IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE PEARSON, an Illinois Resident and Will County Republican Committee Chairman, STEVE BALICH, an Illinois Resident and Will County Board Member, SAMANTHA L.PLAYA, owner of ABSOLUTELY PAWFECT PET STYLING, a Business Owner, AMANDA HAMERMAN owner of COLOR ENVY, INC., a Business Owner, and MICHAEL JUDGE Owner of JUDGE AUTOMOTIVE, a Business Owner, Plaintiffs, v. GOVERNOR JAY ROBERT PRITZKER, in his official capacity, and STATE OF ILLINOIS, Defendants.	No. 20-cv-2888 Judge Robert W. Gettleman

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

The COVID-19 pandemic has swept across the world with astonishing speed. COVID-19 is a "novel, severe respiratory illness" for which "there is no known cure, no effective treatment, and no vaccine." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (Mem) (2020) (Roberts, J., concurring). COVID-19 is particularly difficult to control because it can be spread by asymptomatic carriers. Governors across the country have implemented safety measures to reduce transmission and protect the public health.[1] By July 27, 2020, there were 7,416 deaths from COVID-19 and 172,655 positive cases known in Illinois.[2]

Illinois, like every state, has been forced to adapt to these unprecedented times. On March 9, 2020, Governor Pritzker issued a disaster proclamation in Illinois. Governor Pritzker also issued executive orders on March 20, 2020, April 1, 2020 and April 30, 2020. These orders directed residents to stay-at-home except for essential travel and limited certain business operations to control the spread of COVID-19 in Illinois.

Plaintiffs do not contest Governor Pritzker's authority to enter these executive orders. ECF No. 9 at ¶¶ 34-35. Instead, Plaintiffs allege that Governor Pritzker's actions resulted in a taking of their property in violation of the Fifth Amendment of the United States Constitution

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[1] *See* Sarah Mervosh, Denise Lu, and Vanessa Swales, "See Which States and Cities Have Told Residents to Stay at Home," New York Times (April 20, 2020) available at https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html (last visited July 27, 2020) (showing that, as of April 20,2020, stay-at-home orders had been issued in 42 states, three counties, ten cities, the District of Columbia, and Puerto Rico). A court may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also Sidney Hillman Health Ctr. of Rochester v. Abbott Laboratories, Inc.*, 782 F.3d 922, 929 (7th Cir. 2015) (taking judicial notice of news articles).

[2] Illinois Department of Public Health Coronavirus Statistics, available at https://www.dph.illinois.gov/covid19/covid19-statistics/ (last accessed July 27, 2020). *See Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (noting that contents of government websites are subject to judicial notice).

and the Illinois Constitution. *Id.* ¶ 48. Plaintiffs allege this entitles them to compensation from the State of Illinois. *Id*. Plaintiffs further assert that these actions have violated their due process rights. *Id.* ¶ 49.

All of Plaintiffs' claims against the State of Illinois and against Governor Pritzker in his official capacity—for damages under Section 1983, to enforce the Illinois Constitution, and for equitable relief to remedy alleged past harms—are barred by the Eleventh Amendment. Apart from the Eleventh Amendment bar, Plaintiffs cannot state a viable claim because the Governor's actions did not constitute a taking under the United States or Illinois Constitutions, and they have not stated a claim for violation of Plaintiffs' substantive or procedural due process rights. Because these legal defects cannot be cured, the Court should dismiss this case with prejudice.

BACKGROUND

The First Amended Complaint names seven individual Plaintiffs. *See* ECF No. 9.[3] George Pearson is a Will County Republican Committee Chairman, who also acts as campaign manager for an unnamed candidate. *Id.* ¶ 20. Steve Balich is a member of the Will County Board and Committee Chairman for a United States House of Representative candidate. *Id.* ¶ 21. Pearson and Balich allege that the Governor's executive orders limiting in-person gatherings have deprived them of "full participation in the political process." *Id.* ¶¶ 20-21. Neither Pearson nor Balich allege any property interest.

Samantha L. Playa owns Absolutely Pawfect Pet Styling, Inc. Playa alleges that she was unable to operate her business for 41 days due to the Governor's executive orders. *Id.* ¶ 22. Amanda Hamerman owns Color Envy, Inc., and alleges that she has not been able to operate her

[3] The docket only lists five Plaintiffs, but the body of the First Amended Complaint contains allegations related to seven individual Plaintiffs. This memorandum addresses the claims of all seven Plaintiffs referenced in the First Amended Complaint.

business since March 19, 2020. *Id.* ¶ 23. In fact, Color Envy announced on May 20, 2020 that it would be reopening on June 1, 2020, and reopened on June 1, 2020, three days *before* Plaintiffs filed the First Amended Complaint.[4] James Van Dam owns Van Dam Auto and Truck Repair and alleges that as a result of the executive orders his business has declined, and he was forced to lay-off employees. ECF No. 9 at ¶ 24. Jeff Carpenter owns Caveo Learning and alleges that he has experienced a decline in business due to the restrictions imposed by the executive orders. *Id.* ¶ 25. John Brown owns Chipper's Grill and alleges that his business has been closed from March 21, 2020, through the date of the Amended Complaint. *Id.* ¶ 27.

Plaintiffs also assert claims on behalf of two putative classes, defined as all individuals and businesses in the State of Illinois that were adversely affected by the Governor's actions because: (1) their businesses were temporarily closed (referred to as Business Class Members); or (2) they lost employment due to the executive orders (referred to as both Employee Class Members and Individual Class Members).[5] *Id.* ¶ 14.

In response to the threat COVID-19 posed to the public health of Illinois residents and pursuant to his authority under the Illinois Constitution and the Illinois Emergency Management Agency Act (the "Emergency Management Act" or the "Act") (20 ILCS 3305/1, et seq.), Governor Pritzker issued a disaster proclamation for the State of Illinois on March 9, 2020. *Id.* ¶ 28; *see* ECF No. 9-1. Based on that disaster proclamation, on March 20, 2020, the Governor

[4] *See* Exhibit A, Excerpt from Color Envy's Facebook page, p. 3 (showing that Color Envy is owned by Amanda Hamerman), p. 11 (May 20 announcement that the salon would reopen June 1), p. 8 (May 29 post setting forth guidelines for June 1 opening); p. 7 (June 1 post announcing the salon is open), available online at https://www.facebook.com/colorenvybbk/ (last visited July 22, 2020). The Court may take judicial notice of the Plaintiff's business Facebook page. *See Denius*, 330 F.3d at 926; *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1205 (N.D. Cal. 2014) (taking judicial notice of the named plaintiffs' LinkedIn profiles on motion to dismiss).

[5] Plaintiffs' First Amended Complaint does not properly allege either class. Moreover, even if Plaintiffs were to move for class certification, they cannot satisfy the predominance or commonality requirements of Federal Rule of Civil Procedure 23(b)(3).

issued Executive Order 2020-10 to prohibit public gatherings and non-essential travel through April 7, 2020. ECF No. 9-2 at ¶¶ 3-5. Executive Order 2020-10 also allowed for government infrastructure and essential businesses to stay open and for all non-essential businesses to perform minimum basic operations. *See id.*

On April 1, 2020, the Governor issued another disaster proclamation related to the COVID-19 pandemic, and also issued Executive Order 2020-18 to extend the restrictions of Executive Order 2010-10 until April 30, 2020. *See* ECF No. 9-3. On April 29, the Governor again issued a disaster proclamation related to the ongoing pandemic, and on April 30, 2020, he issued Executive Order 2020-32. *See* ECF No. 9-4. Executive Order 2020-32 relaxed certain restrictions, such as allowing retail stores to complete curbside deliveries and pet groomers to reopen. *Id*. at ¶ 13.

Plaintiffs do not contest that the disaster proclamations and executive orders were prudent and within Governor Pritzker's authority, or that he "properly exercised his authority" in issuing the proclamation and orders "in furtherance of the Governor's duty to protect Illinois Citizens' public health, safety and welfare" and "[i]n accordance with medical advice." ECF No. 9 ¶¶ 34-35, 61-62. Instead, Plaintiffs allege that the impact of the executive orders on their businesses constitutes a regulatory taking entitling them to compensation pursuant to the United States and Illinois Constitutions. *Id*. ¶ 44. Further, Plaintiffs allege that the executive orders were applied in an arbitrary manner in violation of their due process rights. *Id*. ¶ 49.

LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(1) provides that a party may move to dismiss a case based on "lack of subject matter jurisdiction." F.R.C.P. 12(b)(1). Federal courts lack subject matter jurisdiction when a case becomes moot, or if it is not ripe for decision. *Pakovich v. Verizon LTD*

Plan, 653 F.3d 488, 492 (7th Cir. 2011); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). When moving to dismiss under Federal Rule of Procedure 12(b)(1) where "the contention is that there is *in fact* no subject matter jurisdiction, the movant may use affidavits and other material to support the motion. . . . And the court is free to weigh the evidence to determine whether jurisdiction has been established." *Bannon v. Edgewater Med. Ctr.*, 406 F. Supp. 2d 907, 920 (N.D. Ill. 2005). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." F.R.C.P. 12(h)(3).

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. A complaint may be dismissed if the plaintiff fails to allege sufficient facts to state a cause of action that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A sufficient complaint must allege "more than a sheer possibility that a defendant has acted unlawfully" and be supported by factual content because "[t]hreadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. On a motion to dismiss, the court may consider any exhibits attached to the complaint and, where the exhibit and complaint conflict, the exhibit typically controls. *Massey v. Merrill Lynch & Co., Inc.*, 464 F.3d 642, 645 (7th Cir. 2006).

When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must accept all well-pleaded facts as true, but it must also "draw on its judicial experience and common sense" to determine if the plaintiff has stated a plausible claim for relief. *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009), *quoting Iqbal* 556 U.S. at 678. If, upon its review, the court determines that a plaintiff has failed to meet this plausibility requirement, the matter should be dismissed.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED IN FEDERAL COURT.

A. Plaintiffs Cannot Bring A Section 1983 Suit Against The State Or The Governor In His Official Capacity.

Plaintiffs bring their claims for relief under 42 U.S.C. 1983 and seek damages against the State and the Governor in his official capacity. ECF No. 9 at ¶¶ 1, 17, and Prayer for Relief. Section 1983 authorizes suits for damages only against a "person" who acts under color of state law and deprives another person of his or her rights. *See* 42 U.S.C. § 1983. But neither the State nor its officials acting in their official capacity are "persons" subject to suit under Section 1983 for damages. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 49 n.24 (1997); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Because Plaintiffs seek damages against the State of Illinois and Governor Pritzker in his official capacity, ECF No. 9 at ¶¶ 1-2, 15, all of their claims against the State and the Governor must be dismissed. *See Will*, 491 U.S. at 71; *Kolton v. Frerichs*, 869 F.3d 532, 535–36 (7th Cir. 2017) (holding there was no Section 1983 claim under Takings Clause for money damages against Illinois Treasurer in his official capacity).

B. Plaintiffs' Claims for Monetary Relief Are Barred By The Eleventh Amendment.

Alternatively, Plaintiffs' claims for monetary relief are barred under the Eleventh Amendment. The Eleventh Amendment prohibits suits against a state without the state's consent. *See Will*, 491 U.S. at 67. It is long established that this protection is extended to state agencies. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1964) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment"). Because the "impetus of the Eleventh Amendment" is "the prevention of federal-court judgments that must be paid out of a State's treasury," Plaintiffs' claims for compensatory damages cannot proceed. *Hess v. Port*

Authority Trans Hudson Corp., 513 U.S. 30, 48 (1994). This includes both claims for just compensation under the Takings Clause and for purported violations of due process. *See Quern v. Jordan*, 440 U.S. 332, 342 (1979) (Eleventh Amendment bars § 1983 claims); *Hutto v. South Carolina Retirement Sys*., 773 F.3d 536, 551-53 (4th Cir. 2014) (noting all courts of appeals addressing the matter have concluded that the Takings Clause did not abrogate Eleventh Amendment immunity and affirming dismissal of claims for takings without just compensation). Thus, the Eleventh Amendment bars all of Plaintiffs' claims against the State.

Further, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In an official capacity suit, a request for monetary relief does not seek that relief from the official's personal assets, but instead looks to collect the damages from the government entity. *See Graham*, 473 U.S. at 166; *Kolton*, 869 F.3d at 536 ("And after all, Frerichs did not pocket any earnings on Kolton's money. Illinois did."). As the Eleventh Amendment does not permit plaintiffs to sue a state for monetary damages, the courts recognize that any request that "seeks monetary damages from defendants acting in their official capacity . . . [is] barred by the Eleventh Amendment." *Brown v. Budz*, 398 F.3d 904, 918 (7th Cir. 2005). As such, Plaintiffs' claims for damages against Governor Pritzker also fail.

Plaintiffs claim to represent two classes: the Business Class Plaintiffs and the Individual Class Plaintiffs. ECF No. 9 at ¶ 14. The Individual Class Plaintiffs are seeking only compensatory damages. *Id*. at ¶ 19. Thus, the Individual Class Plaintiffs' claims must be dismissed in their entirety.

C. Plaintiffs' Claims for Equitable Relief Are Also Barred.

The Business Class Plaintiffs also seek an order "enjoining Governor Pritzker from enforcing his Executive Orders until such time as a mechanism is enacted to provide just

compensation for affected businesses and appellate review" and request a declaration that the Governor's executive orders resulted in "an unconstitutional taking without just compensation and a violation of [due process]."[6] *Id.*

Although a state official can be subject to an injunction from a federal court to vindicate federal constitutional rights, the relief must be fundamentally prospective, not retrospective. That is, the "not retrospective" limitation prevents a monetary award out of the state treasury. The permitted injunctive relief may require the expenditure of the State's money, but the essentially prospective, forward-looking nature of the relief must predominate. *McDonough Associates, Inc. v. Grunloh*, 722 F.3d 1043, 1043 (7th Cir. 2013). "*Edelman* [*v. Jordan*, 415 U.S. 651 (1974)] thus prohibited relief that was not prospective in nature, specifically barring awards of accrued monetary liability which must be met from the general revenues of a State." *Id.* at 1050 (internal quotation marks omitted). *McDonough* went on to hold that courts may "order state officials to act in a certain manner going forward that may cost the state money to implement." *Id.* at 1050-51. However, courts may not "direct a state to make payments to resolve a private debt or to remedy a past injury to a private party." *Id.*

Plaintiffs' request to enjoin enforcement of the executive orders, ECF No. 9 at ¶ 5, constitutes nothing more than a request that the State pay compensation from the State Treasury for past wrong. *See id.* at 294-95 (holding that requests for orders that State pay third parties for alleged ongoing constitutional violations were requests for monetary relief).

Likewise, requests for declaratory relief that the State violated a constitutional provision which, in effect, require the State to pay plaintiffs compensation for past or future injuries are barred as requests for money damages. *MSA Realty Corp. v. State of Ill.*, 990 F.2d 288, 295 (7th

[6] While this request for relief does not specify who seeks it, the Individual Class Plaintiffs would not have standing to seek an order providing for "just compensation for affected businesses."

Cir. 1993) (affirming dismissal of constitutional claims against State for declaratory relief and injunctions against past and future due process violations as barred by Eleventh Amendment).

Although Plaintiffs' request to enjoin enforcement of the executive orders is phrased as seeking injunctive relief, it is entirely retrospective and seeks an order to compel the State to pay "just compensation" for past harms which is barred by the Eleventh Amendment. Further, any declaratory relief would merely result in the State's payment of just compensation and compensatory damages to Plaintiffs, it is in effect a claim for money damages against the State. *See MSA Realty*, 990 F.2d at 295. Therefore, neither request provides a claim against the State and Governor that is authorized under Section 1983, and regardless, Plaintiffs' claims are barred by the Eleventh Amendment.

D. Any Remaining Claims for Prospective Relief Are Either Moot or Unripe.

Even if Plaintiffs' claims could be construed as seeking only prospective relief (and they cannot), their claims based on expired executive are moot. It is undisputed that the Executive Order 2020-32, the most recent executive order that Plaintiffs challenge, expired by May 29, 2020, ECF No. 9 at ¶ 32, and that the Governor's superseding orders have since allowed businesses to reopen.[7] When a claim for injunctive relief is mooted by an amendment to the challenged law, the claim seeks only retrospective relief and is barred under the Eleventh Amendment. *See Green v. Mansour*, 474 U.S. 64, 68-69 (1985) (retrospective claims include injunctive relief concerning statutes that have become moot by amendment).

And to the extent that Plaintiffs seek an order relating to any future orders, such a claim is speculative and not ripe for decision. The ripeness requirement "prevent[s] the courts, through the

[7] *See* the "Restore Illinois" plan that details the re-opening of businesses and services throughout Illinois. The plan is available at https://www.dph.illinois.gov/restore. This Court should take judicial notice of the Restore Illinois plan as a public document. *Denius*, 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of information published on official government websites).

avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories*, 387 U.S. at 148. The ripeness requirement prevents courts from interfering with laws before it is necessary to do so and enhances judicial decision-making by ensuring that cases present courts with an adequate record for effective review. *Id*. Here, neither the Court nor the parties have any idea whether any restrictions may be imposed in the future, and if so, what those restrictions might be. Such a claim is, accordingly, not ripe for review.

E. Equitable Relief Is Unavailable Because Plaintiffs May Bring an Inverse Condemnation Suit.

Plaintiffs also have no valid basis to seek equitable relief because "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *see Knick v Twp. of Scott, Penn.*, 139 S. Ct. 2162, 2179 (2019) (explaining that "as long as just compensation remedies are available . . . injunctive relief [for the failure to pay just compensation] will be foreclosed"). Illinois has long provided a claim for inverse condemnation in its courts to seek just compensation under the federal and Illinois takings clauses. *See City of Chi. v. ProLogis*, 236 Ill. 2d 69, 77 (2010) (addressing inverse condemnation action alleging State takings without just compensation). Consequently, Plaintiffs have no claim for injunctive relief for alleged failure to pay just compensation under those provisions. *See Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008) (holding that "reverse condemnation actions cannot qualify as claims for prospective relief" under the Eleventh Amendment).

F. Plaintiffs' Claims Under the Illinois Constitution Are Barred by the Eleventh Amendment.

Finally, Plaintiffs' claims for monetary and injunctive relief under the Illinois Constitution in Count I are barred by the Eleventh Amendment. Although the Eleventh Amendment does not bar claims for injunctive relief against state officials to stop an ongoing violation of *federal* law, *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002), this exception does not extend to allowing claims based on alleged violations of state law. *Pennhurst*, 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law … does not vindicate the supreme authority of federal law."). In holding that the Eleventh Amendment bars suits against state officials to compel them to conform their conduct to state law, the *Pennhurst* Court noted that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106. The Eleventh Amendment similarly bars state-law claims for declaratory relief. *Watkins v. Blinzinger*, 789 F.2d 474, 483–84 (7th Cir. 1986); *Benning v. Bd. of Regents*, 928 F.2d 775, 778 (7th Cir. 1991). A declaratory judgment cannot be used to avoid the Eleventh Amendment when monetary and injunctive relief would be barred. *Council 31 of AFSCME. v. Quinn*, 680 F.3d 875, 884 (7th Cir. 2012).

Accordingly, Plaintiffs' claims under the Illinois Constitution are barred in federal court. It is irrelevant that Plaintiffs' other arguments allege violations of federal law. The limits on federal jurisdiction over state-law claims cannot be evaded by making those claims pendant to federal claims. *Pennhurst*, 465 U.S. at 119–21. Applying this logic, the federal courts have routinely dismissed claims based on the Illinois Constitution. *See, e.g.*, *Travis v. Illinois Dep't of Corr.*, No. 18 C 00282, 2019 WL 2576546, at *3 (N.D. Ill. June 24, 2019) ("Therefore, neither the Department nor the State may be sued for violations of the Illinois Constitution in federal

court."); *Illinois Clean Energy Community Foundation v. Filan*, No. 03 C 7596, 2004 WL 1093711, at *1, 3 (N.D. Ill. April 30, 2004) (claims under Illinois Constitution barred by Eleventh Amendment); *see also Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *11 (N.D. Ill. May 3, 2020) (holding, in deciding motion for preliminary injunction in case challenging prior COVID-19 executive order, that "the Eleventh Amendment almost certainly forecloses Plaintiffs' state law claims"). For all these reasons, Plaintiffs' claims should be dismissed in their entirety.

II. ALTERNATIVELY, PLAINTIFFS HAVE NOT PLED A TAKINGS CLAIM UNDER THE FIFTH AMENDMENT.

Plaintiffs allege that they are entitled to compensation because Governor Pritzker's executive orders constitute a taking under the United States Constitution.[8] The Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment and provides that private property shall not be "be taken for public use, without just compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); U.S. Const. amend. V.

A. Plaintiffs are not entitled to compensation because Governor Pritzker's actions were taken pursuant to his authority under the public necessity or police power doctrines.

The related public necessity and police power doctrines recognize that states' actions that regulate the use of, or even destroy, property in response to public emergencies do not constitute takings that require just compensation. *United States v. Caltex*, 344 U.S. 149, 154 (1952); *Trust Co. of Chicago v. City of Chicago*, 96 N.E. 2d 499, 503 (Ill. 1951). Here, the State's actions

[8] As discussed above, Plaintiffs' claims under the Illinois Constitution are barred by the Eleventh Amendment. But even if the Court were to consider those claims, what constitutes a taking under the Illinois and United States Constitutions are subject to the same analysis. *Hampton v. Metropolitan Water Reclamation Dist.*, 2016 IL 119861, ¶ 31 (Ill. 2016). Thus, any takings claim under the Illinois Constitution would fail for the same reasons as discussed below in relation to the United States Constitution.

implicate the public necessity and police power doctrines, and Plaintiffs' takings claims fail accordingly.

1. Plaintiffs are not entitled to compensation for any economic loss due to the executive orders because Governor Pritzker issued them to address a public necessity.

First, the executive orders did not result in a compensable taking as a matter of law because they were necessary to mitigate the COVID-19 public health emergency. The public necessity doctrine absolves the State of liability for even the destruction of "real and public property, in cases of actual necessity . . . to forestall other grave threats to the lives and property of others." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992); *see also United States v. Caltex*, 344 U.S. 149, 154 (1952) (recognizing that, "in time of imminent peril — such as when fire threatened the whole community — the sovereign could, with immunity, destroy the property of a few [so] that the property of many and the lives of many more could be saved").

The public necessity doctrine recognizes that individuals may suffer property loss for the public good and that "economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). The concept of "public necessity" originated in the common law, which recognized that "every one had the right to destroy real and personal property, in case of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy to the owner." *Bodwitch v. City of Boston*, 101 U.S. 16, 18 (1879). This logic has been extended to other situations where public health or safety impacted property rights. *See Juragua Iron Co v. U.S.*, 212 U.S. 97 (1909) (rejecting claim that owner of multiple buildings was entitled to

compensation when U.S. Army destroyed the buildings to prevent the spread of yellow fever); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (holding that temporary closure of gold mines to conserve equipment needed for war effort was not a compensable taking).

Here, there is no dispute that COVID-19 is a highly contagious disease that spreads rapidly and has no effective, consistent treatment. As of July 27, 2020, the pandemic had resulted in over 172,000 infections and 7,400 known deaths in Illinois alone. *See* fn. 2 above. Plaintiffs recognize that Governor Pritzker issued the executive orders "[i]n accordance with medical advice provided by the Illinois Department of Public Health as a means of slowing the spread of the COVID-19 virus, preventing Illinois hospital emergency rooms from being overwhelmed, and preventing unnecessary deaths." ECF No. 9 at ¶ 61. Indeed, the executive order reflected that State modeling showed that "the number of deaths from COVID-19 would be between 10 to 20 times higher" without the "stay at home" restrictions in place. ECF No. 9-4 at 2. As such, pursuant to the public necessity doctrine, the Governor's actions, including any effect of the executive orders, do not constitute a compensable taking, and Plaintiffs' takings claims should be dismissed.

2. The executive orders, and their alleged economic impact on Plaintiffs, were issued pursuant to Governor Pritzker's police power authority and, therefore, do not constitute a taking.

Even if the public necessity doctrine did not apply, Plaintiffs also fail to state a claim for a compensable taking because the executive orders were valid exercises of the State's police powers to address a public health emergency, rather than an exercise of the State's power of eminent domain. The State is in the midst of a global health pandemic that has impacted every aspect of modern life. To address the public health crisis resulting from COVID-19, government

officials worldwide have been required to make swift decisions to protect the public health. It is well established that "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. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905). COVID-19 qualifies as the kind of public health crisis contemplated in *Jacobson*. *Elim Romanian Pentecostal Church v. Pritzker* ("*Elim II*"), No. 20-1811, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020); *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613-14. As such, under *Jacobson*, a state can exercise its police powers as necessary to protect its residents during a public health crisis. *Elim Romanian Pentecostal Church v. Pritzker* ("*Elim I*"), No. 20 C 2782, 2020 WL 2468194, at *2–3 (N.D. Ill. May 13, 2020) (Gettleman, J.), *aff'd*, 962 F.3d 341 (7th Cir. 2020).[9]

Property rights have always been subject to the police power without constituting a compensable taking. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). When a state determines that public health or safety requires prohibiting certain land uses, the state can act without violating the takings clause even if those prohibitions "destroy[] or adversely affect[] recognized real property interests." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978). Without this flexibility, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 124, *quoting Pennsylvania Coal Co.*, 260 U.S. at 413.

Accordingly, the State need not provide compensation when its exercise of the police power for the public health and welfare "diminishes or destroys the value of property" to abate a

[9] Section 8 Article 5 of the Illinois Constitution provides that "[t]he Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws." Ill. Const. art. V, § 8 (West 2020).

public nuisance. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n.22 (1987). After all, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Id*. at 491. For instance, in *Mugler v. Kansas*, the Supreme Court upheld the state's authority to prohibit the manufacture and sale of liquor and rejected plaintiff's claim that the state's prohibition of the manufacture and sale of alcoholic beverages constituted a taking because it prevented him operating his brewery. 123 U.S. 623 (1887). The Court held that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of the property for the public benefit." *Id.* at 668-69.

Miller v. Schoene likewise held that property owners were not entitled to compensation when their cedar trees had to be destroyed to prevent the spread of an agricultural disease to nearby apple trees, which were more valuable to the state's economy. 276 U.S. 272 (1928). The Supreme Court explained that, "where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id.* at 279–80.

Here, Plaintiffs recognize that Governor Pritzker properly issued the executive orders pursuant to his constitutional and statutory authority "in furtherance of [his] duty to protect Illinois Citizens' public health, safety and welfare," and "in accordance with medical advice" to prevent Illinois hospitals from being overwhelmed and "unnecessary deaths." ECF No. 9 at ¶ 35, 61. The dangers associated with COVID-19 and the necessity for swift action by the State to

reduce transmission and "flatten the curve" fall squarely within the State's police powers. *Elim I*, 2020 WL 2468194, at *2–3. If state actions to save trees and prohibit alcoholic beverages did not require compensation to impacted businesses, the Governor's necessary restrictions on business operations to protect the health and lives of Illinois residents from a worldwide pandemic cannot constitute a taking requiring compensation.

A similar case was recently heard by the Supreme Court of Pennsylvania, *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020). In that case, the plaintiffs challenged whether Pennsylvania's police powers applied to COVID-19 and if the state had the authority to require plaintiffs to close their businesses. *See id.* at 887. Here, Plaintiffs do not appear to allege that the Governor's actions exceeded the scope of his authority, ECF No. 9 at ¶ 2, but instead that the executive orders were unduly oppressive for business owners.

The State is sensitive to the economic impact that COVID-19 has had on its residents and has continually adapted its response to COVID-19 to allow for more businesses to open with proper regulations in place.[10] However, the temporary closure of certain businesses is not *unduly oppressive*, as required to negate the police power. As the *Friends of Danny DeVito* court found:

> Faced with protection of the health and lives of [millions of] citizens, we find the impact of the closure of businesses caused by the exercise of police power is not unduly oppressive. The protection of the lives and health of millions of residents is the sine qua non of a proper exercise of police power.

Id. at 892.

The COVID-19 pandemic is a public health emergency unlike any public health crisis that this country has seen in over a century, if ever, requiring decisive government action and the invocation of the Governor's police powers. As such, Plaintiffs cannot bring a takings claim

[10] *See* Restore Illinois Plan referenced in ftn. 7, *supra*.

against the State of Illinois for the temporary closure of their businesses. *Trust Co. of Chicago*, 96 N.E. 2d at 97. Therefore, this Court should dismiss Plaintiffs' takings claims with prejudice.

B. Even under traditional takings claim analysis, Plaintiffs fail to state a claim because they were not subject to a regulatory taking.

Even aside from the Governor's authority under the police powers or the public necessity doctrine, Plaintiffs have still not stated a viable takings claim.

The clearest example of a taking occurs when the government physically appropriates or invades the property. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. at 537. However, property can be subject to a "regulatory taking" when the government's restriction on property is so onerous as to be tantamount to direct appropriation of the property. *Lingle*, 544 U.S. at 537. There are two categories of *per se* regulatory taking: (1) where government action requires the property owner to suffer permanent physical invasion of their property; and (2) where the regulation completely deprives an owner of "*all* economically beneficial or productive use of their land." *Lucas*, 505 U.S. at 1015.

Otherwise, whether Plaintiffs are entitled to compensation is governed by the standards set forth in *Penn Central Transp. Co. v. New York City*. *Lingle*, 544 U.S. at 538. *Penn Central* identified three factors: (1) the economic impact of the regulation; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action, such as whether it only interferes with the owner's property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124.

1. Plaintiffs have not stated a claim for a physical invasion or *per se* regulatory taking.

Here, Plaintiffs do not allege that the State physically invaded any property or required them to suffer a physical invasion of their property. *See* ECF No. 9. Therefore, they have not alleged the first category of a *per se* taking.

Likewise, Plaintiffs have not – and cannot – state a claim for the second category of *per se* taking because they cannot allege that the executive orders deprived them of all economically beneficial use of their real property. *See Lucas*, 505 U.S. at 1019-20. Although Plaintiffs allege in a conclusory fashion that the executive orders deprived the putative Business Class Members "of all economically beneficial use of their Property," ECF No. 9 at ¶ 29, Plaintiffs' allegations and the attached exhibits confirm that the orders did not deprive Plaintiffs of all use of their land.

First, the *per se* category applies to regulations that deprive landowners of all use of their real property. *Lucas*, 505 U.S. at 1019, 1028-29 (adopting *per se* rule "where regulation denies all economically beneficial or productive use of land"). In contrast to landowners, owners of other types of property "ought to be aware of the possibility that new regulation might even render [their] property economically worthless." *Id*. at 1027-28. Plaintiffs' allegations and the attached exhibits, however, confirm that the orders allowed Plaintiffs to use any real property that they owned to operate essential businesses, as residences, or for other purposes than operating non-essential businesses. *See* ECF No. 9-2 at ¶¶ 2, 5, 12, 13; ECF No. 9-3 at Part 1; ECF No. 9-4 at ¶¶ 2, 5, 12, 13. Indeed, Plaintiffs allege that Van Dam and Carpenter continued to operate their businesses throughout the time when the orders were in effect. ECF No. 9 at ¶ 24-25. Playa resumed her business operations on May 1, and Brown operated a restaurant or tavern business, which the orders designated as essential businesses that could provide delivery

and other off-premises food services throughout the pandemic, *id*. ¶¶ 22, 26; *see, e.g.*, ECF No. 9-2 at §1(12)(l).

Even if the orders could be construed to deprive any Plaintiff of all economically beneficial use of their real property, their temporary nature precludes a *per se* taking claim. The Supreme Court rejected "the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 334 (2002). The *Tahoe-Sierra* plaintiffs challenged moratoria that prohibited development of their land for 32 months as a *per se* taking. *Id*. at 306. The Supreme Court, however, explained that it was improper to "effectively sever" a temporary period of restriction to determine whether it deprived the landowner of all economically viable use. *Id.* at 331. Consequently, it refused to find that the 32-month prohibition, or a temporary restriction of economic use for any specific length of time, constituted a *per se* taking. *Id*. at 341-42.

Here, the amended complaint and exhibits confirm that each of the executive orders explicitly expired within a period of 30 days. ECF No. 9 at ¶¶ 31-32, ECF Nos. 9-2, 9-3, 9-4. Consequently, even combined, the executive orders restricted Plaintiffs' use of any real property that they owned for approximately seventy days from March 20 through May 29, 2020, far less than the 32-month period that *Tahoe-Sierra* ruled could not constitute a *per se* taking. *Tahoe-Sierra*, 535 U.S. at 341-42.

Further, even when there is complete deprivation of economically beneficial uses, a landowner is not automatically entitled to compensation if the regulation at issue is consistent with the principles of nuisance and property law. *Murr v. Wisconsin*, 137 S. Ct. 1993, 1943 (2017). To determine whether or not traditional nuisance law applies, courts weigh a variety of

factors, including the degree of harm the desired activity or land use poses to the public, the social value of the desired land use, and whether the government regulation provides a clear route to curtail any potential harm from the proposed activities. *Lucas*, 505 U.S. at 1030-31.

Here, these factors show that traditional nuisance law applies. Allowing Plaintiffs to use their property, meaning operate their businesses unrestricted, would have had severe consequences to the public given the highly contagious nature of COVID-19. There would also be no social benefit given that the executive orders were designed to specifically limit interpersonal interactions to reduce the spread of COVID-19. Finally, the executive orders provided a clear and effective method for the State to reduce the spread of COVID-19 and protect the public health. As such, there is no regulatory taking, as the State's decisions comport with traditional nuisance law. Therefore, Plaintiffs have not and cannot state a *per se* takings claim.

2. Plaintiffs are unable to state a claim that the State's actions constituted a compensable regulatory taking in violation of the Fifth Amendment of the Illinois Constitution.

Plaintiffs also fail to state a claim that the temporary restrictions on the operation of their businesses constitute a regulatory taking under the standards set forth in in *Penn Central*. 438 U.S. at 124.

Here, the third *Penn Central* factor, which looks to the nature of the government action, is particularly significant. As previously discussed with reference to the State's exercise of its police powers, courts are unlikely to find that a government regulation constitutes a taking where "the interference with property rights arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Tahoe-Sierra*, 535 U.S. at 324 (internal quotation marks omitted); *see Penn. Central*, 438 U.S. at 125 (discussing how regulations that

impact or destroy certain uses of land are not entitled to compensation when they promote the health or welfare of the public). Even where the State action denies owners all use of their property, that action may be "insulated as part of the State's authority to enact safety regulations." *Tahoe-Sierra*, 535 U.S. at 329 (internal quotation marks omitted).

When a state exercises its police power in a justified manner to prevent danger to the public, no compensation is required. *Keystone*, 480 U.S. at 490 (holding that restrictions on coal mining that protected public interest was not a taking). In reaching this decision, the *Keystone* court stated that "[l]ong ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,'" and the "Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Id.* at 491-92, *quoting Mugler*, 123 U.S. at 665. Instead, the state can protect the public good by restricting how an individual uses their property and "[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Id.* at 491. The State has an extreme interest in preventing the spread of highly infectious diseases. *See Jacobson*, 197 U.S. 11. As such, the nature of the government action had significant relation to public health and welfare, and the final *Penn. Central* factor weighs heavily in favor of the State's actions.

Plaintiffs acknowledge that Governor Pritzker prudently issued the executive orders pursuant to his duty to protect the health, safety, and welfare of Illinois residents against a deadly pandemic. ECF No. 9 at ¶¶ 34-35, 61-62. Pursuant to the Illinois Department of Public Health's advice, the restrictions were necessary to prevent Illinois hospitals from being overrun and the resulting additional deaths of thousands of Illinois residents. *Id.* ¶ 61. Accordingly, the partial

restrictions on Plaintiffs' business operations to protect the health and lives of Illinois residents from a pandemic is a prototypical public health program that cannot constitute a taking.

Turning to the other *Penn Central* factors, in *Tahoe-Sierra*, the court recognized that "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim." *Tahoe-Sierra*, 535 U.S. at 334-35. Here, the temporary nature of the executive orders totaling seventy days stands in stark contrast to the 32-month moratoria that *Tahoe-Sierra* held did not constitute a taking. *Id*. at 341-42. Plaintiffs, on the other hand, offer no allegations concerning their reasonable investment-backed expectations for operating their businesses during a public health emergency. Thus, the temporary and partial nature of the restrictions only undermine any argument that the orders' economic impact or their investment-backed expectations give rise to a compensable taking. *See Lawrence v. Colorado*, No. 20-cv-862, 2020 WL 2737811 at *10 (D. Colo. Apr. 19, 2020) (temporary nature of business closures due to COVID-19 weakens any takings claim); *Friends of Danny DeVito*, 27 A.3d at 896 (the closures were a "stop-gap measure and, by definition, temporary").

First, Pearson and Balich have not alleged that they were deprived of any property right amenable to a takings claim or otherwise, but allege only that they were forced to alter how they conducted their political business. ECF No. 9 at ¶¶ 20-21. As such, they have not alleged that the regulations had any economic impact or interference with their investment-backed expectations. Further, Van Dam and Carpenter never closed their businesses. *Id.* at ¶¶ 24-25. Their claim that their reduced business constitutes a taking is unpersuasive given the short duration of any reduction.

Playa alleges that her business was closed for 41 days. *Id.* at ¶ 22. Hamerman alleges that her business closed in March and was closed as of June 4, 2020, (*id.* at ¶ 23), but her business's

Facebook page shows that she reopened on June 1, 2020. *See* Exhibit A at 7. Brown also closed his business in March, despite always being allowed to operate on a take-out basis, but has potentially reopened.[11] However, these temporary closures are not significant enough to constitute a taking. *See Tahoe-Sierra*, 535 U.S. at 329 (even the denial of all use of land is not a taking if "part of the State's authority to enact safety regulations"). Otherwise, even orders temporarily closing businesses violating health codes, fire-damaged buildings, or crime scenes would require compensation. *See id*. at 335.

These temporary closures or restrictions that impacted profits are not significant enough to outweigh the State's compelling need to act to slow the spread of COVID-19. *Tahoe-Sierra*, 535 U.S. at 335 ("Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of police power"). Instead, this temporary measure to protect the public health should be "insulated as a part of the State's authority to enact safety regulations." *Id.* at 329. As such, given the temporary, and comparatively minor interruptions to Plaintiffs' business operations, there has not been a taking of any of Plaintiffs' property and their takings claims should be dismissed with prejudice.

III. PLAINTIFFS FAIL TO STATE A SUBSTANTIVE DUE PROCESS CLAIM.

As a threshold matter, as Plaintiffs allege that the restrictions imposed by the executive orders resulted in a taking of their property, their substantive due process claim is properly analyzed under the Takings Clause, which specifically addresses government confiscation of property. *Albright v. Oliver*, 510 U.S. 266, 273 (stating that when an amendment provides specific protection against government behavior, the more particular Amendment is used to

[11] Brown could also have opened his business for indoor dining since the Amended Complaint was filed and was always allowed to operate on a takeout and delivery basis. *See* ECF No. 9-2 at §12(l).

analyze the claim instead of the general concept of substantive due process). Thus, for the same reasons that their takings claims fail, Plaintiffs also fail to state a substantive due process claim.

Even if the Court applies a general substantive due process analysis, Plaintiffs' claim fails. The Seventh Circuit recognizes that "the scope of substantive due process is very limited." *Campos v. Cook County*, 932 F.3d 972, 975 (7th Cir. 2019). To assert a substantive due process claim, "a plaintiff must allege that the government violated a fundamental right or liberty" . . . "[a]nd that violation must have been arbitrary and irrational." *Id.* at 975 (internal citations omitted). "Substantive due process protects against only the most egregious and outrageous government action." *Id*. Plaintiffs cannot satisfy either requirement to state a substantive due process claim.

First, Plaintiffs do not allege that the executive orders violated a recognized fundamental right. Courts have recognized only a handful of fundamental rights with a substantive component under the due process clause, specifically the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion, and Plaintiffs do not claim that any of these rights are at issue here. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). "The Supreme Court has repeatedly cautioned against expanding the contours of substantive due process." *Catinella v. Cty. of Cook*, 881 F.3d 514, 518 (7th Cir. 2018). This is "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Tun v. Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005).

Instead, they allege that the orders violated their "right to live and operate their businesses free from arbitrary and capricious government interference and a property right to

enjoy [their] land." ECF No. 9 at ¶ 72.[12] But no court has recognized a fundamental right to operate businesses *without government regulation*, and courts across the country have rejected similar due process claims challenging COVID-19 related measures. *See Talleywhacker, Inc. v. Cooper* No. 20-cv-218, 2020 WL 3051207 at *12 (E.D.N.C. June 8, 2020) (stating that general right to do business is not a constitutionally protected right); *Prof'l Beauty Fed'n. of California v. Newsom*, No. 20-cv-0475, 2020 WL 3056126 at *8 (C.D. Cal. June 8, 2020); *Xponential Fitness v. Arizona*, No. 20-cv-1310, 2020 WL 3971908 at *5 (D. Ariz. July 14, 2020). It is axiomatic that the government can regulate businesses through a variety of methods, including licensure requirements, zoning ordinances, noise ordinances, and anti-discrimination laws such as the Americans with Disabilities Act. As such, Plaintiffs do not have the unfettered right to operate their businesses absent any government oversight or regulation. The closest that Plaintiffs can get to alleging a liberty interest is the "interest in obtaining the maximum return on investment," but "[t]hat is not a 'fundamental right.'" *Nat'l Paint & Coating Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995) (holding that a law prohibiting the sale of spray paint did not violate substantive due process rights of a group of spray paint manufacturers, wholesalers, and retailers).

Second, even if Plaintiffs had a right to run their businesses with no restraints, their due process claim fails because the State's actions were rationally related to a legitimate governmental interest. *Frey Corp. v. City of Peoria, Ill.*, 735 F.3d 505, 508 (7th Cir. 2013). "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and

[12] To the extent that Pearson and Balich are considered "individual class members," their claims are barred by the Eleventh Amendment as discussed. *See* Sec. I above. However, the substantive due process claim of the "individual class members" in Count III would also fail, as there is no fundamental right at issue. Plaintiffs are unable to show that the State's actions were arbitrary and capricious, and the Seventh Circuit has held that there is no fundamental right to work. *Park v. Ind. Univ. Sch. of Dentistry*, 692 F.3d 828, 832 (7th Cir. 2012).

prohibitions imposed in the interests of the community." *Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911). "A property owner challenging a land-use regulation as a violation of due process is therefore obligated to show that the regulation is arbitrary and unreasonable, bearing no substantial relationship to public health, safety, or welfare." *Frey Corp.*, 735 F.3d at 508. This is a deferential standard because the "Constitution does not insist that a local government be *right*." *Gosnell v. City of Troy, Ill.*, 59 F.3d 654, 658 (7th Cir. 1995) (emphasis in original); *Vaden v. Village of Maywood, Ill.*, 809 F.2d 361, 364-65 (7th Cir. 1987) ("[W]e cannot consider whether the Village Board acted wisely in regulating the business . . . we consider only whether the ordinance is wholly arbitrary.").

Plaintiffs do not contest that a deadly pandemic has swept Illinois and the world for which there is no known effective treatment or vaccine, or that the restrictions imposed by the orders were prudently issued to address that public health threat. *Id.* ¶ 28, 34-35, 61-62. Plaintiffs admit that "everyone in Illinois benefits by 'flattening the curve'" but also allege that the decision to temporarily close certain businesses was "arbitrary, capricious, irrational and abusive conduct." *Id.* at ¶¶ 7, 75. However, for the reasons already discussed, there is nothing arbitrary or irrational about the State's decision to temporarily suspend certain activities to protect public health, slow the spread of COVID-19, and ensure that the medical system would not be overwhelmed. *See Cassell*, 2020 WL 2112374, at *7 (finding Governor's executive order "undoubtedly advances the government's interest in protecting Illinoisans from the pandemic"); *e.g.*, *Elim Romanian Pentecostal Church v. Pritzker ("Elim III")*, No. 20-1811, 2020 WL 3249062, at *1 (7th Cir. June 16, 2020) (discussing how restriction on individual movement and limiting nonessential business operations are components of a reasonable response to the pandemic). As such, Plaintiffs' substantive due process rights were not violated.

IV. PLAINTIFFS FAIL TO STATE A PROCEDURAL DUE PROCESS CLAIM.

Plaintiffs allege that the executive orders violated their procedural due process rights by failing to provide any mechanism "to challenge his determination which business is 'essential' or 'non-essential.'" ECF No. 9 at ¶ 95. However, this argument fails because Plaintiffs were not entitled to the type of process they allege was required.

At its core, procedural due process requires notice and the opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 332-3 (1976). It is well established that the contours of what constitutes adequate due process are "flexible and calls for such procedural protections as the particular situation demands." *Morissey v. Brewer*, 408 U.S. 471, 481 (1972). To determine the amount of process required, the courts consider: (1) "the private interest that will be affected by the official action," (2) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," and (3) "the risk that the plaintiff will suffer an erroneous deprivation through the procedure used and the probable value if any of additional procedural safeguards." *Mathews*, 424 U.S. at 335.

The state may pass statutes of general applicability that place conditions on or prohibits the right to conduct business without violating a business owner's procedural due process rights. *Vaden*, 809 F.2d at 364. These statutes may be passed without giving every individual a right to be heard, even if the statute may impact an individual's property to the point of ruin. *Id*. Here, the challenged regulations are not statutory, but this reasoning still applies because it rests on the constitutional and statutory authority of elected officials and how "the process due is found in the electorate's power over its chosen representatives." *Id., quoting Philly's v. Byrne*, 732 F.2d 87, 95 (7th Cir. 1984) (Wood, J. concurring).

The executive orders list in detail the categories of businesses and services that could continue to operate as "essential businesses." *See* ECF Nos. 9-2 and 9-4 at ¶ 12. Procedural due

process, however, does not bar Governor Pritzker from imposing such irrebuttable classifications through executive action. *See Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion); *id*. at 132 (Stevens, J., concurring in judgment). Rather, to the extent that Plaintiffs challenge the reasonableness of the classifications mandated under the orders, they challenge the "fit between the classification and the policy that the classification serves" – not the procedural adequacy of the orders. *See id.* at 121. Therefore, their challenge is properly analyzed only under substantive due process. *Id*. And as discussed above, Plaintiffs fail to state such a claim.

Further, the contours of what constitutes sufficient due process are flexible and may be adapted to the particular situation. *Morissey*, 408 U.S. at 481. Plaintiffs seem to allege that during a global pandemic of a highly contagious disease that spreads rapidly in any public setting, adequate procedural due process requires a mechanism by which every business in the state could challenge whether or not they are deemed "essential" before the executive orders went into effect.[13] ECF No. 9 at ¶ 95. However, the Due Process Clause "do[es] not confer a right to a predeprivation hearing in every case in which a public officer deprives an individual of liberty or property." *Holly v. Woolfolk*, 415 F.3d 678, 680 (7th Cir. 2005). Further, the Supreme Court "has recognized, on many occasions, that where a State must act quickly, or where it would impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). Plaintiffs' requested process is not warranted, as pre-deprivation hearings to determine whether each business in the state is essential would overwhelm the judicial system and would have undermined the State's ability to effectively address a public health emergency. *Mathews*, 424 U.S. at 348 (discussing how safeguards to an individual can be outweighed by the cost of

[13] If Plaintiffs allege that the required process is to challenge whether they were essential after the fact, then their due-process claim fails because they are able to litigate that issue.

providing those safeguards). In other COVID-19 related cases, courts have determined that pre-deprivation process was not required due to the nature of the disease. *See Friends of Danny DeVito*, 227 A.3d at 897; *Xponential Fitness*, 2020 WL 3971908 at *6.

Plaintiffs' position is entirely unreasonable given the temporary nature of the disruption. Many of the complained-of restrictions have lifted. As stated, every Plaintiff business has reopened, or can reopen at this point. Administratively, it is impossible to conceive of a way that the State could have allowed for individual determinations within the period of time that any business was closed. In sum, Plaintiffs have offered no support for the idea that individualized due process was required, or warranted, to place temporary restrictions on businesses in the midst of the COVID-19 pandemic and they are unable to bring a claim for any alleged procedural due process violation.

CONCLUSION

Plaintiffs cannot obtain the requested relief from the State or Governor Pritzker under Section 1983 and such relief is barred by the Eleventh Amendment. Further, they are unable to bring viable claims under the Fifth Amendment's Takings Clause or the Illinois Constitution and cannot state a claim for substantive or procedural due process violations. As such, the First Amendment Complaint should be dismissed with prejudice.

WHEREFORE, Defendants, Governor JB Pritzker and the State of Illinois, respectfully request that this Honorable Court grant its Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and dismiss Plaintiffs' First Amended Complaint in its entirety.

July 27, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 27, 2020, I caused a copy of the foregoing *Defendants' Memorandum of Law in Support of their Motion to Dismiss Plaintiffs' First Amended Complaint* to be filed electronically on CM/ECF, which will cause a notice of filing to be sent to all counsel of record who have entered appearances.

/s/ Mary A. Johnston