UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Re: Case No. 20-1581, *League of Independent Fitness, et al. v. Gretchen Whitmer, et al.*
Originating Case No. : 1:20-cv-00458

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Renee M. Jefferies
On Behalf of Karen S. Fultz, Case Manager
Direct Dial No. 513-564-7036

cc: Mr. Thomas Dorwin

Enclosure

No. 20-1581

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEAGUE OF INDEPENDENT FITNESS FACILITIES AND TRAINERS, INC., et al.,

Plaintiffs-Appellees,

v.

GOVERNOR GRETCHEN WHITMER, et al.,

Defendants-Appellants.

O R D E R

Before: GIBBONS, COOK, and READLER, Circuit Judges.

In addressing the COVID-19 outbreak, executives at the national, state, and local levels have had difficult decisions to make in honoring public health concerns while respecting individual liberties. Those decisions have now been the subject of numerous legal challenges, from coast to coast. Some involve individual rights for which precedent requires courts to apply a heightened level of scrutiny to government actions, for example, the free exercise of religion, *see Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614–15 (6th Cir. 2020), or access to an abortion, *see Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925–26 (6th Cir. 2020). But many other cases involve executive actions that, by precedent, are viewed only through the lens of a very modest, or "rational basis," standard of review. And almost without exception, courts in those instances have appropriately deferred to the judgments of the executive in question. *See, e.g., Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020); *McCarthy v. Cuomo*, No. 20-cv-2124

(ARR), 2020 WL 3286530, at *6 (E.D.N.Y. June 18, 2020); *Cassell v. Snyders*, -- F. Supp. 3d --, 2020 WL 2112374, at *11 (N.D. Ill. May 3, 2020).

Today's case similarly fits that deferential mold. As this case comes to the Court in the posture of a request for an emergency stay, residents of the State of Michigan have been subject to a wave of executive orders governing their rights and responsibilities since the onset of the COVID-19 crisis. Governor Gretchen Whitmer has taken an "incremental approach" to reopening sectors of the economy closed in response to COVID-19. Governor's Motion at 7. While many states have allowed their residents to resume most traditional day-to-day activities, Michiganders do not yet enjoy those same privileges, in full. And so it is perhaps somewhat understandable that those restrictions have generated various legal challenges, including this one.

Plaintiffs here are mostly owners and operators of Michigan indoor fitness facilities closed in all but the northernmost parts of the state by order of Governor Whitmer. *See* § 12(b) Mich. Exec. Order No. 2020-110. Plaintiffs challenge that Order on the grounds that it violated, among other constitutional protections, the Fourteenth Amendment's guarantee of equal protection of the laws by treating indoor fitness facilities (which remain completely closed) differently from bars, restaurants, and salons (which may open with restrictions). Finding that the Order did not involve a fundamental right or suspect classification, the district court concluded that rational-basis review applied. Nevertheless, it found that the Order's differential treatment of indoor fitness facilities failed even that deferential test and issued a preliminary injunction. The Governor unsuccessfully moved the district court for a stay pending appeal. She now moves this Court for an emergency stay.

Our jurisdiction over the district court's order granting a preliminary injunction is well-established. 28 U.S.C. § 1292(a)(1). We review four factors when evaluating whether to grant an

injunction or stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). First among equals are factors one and two, which we typically treat as "the most critical." *Id.*; *see Ohio State Conference of NAACP v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014). More broadly, "[t]hese factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 918 (6th Cir. 2018). As the moving party, the Governor bears the burden of showing a stay is warranted. *Id.* She has met that burden.

We first consider the likelihood that the district court's grant of a preliminary injunction will be reversed on appeal. All agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts. *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905). This century-old historical principle has been reaffirmed just this year by a chorus of judicial voices, including our own. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020); *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020); *In re Rutledge*, 956 F.3d 1018, 1031–32 (8th Cir. 2020); *In re Abbott*, 956 F.3d 696, 704–05 (5th Cir. 2020); *Geller v. de Blasio*, -- F. Supp. 3d --, 2020 WL 2520711, at *3 (S.D.N.Y. May 18, 2020); *McGhee v. City of Flagstaff*, No. CV-20-08081-PCT-GMS, 2020 WL 2308479, at *3 (D. Ariz. May 8, 2020); *Givens v. Newsom*, No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224, at *3 (E.D. Cal. May 8, 2020). The police power, however, is not absolute. "While the law may take periodic naps during a pandemic, we will not let it sleep through one." *Maryville Baptist Church*, 957 F.3d at 615.

