Ex. 12 at p. 1. The Stay Home Proclamation required people to "cease leaving their home" except for (1) "essential activities" (such as obtaining necessary household supplies) and (2) "employment in essential business services." *Id.* at p. 3 (emphasis omitted). Essential business services include work either for a business identified as essential, or "carrying out minimum basic operations . . . for a non-essential business." *Id.* Businesses identified as essential are those "needed to maintain continuity of operations . . . critical to public health and safety, as well as economic and national security," a list that included "restaurant carry-out and quick serve food operations."[5] The Governor invited workers and businesses to request essential business

[4] For a complete repository of the Governor's proclamations, see Washington State Office of the Governor, *Proclamations*, https://www.governor.wa.gov/office-governor/official-actions/proclamations.

[5] Washington State Office of the Governor, *Proclamation 20-25, Appendix* (Mar. 23, 2020), https://bit.ly/2TKFXbu.

status, or to clarify their status, through an online form.[6] The Stay Home Proclamation also ordered people to "immediately cease participating in all public and private gatherings and multi-person activities for social, spiritual and recreational purposes, regardless of the number of people involved," except those including only persons from the same household. Postman Decl., Ex. 12 at p. 4. Such activity "includes, but is not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities," as well as "wedding and funeral events." *Id.*

After a month, the Stay Home Proclamation's unprecedented mitigation measures had begun to yield positive results, as measured by lower rates of COVID-19 cases and hospitalizations. Lofy Decl. ¶ 17-18; *see* Figure 1. At the same time, the situation remained precarious; as of May 3, 2020, about 200 new confirmed cases continued to arise daily, and for every confirmed COVID-19 case there may be as many as 11 undetected cases. Lofy Decl. ¶ 17.

D. The Safe Start Phased Reopening Plan

On May 4, the Governor announced a four-phase Safe Start, Washington reopening plan (the Safe Start Proclamation). Postman Decl., Ex. 17. In Phase 1, no gatherings are permitted outside the home, except for essential activities. *Id.*, Ex. 18. The Safe Start Proclamation continued to allow restaurants to be open for takeout and delivery and permitted other businesses to reopen, including auto dealerships, curbside retail, car washes, and certain construction projects. *Id.*, Ex. 17 at p. 4. In Phase 2, gatherings of up to five people outside one's household are permitted, as is restaurant dining (with detailed safety protocols[7]). *Id.*, Ex. 18 at p. 6. A wide array of other businesses may reopen in Phase 2, including real estate, all construction projects, professional services, and personal services (such as beauty salons). *Id.* In Phase 3, gatherings

[6] Washington State, *Coronavirus Response (COVID-19), Essential Business Inquiries*, https://bit.ly/36sjqFy. The Essential Business Inquiries form is no longer active with the phased reopening of the state. *See also* Washington State Dep't of Commerce, *State launches web form to clarify "essential" businesses under COVID-19 Stay Home, Stay Healthy proclamation*, https://bit.ly/3ivcoFH.

[7] Washington State Office of the Governor, *Phase 2 Restaurant/Tavern Reopening COVID-19 Requirements* (last visited July 6, 2020), https://www.governor.wa.gov/sites/default/files/Phase%202%20Restaurant%20industry%20re-open%20proposal_FINAL.pdf.

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of up to 50 non-household members are permitted, restaurants may operate at 75% capacity, and all other businesses may reopen except nightclubs, concert venues, and those that involve events of more than 50 people. *Id.* Phase 4 represents the resumption of normal public interactions (with distancing), all recreational activity, and gatherings larger than 50 people. *Id.*

When the Governor first announced the Safe Start Proclamation, all counties were in Phase 1. As of July 3, 2020, no counties remain in the unmodified Phase 1. Five counties are in a modified "Phase 1.5," 17 counties are in Phase 2, and 17 are in Phase 3. Postman Decl. ¶ 24. Phase 2 counties include Walla Walla (the location of Plaintiff Hatch's business[8]), Okanogan (Plaintiffs DeTro and Bernica), and King (Plaintiff Eyman). Dkt. # 13, ¶¶ 7, 8; Dkt. # 15-3, 15-4, 15-6, 15-7; Lofy Decl. ¶¶ 19, 21. Phase 1.5 counties include Yakima, Franklin (Plaintiffs Wellsfry, Ransier, Didier), and Benton (Plaintiff Thomas). Dkt. # 13, ¶¶ 2, 3, 6, 10; Dkt. # 15-1, 15-2, 15-5; Lofy Decl., ¶ 21.[9]

In Benton and Franklin Counties, COVID-19 activity is increasing rather than decreasing, and those counties lagged behind statewide goals, including with regard to new cases; the statewide target for new cases is 25 or fewer per day; as of July 1, 2020, Benton County was at 265.1 new cases per day and Franklin County was at 629.5. Lofy Decl., ¶ 22. After Benton and Franklin (and Yakima) Counties remained in Phase 1 for several weeks, the Governor and Secretary of Health visited the region and met with local leaders to hear their concerns. *Id.* ¶ 23. These visits resulted in the creation of a specific recovery plan and decision to move these counties to a modified Phase 1. *Id.*; *see also* Postman Decl., ¶ 24.

[8] The Amended Complaint alleges that Plaintiff Hatch "is a Wedding Designer and Planner in Franklin County," Dkt. # 13, ¶ 5, but Hatch's declaration attached to Plaintiffs' Motion clarifies that she works at Cameo Heights Mansion, which is in Walla Walla County. Dkt. # 15-4 at p. 2.

[9] The remaining Plaintiff, Wilson, has not specified a county of residence and has not submitted a declaration. Dkt. # 13 at ¶ 26. The Amended Complaint alleges that Wilson is a former contract employer for Expedia, which is headquartered in King County. *Id.*, ¶ 26.

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E. COVID-19's Continuing Threat to Washington

Although Washington has made progress in combatting COVID-19, an emergency continues to exist for the entire state. Lofy Decl. ¶ 22. As Dr. Lofy testifies, "COVID-19 can be (1) difficult to detect, (2) easily transmitted, and (3) lethal," and in parts of the state—including Benton and Franklin Counties—COVID-19 activity is increasing. *Id.*; *see also* Fig. 1. As more and more counties reopen, "social distancing will decline," "mobility across the state will increase," and the state will face a greater risk of a second wave of COVID-19, which knows "neither geographic nor political boundaries." *Id.* Dr. Lofy's warning is consistent with the rising number of cases around the country and the state, which reached an all-time daily high of 753 cases on July 2, 2020.[10] The Governor will continue to analyze the data and epidemiological modeling and adjust the phased reopening plan accordingly. Postman Decl. ¶ 23, Ex. 23.

F. Plaintiffs' Lawsuit and Motion for Preliminary Injunction

Plaintiffs filed their Amended Complaint on May 18, 2020, seeking declaratory and injunctive relief invalidating the "Inslee Proclamations," defined as Proclamations 20-25 (the Stay Home, Stay Healthy order, issued March 23, 2020); 20-25.1 (issued April 2, 2020, extending Stay Home, Stay Healthy to May 4, 2020); and 20-25.2 (issued April 27, 2020, adjusting Stay Home, Stay Healthy to permit certain outdoor activity), as well as compensatory and punitive damages. Dkt. # 13 at pp. 8-9, 48-50. Plaintiffs sort themselves into three groups. The first, three "political activists" (Didier, Eyman, and Thomas) assert that the Proclamations violate their free assembly rights by preventing them from engaging in in-person political activity. Dkt. # 13 at pp. 2-3, 28-32. The second, four business owners (Hatch, DeTro, Bernica, and Wellsfry), have seen lost profits in the past three months. *Id.* at pp. 3-4, 39-43, 46-48. The

[10] Wash. State Dep't of Health, *COVID-19 Data Dashboard*, (Cumulative Counts Tab: Confirmed Cases) (data as of July 4, 2020), https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/DataDashboard; *see also* Lauren Leatherby & Charlie Smart, *Coronavirus Cases Are Peaking Again. Here's How It's Different This Time*, N.Y. Times, July 2, 2020, https://www.nytimes.com/interactive/2020/07/02/us/coronavirus-cases-increase.html?action=click&module=Top%20Stories&pgtype=Homepage.

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third, two employees (Wilson and Ransier), allege that their employment (or, in Wilson's case, her contract work) has been terminated. *Id.* at pp. 5, 43-46.

Plaintiffs' Motion for a Preliminary Injunction seeks to enjoin enforcement of Proclamations 20-05, 20-25, 20-25.1, 20-25.2, 20-25.3, and 20-25.4. Dkt. # 15 at p. 24. Plaintiffs question the existence of the COVID-19 crisis, asserting that the proclamations are based on "now discredited models that claimed a pandemic was arising in the United States" and claiming that the Governor unnecessarily ordered a state of emergency based on "one confirmed death." *Id.* at p. 4. Premised on the belief that COVID-19 does not represent a serious threat to Washingtonians, Plaintiffs ask the court to prevent enforcement of the state's mitigation strategies. They seek relief on the basis of (1) the Free Assembly Clause, U.S. Const. amend. I; (2) the Takings Clause, U.S. Const. amend. V; (3) substantive and procedural due process under U.S. Const. amend. XIV; and (4) the Equal Protection Clause, U.S. Const. amend. XIV.[11]

III. ARGUMENT

A. The Court Lacks Jurisdiction

Before reaching the merits of Plaintiffs' Motion, the Court must first consider the threshold question of jurisdiction. *See Page v. Tri-City Healthcare Dist.*, 860 F. Supp. 2d 1154, 1159 (S.D. Cal. 2012). Here, the Court lacks jurisdiction because (1) Plaintiffs' claims are not justiciable, and (2) the Governor has sovereign immunity under the Eleventh Amendment.

1. Plaintiffs' claims are unripe and they lack standing

Whether viewed through the lens of standing or ripeness, Plaintiffs' claims are not justiciable because they cannot demonstrate a genuine threat of imminent prosecution for violating the Proclamations. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000). Plaintiffs do not plead facts to show their actual or planned conduct would violate

[11] The Motion also contains a passing reference to "freedom . . . to worship," Dkt. # 15 at p. 17, but does not make an argument based on the Free Exercise Clause. *See, e.g.*, *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) ("Arguments made in passing and not supported by citations to the record or to case authority are generally deemed waived.").

the order. First, the political activist Plaintiffs (Didier, Thomas and Eyman) have not articulated any plans to hold events prohibited by the Proclamations, *see* Dkt. # 15-1, 15-2, 15-3, and the two employee Plaintiffs (Ransier and Wilson) who claim they lost employment or contract work in recent months, Dkt. # 13 at p. 4, have not submitted declarations in support of the Motion, let alone articulated plans to violate the Proclamations.

Second, all four business owner Plaintiffs are currently allowed to operate their businesses under the Safe Start Proclamation: an auto dealership (Bernica), beauty salon (DeTro), and wedding planning business (Hatch), all permitted to operate under Phase 2 in Okanogan and Walla Walla Counties, and a pizza restaurant (Wellsfry), permitted to operate for take-out, quick serve, delivery, and outdoor dining under Phase 1.5 in Franklin County. *See* Dkt. # 13 at pp. 3-4; Dkt. # 15-4, 15-5, 15-6, 15-7; Postman Decl., Ex. 18 at p. 6 (permitting opening of "Auto/RV/Boat/ORV sales" in Phase 1, and beauty salons in Phase 2); Postman Decl., Ex. 20 at p. 9 (permitting restaurants to open for outdoor dining under modified "Phase 1.5"); Washington State Office of the Governor, *Proclamation 20-25, Appendix* (Mar. 23, 2020), https://bit.ly/2TKFXbu (defining "essential workforce" as including "restaurant carry-out and quick serve food operations"); Washington State Office of the Governor, *Phase 1, Modified Phase 1, Phase 2, and Phase 3: Religious and Faith-based Organization COVID-19 Requirements*, https://bit.ly/3e2cHUX (permitting religious weddings in modified Phase 1 and Phase 2 counties of up to 25% of room capacity or 200 people, whichever is less); Memo from Governor Jay Inslee: *Re: Phase 1, 2, and 3 Weddings and Funerals – Proclamations 20-25 and 20-25.4* (June 19, 2020), https://bit.ly/38BPiJ6 (same for secular weddings).

Plaintiffs satisfy none of the three factors required for pre-enforcement standing, which requires "a genuine threat that the allegedly unconstitutional law is about to be enforced against [the plaintiff]," *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983): (1) "whether the plaintiff[has] articulated a 'concrete plan' to violate the law in question"; (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings";

and (3) "the history of past prosecution or enforcement under the challenged [law]." *Thomas*, 220 F.3d at 1139. First, as discussed above, the Amended Complaint and the Plaintiffs' declarations contain no allegations demonstrating any plan, concrete or otherwise, to violate the Proclamations—either by in-person operation of businesses not permitted to operate in a particular county, or by engaging in public gatherings. Again, all of the Plaintiffs work in sectors that are currently permitted to operate. Second, Plaintiffs do not allege that any official has made "even a general threat" to commence proceedings against them. *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996).[12] Third, Plaintiffs have not identified a history of enforcement of the Proclamations. In short, every factor relevant to whether Plaintiffs have shown a "genuine threat of imminent prosecution," *Thomas*, 220 F.3d at 1139, demonstrates that they have not. Their generalized claims against the Proclamations are hypothetical; they lack Article III standing and their claims are unripe.[13]

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[12] Plaintiff Eyman asserts that he "faced imminent arrest" at a Bellingham City Council meeting and was "denied entry" to an Edmonds City Council meeting. Dkt. # 13 at p. 10. But Plaintiffs do not explain how or why either of these incidents constituted enforcement of the challenged rules, and any implication to the contrary is facially implausible. News media reports and a recording of a March 23, 2020 in-person Bellingham City Council meeting suggest that Eyman was rebuked by the council president *not* for attending the meeting, but for continuing to speak even though the council was not taking public comment. KGMI News: Talk Radio, *Eyman confronts City Council, tempers flare at Monday's meeting* (Mar. 26, 2020), https://bit.ly/2BbZJq5 (embedding video recording from Eyman's social media account). Nothing suggests a relationship between that incident, which involved a city council's authority over its own procedures, and the Proclamation, and Eyman's declaration does not draw a connection other than speculating that fewer of his supporters showed up for the meeting due to "Inslee's lockdown." Dkt. # 15-3 at p. 2. Similarly, council minutes indicate that Eyman was not "denied entry" to an online Edmonds City Council meeting on March 24, 2020 (at which public comments were heard via video); rather, he appeared in person in the council chambers and stood within six feet of the clerk; a councilmember stated that he was violating social distancing and "putting staff at risk"; the City Attorney advised that Eyman could remain in chambers "but must remain 6 feet apart." City of Edmonds, Washington, *Edmonds City Council Virtual Online Meeting April 7, 2020*, https://bit.ly/3gxP3Ck (Packet Page 24, page 11 of draft council minutes for virtual online meeting held March 24, 2020). Eyman admits in his declaration that he and other supporters "still managed to chant 'let us speak' repeatedly which resulted in a 30-minute delay in the meeting," and he credits this action with forcing the mayor and council to reverse their policy on a firearm regulation—further demonstrating the inappropriateness of a pre-enforcement challenge here. Dkt. # 15-3 at p. 2. Notably, Eyman—who claims he is unable to engage in political activity as a result of the Proclamations—was nonetheless able to hold a rally criticizing the Governor on May 27, 2020 in Wenatchee, reinforcing the prematurity of this challenge. Pete O'Cain, *Eyman leads rally outside Wenatchee restaurant*, Wenatchee World (May 27, 2020), https://bit.ly/3c8Gzy1.

[13] Plaintiffs also cannot establish prudential ripeness, which requires consideration of two factors: the fitness of the issues for judicial decision and the hardship to the parties of withholding adjudication. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Both factors here counsel against attempting to resolve the generalized and hypothetical claims that Plaintiffs raise. First, Plaintiffs' claims are not fit for judicial decision because they challenge the Proclamations before they have

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2. The Governor is immune under the Eleventh Amendment

The second threshold barrier is the "jurisdictional bar of the Eleventh Amendment," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996), which prohibits "federal courts from hearing suits brought by private citizens against state governments without the state's consent," *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183 (9th Cir. 1997). The narrow exception articulated in *Ex parte Young*, 209 U.S. 123, 157 (1908), permits suits for prospective injunctive relief against state officials only if they have a proven connection to enforcing the challenged law. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). The connection "must be fairly direct," and "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision" does not suffice. *L.A. Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992).

Here, the *Ex parte Young* exception does not apply because the Governor does not have a "fairly direct" connection to enforcement of the Proclamations. Under state law, the Governor has authority to issue (and amend or rescind) an emergency order, *see* Wash. Rev. Code 38.52.050(3)(a), but enforcement power lies with others, *see generally* Wash. Rev. Code 43.06.220(5) (making willful violation of any emergency order issued by the Governor a gross misdemeanor). Enforcement guidelines for the Proclamations make clear that enforcement power lies with local law enforcement "based on their policies and procedures" (for individual violators) or with regulatory agencies (for businesses regulated by those agencies). Postman Decl., ¶ 27, Ex. 25. Law enforcement agencies "will determine appropriate actions based on the law enforcement agency policy." *Id.* If an official "cannot direct, in a binding fashion, the prosecutorial activities of the officers who actually enforce the law or bring his own prosecution,

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ever been enforced against them and without alleging facts sufficient to demonstrate that they will be enforced against them. *See Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 837 (9th Cir. 2012). Second, there is no hardship to Plaintiffs in delaying judicial review until the Court has a factual context to analyze application of the challenged restrictions, especially where most of Plaintiffs' businesses are currently permitted to operate. Plaintiffs have not been charged with violating the Proclamation and do not "face a credible threat of prosecution"; thus, "any hardship caused by [a] decision to delay resolution of plaintiffs' claims does not justify the exercise of jurisdiction." *San Diego Cty. Gun Rights Comm.*, 98 F.3d at 1132.

he may not be a proper defendant." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004). "Were the law otherwise, the exception would always apply" and "[g]overnors who influence state executive branch policies (which virtually all governors do) would always be subject to suit under *Ex parte Young*." *Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1311 (D. Ariz. 2015).[14]

B. Preliminary Injunction Standards

To obtain a preliminary injunction, Plaintiffs must make a "clear showing" that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in their favor; and (4) an injunction is in the public interest. *See* Fed R. Civ. P. 65(b)(1); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 423-24 (9th Cir. 2019).

C. Plaintiffs Are Unlikely to Succeed on the Merits of Any Claim

1. The Proclamations do not violate the Free Assembly Clause

Plaintiffs assert that the Proclamations violate their First Amendment freedom of assembly both facially, because they prohibit activity generally protected under the First Amendment, and as applied to Plaintiffs Didier, Eyman, and Thomas. Dkt. # 15 at pp. 8-9, 14-18. This claim is unlikely to succeed, as evidenced by the growing consensus of courts that have rejected assembly-based challenges to state and local COVID-19 stay-at-home orders.[15]

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[14] Consistent with this principle, the only appellate court to thus far consider this issue in the context of a governor's COVID-19 emergency order has concluded that the *Ex parte Young* exception did not apply because "[t]he power to promulgate law is not the power to enforce it" and the governor "lack[ed] the required enforcement connection to" his emergency order. *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020); *see also Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-204, 2020 WL 2614626, at *4 (E.D. Va. May 21, 2020) (denying injunction pending appeal where governor lacked authority to enforce stay home order). *But cf. First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1984259, at *7 (D. Kan. Apr. 27, 2020) (*Ex parte Young* exception applied to governor where Kansas state constitution, unlike Washington's, explicitly charged her with enforcing state law).

[15] *See, e.g.*, *Benner v. Wolf*, No. 20-cv-775, 2020 WL 2564920, at *4 (M.D. Pa. May 21, 2020); *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 WL 2556496, at *10 (D. Md. May 20, 2020); *Amato v. Elicker*, No. 3:20-cv-464 (MPS), 2020 WL 2542788, at *13 (D. Conn. May 19, 2020); *Geller v. de Blasio*, No. 20-cv-3566 (DLC), 2020 WL 2520711, at *2 n.1 (S.D.N.Y. May 18, 2020); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 WL 2310913, at *9 (D. Me. May 9, 2020); *Givens v. Newsom*, No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224, at *6 (E.D. Cal. May 8, 2020); *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-204, 2020 WL 2110416 (E.D. Va. May 21, 2020); *Gish v. Newsom*, No. EDCV 20-755 JGB (KKx), 2020 WL 1979970

Plaintiffs' cursory arguments consist mostly of quotations to case law unmoored from the facts of this case. They do not cite, let alone apply, the correct legal framework governing assembly claims, which track the well-established "time, place, and manner" standards of regulations of protected speech. *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003); *Am. Civil Liberties Union of Colorado v. City & Cty. of Denver*, 569 F. Supp. 2d 1142, 1161 (D. Colo. 2008); *Serv. Emp. Int'l Union v. City of Los Angeles*, 114 F. Supp. 2d 966 (C.D. Cal. 2000). The Proclamations are a valid "time, place, and manner" regulation because they are (1) "content-neutral"; (2) "designed to serve a substantial governmental interest"; and (3) "do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

First, the Proclamations are content neutral because they "serve[] purposes unrelated to the content of expression," namely to combat a pandemic. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Governor did not adopt them because of any "disagreement with the message" conveyed at any of the gatherings the Proclamations temporarily prohibit. *Id*. Indeed, the sheer diversity of messages at these events, gatherings, or activities illustrates that their content cannot be the Proclamations' target. Although Plaintiffs Didier and Eyman imply that the Proclamations target the Governor's political opponents, Dkt. # 15-2 at p. 2, 15-3 at p. 3, they provide no evidence that the Proclamations do not apply equally to all political speech. Notably, the Governor has expressed support for Plaintiff Eyman's *own* First Amendment rights to attend public demonstrations against the Governor's Proclamations. Asked about a planned demonstration by "those who oppose his stay-at[-]home order," including "among others . . . Tim Eyman," the Governor said, "of course they're welcome to express their First Amendment

(C.D. Cal. Apr. 23, 2020), *injunction pending appeal denied by* No. 20-55445, Dkt. No. 21, (9th Cir. May 7, 2020); *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB\SCY, 2020 WL 1905586 (D.N.M. Apr. 17, 2020); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. Apr. 13, 2020).

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rights to say what they want to say," and "I do encourage them to socially distance when they do that, try to maintain 6 feet apart while you're expressing yourself[.]"[16]

Rather than regulating the content of expression, the Proclamations instead "serve[] purposes unrelated to the content of expression[.]" *Ward*, 491 U.S. at 791. The purpose they serve are to prevent people from transmitting the virus to others. *See, e.g.*, *Benner*, 2020 WL 2564920, at *8 (stay-home order content neutral because "[it] appl[ied] equally to all citizens . . . and to a great number of non-life sustaining businesses, 'regardless of message'"). The Proclamations do not target speech but, rather, the "harmful secondary effects of public gathering—the spread of a novel virus for which there is currently no cure or effective treatment." *Geller*, 2020 WL 2520711, at *4. They are content neutral.

The Proclamations also unquestionably serve a "substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotation marks omitted). Protecting public health and slowing the spread of a highly contagious pandemic that has already infected more than 35,000 Washingtonians and killed over 1,300 is not only a "substantial" governmental interest, but a compelling one. *See Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 438 (2006). As the *Legacy Church* court recognized in denying a TRO against New Mexico's stay-home order, mitigating "a global pandemic and its local outbreak amount to a compelling state interest." 2020 WL 1905586, at *40; *see also Givens*, 2020 WL 2307224, at *7 (mitigating local outbreak of pandemic is compelling state interest in limiting gatherings, including protests at state capitol); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089-90 (S.D. Cal. 2016) (government's interest in fighting spread of contagious disease is compelling; collecting cases). The physical distancing strategy that the Proclamations implement serves that interest. *See, e.g. Benner*, 2020 WL 2564920, at *4

[16] Joseph O'Sullivan, *Inslee rebukes the president, as Trump encourages rebellion to states' coronavirus stay-home orders*, Seattle Times, Apr. 17, 2020, https://www.seattletimes.com/seattle-news/politics/inslee-rebukes-the-president-as-trump-encourages-rebellion-to-states-coronavirus-stay-home-orders/ (internal quotation marks omitted).

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("public health experts the world over proclaimed that social distancing was the only effective way to combat its deadly effects"); *Miller v. Thurston*, No. 5:20-cv-05070, 2020 WL 2617312, at *1 (W.D. Ark. May 25, 2020) (distancing "current best tool to prevent uncontrolled spread").

Because slowing the spread of the virus would be achieved less effectively without the Proclamations' physical distancing strategy, the Proclamation is narrowly tailored. To be narrowly tailored to achieve a legitimate state interest, a regulation "need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798. Rather, a law is narrowly tailored "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Id.* at 800. Limiting gatherings is currently the best way to prevent contagion. *See, e.g.*, *Geller*, 2020 WL 2520711, at *4 ("The City has demonstrated that the scientific and medical communities believe that preventing in-person gatherings is crucial to any strategy of containment."). Because COVID-19 spreads easily and because asymptomatic individuals may spread the virus, gatherings pose the risk more people will contract the virus if someone has it. *See Antietam Battlefield KOA*, 2020 WL 2556496, at *11.

The history of the Governor's orders also indicates narrow tailoring. *See id*. The Governor first tried other mitigation measures before the Stay Home Proclamation, including prohibiting gatherings of 250 people or more, then 50 or more; permitting smaller gatherings only if individuals complied with social distancing and sanitation guidelines; closing schools, colleges, and universities; prohibiting gatherings of any size in "public venues," including restaurants, gyms, private clubs, faith-based organizations, and any "other similar venues." Postman Decl., ¶¶ 7-14. Only after these did not sufficiently avert the crisis did the Governor adopt the Stay Home – Stay Healthy Order. This demonstrates "a gradual tailoring of the prohibition based on the COVID-19 figures and how well the previous prohibitions were working." *Antietam Battlefield KOA*, 2020 WL 2556496, at *11.

Third, the Proclamation does not limit Washingtonians from connecting over the phone and online, which offer alternative avenues of communication for assembling and associating,

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including for political activity and fundraising. *See Geller*, 2020 WL 2520711, at *4 (ability to express discontent online, through media, and protesting on her own were acceptable alternatives to group protests); *Givens*, 2020 WL 2307224, at *6 (same); *Friends of Danny DeVito*, 227 A.3d at 903 (similar). This is a reasonable limitation to prevent the spread of the virus.

To the extent Plaintiffs' assembly claim raises the "freedom to engage in association," Dkt. # 15 at 14, it is also unavailing. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, which cannot be achieved through means significantly less restrictive of associational freedoms. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see, e.g.*, *Legacy Church, Inc.*, WL 1905586, at *39 ("The right to expressive association is not an absolute right and can be infringed upon if that infringement is (i) unrelated to the suppression of expressive association; (ii) due to a compelling government interest; and (iii) narrowly tailored."). For the same reasons discussed above, the Proclamations do not violate Plaintiffs' right to expressive association. Stopping the spread of a deadly virus is a compelling state interest. The restrictions on gatherings are not related to suppressing ideas but instead serve the purpose of limiting the interactions that cause the virus to spread. And in the absence of a vaccine, cure, or treatment, reducing person-to-person transmission through community mitigation measures is the only way to achieve the goal of stopping the spread of the virus. *See Givens*, 2020 WL 2307224, at *7 (denying TRO and rejecting argument that freedom of association allowed in-person protests and rallies at state capitol during COVID-19 pandemic).

Plaintiffs' claim also fails insofar as it asserts in passing an infringement of the right to petition the government for redress of grievances. *See* Dkt. # 15 at pp. 9, 14, 17. The Petition Clause "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011). Plaintiffs have not alleged any facts in connection with a petition claim distinct from those addressed by their freedom of assembly claim. Dkt. # 13 at pp. 28-32. They do not identify any

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grievances they hope to air or contend that they have been prevented from doing so by other means. *See Friends of DeVito*, 227 A.3d at 903 ("In this era, cyberspace in general and social media in particular have become the lifeblood for the exercise of First Amendment rights."). Plaintiffs have failed to demonstrate a likelihood of success on the merits on a petition claim. *See Givens*, 2020 WL 2307224, at *8 (denying TRO on COVID-19 petition clause claim where plaintiffs failed to allege facts to distinguish from freedom of speech and assembly claims).

2. The Proclamations do not violate the Takings Clause

The business owner Plaintiffs have failed to demonstrate a likelihood of success on their takings claim for three reasons: (1) the claim is unripe, (2) it meets neither of the prerequisites of a takings claim, a protected property interest and a compensable injury, and (3) and a preliminary injunction is not an appropriate remedy for a takings.

a. Plaintiffs' Takings claim is unripe

Plaintiffs cannot meet the ripeness requirement for takings claims. Although the ripeness standard has changed in recent years, the law remains that the government must have "reached a final decision regarding the application of the regulations to the property at issue." *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 850-51 (9th Cir. 2001) *aff'd sub nom. Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (en banc) (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *overruled on other grounds by Knick v. Twp of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019)); *see also Pakdel v. City & County. of San Franscisco*, 952 F.3d 1157, 1160 (9th Cir. 2020) (confirming *Williamson*'s "separate finality requirement, which survived *Knick* and thus continues to be a requirement for bringing regulatory takings claims such as Plaintiffs' in federal court").

Plaintiffs cannot establish that any of the property deprivations they allege reflects a "final decision" by the Governor. *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 186. To the contrary, the emergency Proclamations are by their very nature temporary, with the most recent Safe Start Washington Proclamation set to expire on July 9, 2020. Postman Decl., ¶ 23.

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See, e.g., *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1126 (9th Cir. 1999) (takings claim unripe where allegedly confiscatory policy is "interim" policy and government has "not taken final action"). This presents an insurmountable hurdle to Plaintiffs' takings claim.

b. Plaintiffs lack constitutionally protected property interests

Even if Plaintiffs could plead a ripe takings claim, none has plausibly alleged that the Proclamations impinge on any protected property interests—a threshold requirement of any takings claim. As the Ninth Circuit has explained, a "Takings Clause claim requires proof that the plaintiff possesses a property interest that is constitutionally protected." *Sierra Med. Servs. All. v. Kent*, 883 F.3d 1216, 1223 (9th Cir. 2018) (internal quotation marks omitted). The Fifth Amendment does not create property interests, so the Court must look to state, federal, or common law principles to ascertain whether Plaintiffs have asserted a cognizable property interest. *See Colvin Cattle Co., Inc. v. United States*, 468 F.3d 803, 806-07 (Fed. Cir. 2006).

Plaintiffs do not allege that they own any protected property interest burdened by the Proclamations. While Plaintiffs allege that they own businesses that have suffered and have therefore "been deprived of their property interests in being unable to pursue their businesses," Dkt. # 15 at p. 18, they fail to identify any "legitimate claim of entitlement, arising from" any law, "implied contract, customs, practices, [or] de facto policies, to operate their . . . business[es]." *See Hudson v. City of Wenatchee*, 94 Wash. App. 990, 997, 974 P.2d 342 (1999). Because no Plaintiff plausibly alleges a property right "encumbered by regulatory duties" attendant in the Proclamations, none has an interest cognizable under the Takings Clause. *Callahan v. City of Chicago, Illinois*, 813 F.3d 658, 661 (7th Cir. 2016).

c. Plaintiffs could not establish a regulatory takings claim

Even if Plaintiffs' Takings Clause claim were ripe (it is not), and even if any had a cognizable property right at stake (none does), they could not prevail on this claim. Plaintiffs claim that the Proclamations constitute a total regulatory taking because they have "entirely diminished the economically beneficial use of [their] Properties," Dkt. # 15 at p. 18, but they

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provide no support for this assertion, which is belied by the fact that the restrictions are temporary in nature and all four business owner Plaintiffs are *currently* permitted to operate their businesses. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) (by definition, temporary regulation is not total regulatory taking).

In the alternative, Plaintiffs assert a partial regulatory taking (Dkt. # 15 at p. 20), but this claim fails because the claimed "taking" was made pursuant to the state's police power (as opposed to eminent domain). *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992). That subset of state action does "not constitute a taking requiring compensation as contemplated by the Fifth Amendment." *Furgeson v. City of Tacoma*, No. C05-5490-FDB, 2006 WL 3333046, at *4-5 (W.D. Wash. Nov. 15, 2006); *see, e.g.*, *Lucas*, 505 U.S. at 1022-23 ("government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power"); *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (police powers are not "burdened with the condition that the state must compensate [affected] individual owners for pecuniary losses"); *see also Lech v. Jackson*, 791 F. App'x 711, 717 (10th Cir. 2019); *Johnson v. Manitowoc Cty.*, 635 F.3d 331, 336 (7th Cir. 2011). Because the Governor issued the Proclamation pursuant to his police powers, any harm to Plaintiffs' property interests is not compensable under the Takings Clause.

d. The exclusive remedy for a Takings Clause violation is damages

Finally, even if Plaintiffs could establish a violation of the Takings Clause, they would not be entitled to a preliminary injunction because "damages—not injunctive relief—are the proper remedy for a taking." *Prof'l Beauty Fed'n of Cal. v. Newsom*, No. 2:20-CV-04275-RGK-AS, 2020 WL 3056126, at *8 (C.D. Cal. June 8, 2020).

3. The Proclamations do not violate the Due Process Clause

Plaintiffs have not shown a likelihood of success on their due process claims. First, Plaintiffs raise a substantive due process claim premised on their contention that the Proclamations impermissibly burden the business owner Plaintiffs' unspecified "liberty and property interests," *see* Dkt. # 15 at p. 21. Assuming the right invoked is the ability to practice an occupation, a growing consensus of courts have rejected this type of claim in the context of challenges to COVID-19 orders.[17] Neither the Supreme Court nor the Ninth Circuit "has []ever held that the right to pursue work is a fundamental right" that would be entitled to heightened constitutional scrutiny. *Sagana v. Tenorio*, 384 F.3d 731, 743 (9th Cir. 2004), *as amended* (Oct. 18, 2004); *Dittman v. California*, 191 F.3d 1020, 1031 n.5 (9th Cir. 1999). Judicial review of laws affecting non-fundamental rights is "very narrow," asking only "whether the government *could* have had a legitimate reason for acting as it did." *Id* at 1031 (internal quotation marks omitted). In fact, Plaintiffs themselves acknowledge that "the Inslee Proclamations were issued to serve a well-recognized public purpose." Dkt. # 13 at p. 34; *see id.* at p. 42 ("Governor Inslee implemented the Inslee Proclamations for the purpose of preserving public health, safety, and welfare."); *id.* (Proclamations issued for a "manifest public benefit").

Therefore, to successfully challenge the Proclamations on this basis, Plaintiffs must show not only that the restrictions lack "any reasonable justification in the service of a legitimate governmental objective," but that the question is not even "fairly debatable." *Shanks v. Dressel*,

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[17] *See, e.g.*, *Best Supplement Guide, LLC v. Newsom*, No. 2:20-cv-00965-JAM-CKD, 2020 WL 2615022, at *6 (E.D. Cal. May 22, 2020) (denying TRO on business owners' substantive due process claim where stay home orders enacted for legitimate reason because "limiting physical contact between people is the most effective way to stop COVID-19's spread"); *SH3 Health Consulting, LLC v. Page*, No. 4:20-cv-00605-SRC, 2020 WL 2308444, at *10 (E.D. Mo. May 8, 2020) (denying claim based on "some right to conduct their business and to earn a living" where "[d]uring these uniquely rare times, the executive branch has extraordinary powers over businesses"); *Henry v. DeSantis*, No. 20-cv-80729-SINGHAL, 2020 WL 2479447, at *7 (S.D. Fla. May 14, 2020) (dismissing business owners' substantive due process challenge where COVID-19 orders "most certainly [had] a 'legitimate' government interest"); *see also McGhee v. City of Flagstaff*, No. CV-20-08081-PCT-GMS, 2020 WL 2308479, at *5, *6 (D. Ariz. May 8, 2020) (denying TRO on substantive due process claim where plaintiff could not show stay-home measure "shocks the conscience" "in light of the circumstances presented by COVID-19 and the fundamental principle that our individual rights must at times yield to the needs of society").

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540 F.3d 1082, 1088, 1889 (9th Cir. 2008); *see also Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012) (challenge must show that state action bears "no substantial relation to the public health, safety, morals or general welfare" (internal quotation marks omitted)). Plaintiffs cannot make this showing. They have not shown the lack of any legitimate reason for the challenged restrictions; they may disagree with the manner in which the Governor has combatted COVID-19, but they fail to provide any basis to conclude that the challenged restrictions bear no substantial relation to public health. See *Halverson v. Skagit Cty.*, 42 F.3d 1257, 1262 (9th Cir. 1994), *as amended on denial of reh'g* (Feb. 9, 1995). Notably, the U.S. District Court for the Eastern District of Washington recently rejected a similar claim under the purported due process "right to pursue [a] common calling," concluding that the Proclamations had a reasonable relation to the ongoing crisis. *Slidewaters LLC v. Wash. Dep't of Labor & Indus.*, No. 2:20-cv-0210-TOR, 2020 WL 3130295, at *4 (E.D. Wash. June 12, 2020).

Plaintiffs' procedural due process claim also fails. First, although the business owner Plaintiffs argue that the state should have afforded them some additional process prior to enacting the Proclamations, the Ninth Circuit has specifically rejected the notion that the Due Process Clause requires individualized pre-deprivation process before enacting and enforcing laws of general applicability. *Halverson*, 42 F.3d at 1260. "[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." *Id* at 1261. Second, as discussed on page 8, the Proclamations currently permit all four business owner Plaintiffs to operate their businesses.

4. The Proclamations do not violate the Equal Protection Clause

Plaintiffs are unlikely to prevail on an Equal Protection Claim against the Proclamations. First, the Amended Complaint does not plead an Equal Protection claim. *See* Dkt. # 13 at pp. 28-48. The complaint's only mentions of Equal Protection comes in passing in the jurisdiction and venue and class certification sections. *Id*. at pp. 7, 13. Passing references to a constitutional

provision do not suffice to properly plead a claim. *See United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970) ("[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion[.]"). Thus, preliminary injunctive relief may not issue based on a claim Plaintiffs "did not raise [in] their Complaint, because logically speaking, they could not prevail on its merits at trial." *Tri-Valley Cares v. U.S. Dep't of Energy*, No. C-08-01372-SBA, 2008 WL 2951396, at *5 (N.D. Cal. July 28, 2008).

Second, even if the claim had been properly pleaded, Plaintiffs are not likely to succeed on the merits. For an equal protection claim that does not involve a suspect classification such as race, "[t]he 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, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). This requires only "plausible, arguable, or conceivable reasons which may have been the basis for the distinction." *Jackson Water Works, Inc. v. Pub. Utils. Comm'n of Cal.*, 793 F.2d 1090, 1094 (9th Cir. 1986) (internal quotation marks omitted). Plaintiffs challenge the distinction between "essential" and "non-essential" businesses. Although Plaintiffs claim that the Proclamations have "closed" their businesses (Dkt. # 15 at pp. 6-7), in fact the Proclamations explicitly permit all of their businesses to operate. Rather than shut down all businesses, the Governor's approach appropriately allowed for operation and reopening of successively broader sections of the economy, to the extent data indicated that reopening could be done safely with adherence to physical distancing. Lofy Decl. ¶¶ 16-20. Plaintiffs may disagree with the manner in which the Governor has combatted COVID-19, but they have failed to provide any basis to conclude that the challenged distinctions bear no substantial relation to public health. *See Prof'l Beauty Fed'n of Cal.*, 2020 WL 3056126, at *7 (denying TRO where "Plaintiffs have not shown that the Stay at Home Order's designation between essential and non-essential businesses is 'beyond all question, a plain, palpable invasion' of the right to equal protection").

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5. *Jacobson v. Massachusetts* compels denial of the motion

Plaintiffs are unlikely to prevail on any of their claims under traditional constitutional standards. In a state of emergency such as this, however, the state's interests in protecting its residents' health and safety are at their apex, tipping the constitutional scale in its favor. Thus, during the COVID-19 pandemic, federal courts—as well as Chief Justice Roberts—have applied a more deferential constitutional framework in adjudicating constitutional claims arising out of state and local governments' public health orders. Derived from *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the standard allows the state to "implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020) (quoting *Jacobson*, 197 U.S. at 31); *accord Gish*, 2020 WL 1979970, at *4-5.

The Governor's orders easily pass the *Jacobson* standard. On their face, the challenged rules relate to an ongoing public health crisis. *See Abbott*, 954 F.3d at 787 ("Faced with exponential growth of COVID-19 cases, states have . . . banned social gatherings . . . prohibited churches from holding public worship services, and locked down entire cities. These measures would be constitutionally intolerable in ordinary times, but are recognized as appropriate and even necessary responses to the present crisis." (Emphasis added)). As the Chief Justice recognized in *South Bay*, federal courts should defer to the "background, competence, and expertise" (citing *Jacobson*, 197 U.S. at 38) of "the politically accountable officials of the States[.]" *South Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613, 1614 (2020).

Whether viewed under the traditional standards or *Jacobson*'s lens, Plaintiffs have failed to carry their heavy burden to show that they are likely to prevail on any claim. On this basis alone, their Motion should be denied. *See, e.g.*, *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999) (where plaintiff unlikely to prevail, court "need not consider . . . balance of hardships or . . . irreparable harm" requirements).

D. Plaintiffs Have Failed to Establish Irreparable Harm

Plaintiffs' motion should also be denied because it fails to present any argument regarding whether any Plaintiff would suffer irreparable harm without a preliminary injunction. "Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). Plaintiffs have not alleged, let alone provided evidence to support, a "*demonstrate*[d]" and "immediate threatened injury" that is "a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

First, assuming the claimed harm to the political activist Plaintiffs is the inability to hold in-person political events, Plaintiffs do not explain why such harm would be irreparable, particularly in light of the temporary nature of the restrictions and their ability to host such events virtually. Second, the business owner Plaintiffs may claim economic injuries to their businesses and personal finances, but while "being driven out of business" entirely may satisfy the irreparable harm requirement, economic strain alone does not. *See hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 993 (9th Cir. 2019) (internal quotation marks omitted); *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 851 (9th Cir. 1985) ("[E]conomic injury alone is not considered irreparable."). None of the Plaintiffs provide any evidence that the Governor's orders are likely to result in the permanent closure of their companies. To the contrary, all of Plaintiffs' businesses are currently permitted to operate under the Safe Start Proclamation.[18] Although their revenues may be lower than they would be had COVID-19 not necessitated urgent mitigation measures, this does not constitute an irreparable injury warranting preliminary

[18] Postman Decl., Ex. 18 at p. 6 (permitting opening of "Auto/RV/Boat/ORV sales" in Phase 1, and beauty salons in Phase 2); Postman Decl., Ex. 20 at p. 9 (permitting restaurants to open for outdoor dining under modified "Phase 1.5"); Washington State Office of the Governor, *Proclamation 20-25, Appendix* (Mar. 23, 2020), https://bit.ly/2TKFXbu (defining "essential workforce" as including "restaurant carry-out and quick serve food operations"); Washington State Office of the Governor, *Phase 1, Modified Phase 1, Phase 2, and Phase 3: Religious and Faith-based Organization COVID-19 Requirements*, https://bit.ly/3e2cHUX (permitting religious weddings in modified Phase 1 and Phase 2 counties of up to 25% of room capacity or 200 people, whichever is less); Memo from Governor Jay Inslee: *Re: Phase 1, 2, and 3 Weddings and Funerals – Proclamations 20-25 and 20-25.4* (June 19, 2020), https://bit.ly/38BPiJ6 (same for secular weddings).

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injunctive relief. Finally, the two employee plaintiffs have not submitted declarations in support of the motion and have failed to make any factual showing that the Proclamations caused them to lose their employment or contract work, much less that they will suffer irreparable harm in the absence of an injunction.

E. The Balance of Equities and the Public Interest Weigh Against an Injunction

The final *Winter* factors merge when the federal government or a state (or an official thereof) is a defendant. *See Slidewaters*, 2020 WL 3130295, at *5 (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)). Both the balance of equities and the public interest weigh against "employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (internal quotation marks omitted). As the *Slidewaters* court explained in denying a TRO on a similar record, "in the absence of other effective prevention or treatment measures" there is a demonstrated and continuing "need to restrict in-person gatherings to slow transmission of the disease," and "the public interest in mitigating and combatting the significant danger posed by the spread of COVID-19 outweighs individual business interests in continued operations." 2020 WL 3130295, at *5-6; *see also Prof'l Beauty Fed'n of Cal.*, 2020 WL 3056126, at *9 (finding injunction "at this stage in the crisis would be premature and might undermine the State's efforts and disrupt the balance of powers established by our federal system" (citing *South Bay*, 140 S. Ct. at 1614 (Roberts, C.J., concurring)) and that plaintiffs failed to "show that the hardships they suffer *definitively* outweigh the risk of interfering in the State's process for reopening").

Plaintiffs make no argument on the equities. Granting Plaintiffs' requested injunction restraining enforcement of the Proclamations would risk significant backsliding in the state's battle against COVID-19 and would gravely endanger public health, as well as the delaying the economic reopening Plaintiffs desire.

IV. CONCLUSION

For the foregoing reasons, the Governor respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

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DATED this 6th day of July, 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to all counsel of record.

DATED this 6th day of July, 2020, at Seattle, Washington.

/s/ Emma Grunberg
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