The parties agree that rational basis review is the hurdle the Governor's Order must clear. Utilizing that legal framework, we presume the Order is constitutional, making it incumbent upon Plaintiffs to negate "every conceivable basis which might support" it. *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012). That is no easy task. Plaintiffs must disprove all possible justifications for the Order regardless whether those justifications actually motivated the Governor's decisionmaking. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–15 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of 'legislative facts' explaining the distinction 'on the record' has no significance in rational-basis analysis.") (citations omitted). Under this test, the Governor's action "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. Especially so, we note, in the case of a public health crisis like the one presented by COVID-19, where "[Michigan's] latitude must be especially broad." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Mem.) (Roberts, C.J., concurring in the denial of injunctive relief) (citing *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

The district court granted the injunction primarily because the Governor did not adequately explain during the hearing below her somewhat unique treatment of indoor fitness facilities, relying instead on conclusory statements that gyms are "dangerous." While perhaps a fair critique of the statements made during the hearing, that observation to overlooks rationales offered by the Governor in her briefing. Governor's Dist. Ct. Br. at 28 (describing indoor fitness facilities as presenting a "combination of heightened risks of infection and spread" of COVID-19). More to the point, unlike exacting forms of scrutiny applied in other contexts, the Governor was not

required to explain that choice at all, let alone exhaustively. *Beach Commc'ns*, 508 U.S. at 313–14. Rather, the relevant standard merely requires "rational speculation" that offers "conceivable" support to the Governor's order. *Id.* at 315.

Against the backdrop of that low bar, the Governor justifies her order as follows, citing a CDC Research Paper for support:

> [E]ven the most ventilated indoor facility is susceptible to respiratory spread of the virus. The danger is only amplified when people congregate (even with social distancing) in a confined space and work out. By its nature, working out is sustained vigorous physical activity, which necessarily means heavy breathing and sweating and, therefore, acute, propulsive bursts of virus shedding by anyone in that confined space who might be infected. Apart from individual exercisers in proximity, there is the added risk of individuals working out together or organized groups working out for extended trainer-led sessions. And the risk of viral spread is only heightened further by the sharing of exercise equipment among many different people over the course of the day, even when good-faith efforts are made to clean that equipment after each use.
>
> At a fitness center, these factors merge to significantly increase the incidence of this highly contagious and asymptomatically transmittable virus spreading.

Governor's Dist. Ct. Br. at 20 (footnote omitted). The idea that heavy breathing and sweating in an enclosed space containing many shared surfaces creates conditions likely to spread the virus is a paradigmatic example of "rational speculation" that fairly supports the Governor's treatment of indoor fitness facilities. Presumably for these same reasons, some similar establishments, such as dance halls and rock-climbing facilities, are also closed pursuant to the Order. Whether the Governor's Order is "unsupported by evidence or empirical data" in the record does not undermine her decision, at least as a legal matter. *Beach Commc'ns*, 508 U.S. at 315. After all, we must

"accept [the Governor's] generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

The district court understandably expressed frustration at the justifications underlying these executive actions. Dist. Ct. Op. at 13 ("This Court fully recognizes that the bar is extremely low, but it is not that low. Defendants cannot rely on the categorization of gyms as 'dangerous,' without a single supporting fact, to uphold their continued closure."). Among other uncertainties of the decisionmaking process, the Order does not close every venue in which the virus might easily spread. Yet the Governor's order need not be the most effective or least restrictive measure possible to attempt to stem the spread of COVID-19. *Heller*, 509 U.S. at 321. Shaping the precise contours of public health measures entails some difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people. *South Bay*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring) (citing *Jacobson*, 197 U.S. at 38) (observing that where the "broad limits" of rational basis review "are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people"). Even if imperfect, the Governor's Order passes muster under the rational basis test. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others.").

The remaining three stay factors follow quickly in tow. Start with harm. Enjoining the actions of elected state officials, especially in a situation where an infectious disease can and has spread rapidly, causes irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 1301 (2012). Effects on interested parties and the public interest are closely related. Though Plaintiffs bear the very real risk of losing their businesses, the Governor's interest in combatting COVID-19 is at

least equally significant. To date, the disease has infected thousands of Michiganders, and it has shown the potential to infect many more. That the public interest weighs in favor of a stay is apparent for the same reason.

* * * * *

We sympathize deeply with the business owners and their patrons affected by the Governor's Order. Crises like COVID-19 can call for quick, decisive measures to save lives. Yet those measures can have extreme costs—costs that often are not borne evenly. The decision to impose those costs rests with the political branches of government, in this case, Governor Whitmer. Her motion for an emergency stay is thus **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk