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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

MOUNTAINSIDE FITNESS ACQUISITIONS, LLC, an Arizona limited liability company,

Plaintiff,

v.

DOUGLAS A. DUCEY, Governor of Arizona, in his official capacity;

Defendant.

FITNESS ALLIANCE, LLC, dba EOS Fitness, an Arizona limited liability company,

Plaintiff,

v.

DOUGLAS A. DUCEY, Governor of Arizona, in his official capacity;

Defendant.

No. CV2020-093916

DEFENDANT'S MOTION TO STAY ENFORCEMENT OF PRELIMINARY INJUNCTION

Assigned to: Hon. Timothy Thomason

Pursuant to Ariz. R. Civ. P. 62(e), Defendant Governor Douglas A. Ducey respectfully moves the Court for an order suspending enforcement of the ruling issued on August 4, 2020 ruling (the "Ruling"). In support thereof, Governor Ducey states as follows:

I. BACKGROUND[1]

On June 30, 2020, Plaintiff Mountainside filed in this Court an application for Temporary Restraining Order and Preliminary Injunction ("TRO") along with a Complaint alleging a violation of procedural due process, substantive due process and equal protection. On July 6, 2020, this Court held a hearing on the request for Temporary Restraining Order on these matters. After that hearing, this Court issued an order denying Plaintiffs' requested relief for a TRO. Plaintiffs subsequently filed a notice of appeal on that issue with the Arizona Court of Appeals which currently has jurisdiction over that ruling. Then on July 22, 2020, Plaintiffs filed a "Renewed Motion for TRO/Preliminary Injunction" where not once did they claim that the reason for their request was an alleged violation of procedural due process. At a hearing on July 27, 2020, discussion on the jurisdiction of the TRO was discussed and it was stated that this Court did not have jurisdiction over that issue and the parties agreed that the "Renewed Motion" would be treated as a new motion. At that hearing, this Court set an evidentiary hearing for August 3, 2020 that involved submissions of declarations by both sides to argue the claims in the Renewed Motion with cross-examination to occur at the hearing. The declarations and arguments presented centered around Plaintiffs substantive due process claims, not procedural due process.

On August 4, 2020, this Court entered the Ruling. The ruling, which states the "Executive Orders, as implemented, violate procedural due process," requires Governor Ducey to provide Plaintiffs with a prompt opportunity to apply for reopening within one week of the date the Ruling was issued. Contemporaneously with the filing of this motion, Governor Ducey has filed a Notice of Appeal and Petition for Special Action with the

[1] Because the Court is well aware of the facts surrounding this case, Governor Ducey does not reiterate them here, but incorporates the factual and procedural background set forth in the papers he previously filed with the Court.

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Arizona Court of Appeals seeking review of the Ruling. *See* Notice of Appeal (attached as **Exhibit A**); Petition for Special Action (attached as **Exhibit B**).

Thus, to preserve the status quo and clarify exactly which issues are under the Court's purview, Governor Ducey seeks an order from this Court staying enforcement of the Ruling until one week after the Court of Appeals either denies special action jurisdiction or rules on the merits of the Petition for Special Action, whichever is later.

II. LEGAL STANDARD

Under Ariz. R. Civ. P. 62(e), "[w]hile an appeal is pending from an interlocutory order or final judgment that grants . . . an injunction, the court may suspend" the "injunction on such terms . . . that preserve the adverse party's rights." Indeed, Rule 62(e) "allows the trial court to modify an injunction pending appeal [] if the modification is necessary to preserve the status quo at the time of the appeal." *State ex rel. Corbin v. Tolleson*, 732 P.2d 1114, 1117 (Ariz. App. 1st Div. 1986) (analyzing the previous version of the rule, which was previously codified at Ariz. R. Civ. P. 62(c) with substantially similar language). Relying on decisions from federal courts analyzing a similar provision contained in Fed. R. Civ. P. 62(d), an Arizona Superior Court has considered the following factors in determining a motion to stay enforcement of an injunction 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.

Cimarron Foothills Cmty. Ass'n v. Kippen, 2003 WL 25777605 (Pima Cty. Ariz. Super. Ct. Mar. 18, 2003) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). A supersedeas bond is not required when the injunction being appealed is entered against the State of Arizona or one of its agencies or political subdivisions. Ariz. R. Civ. P. 62(g)(2).

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III. ARGUMENT

Governor Ducey has appealed the Court's Ruling and filed a Petition for Special Action seeking review of the same. Thus, under Ariz. R. Civ. P. 62(e), this Court has discretion to stay enforcement of the Ruling and maintain the status quo. As explained below, each of the relevant factors weighs in favor of staying enforcement of the Ruling.

A. Governor Ducey Has Made a Strong Showing on the Merits of His Petition for Special Action.

"[O]n motions for stay pending appeal the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (citing *Providence Journal v. Federal Bureau of Investigation*, 595 F.2d 889 (1st Cir. 1979)); *see also Kippen*, 2003 WL 25777605 (citing *Tolleson*, 152 Ariz. at 379 for the proposition that "Arizona Courts may look to federal interpretation of Rules for guidance"). Indeed, when a "request for a stay is made to a district court, common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal." *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998). Rather, "the movant must only establish that the appeal raises serious and difficult questions of law." *Id.*

Respectfully, Governor Ducey submits that he has made a strong showing that he is likely to succeed on his Petition for Special Action. In its Ruling, the Court ruled that the subject executive orders violate procedural due process because the State's post-deprivation procedures were inadequate. However, the Court reached this decision after reviewing pleadings that did not once mention procedural due process and a hearing in which Plaintiffs presented no evidence at all in support of a *procedural* due process argument, relying instead completely on the substantive due process arguments the Court properly rejected.

Rather than "presuming the [challenged executive order] is constitutional" and forcing "Plaintiffs to negate every 'conceivable basis which might support it,'" the Court effectively flipped the burden on Governor Ducey, effectively requiring him to explain why

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the Executive Orders and post-deprivation process were constitutionally sufficient. *See League of Independent Fitness Facilities and Trainers, Inc. v. Whitmer*, ---Fed. App'x---, 2020 WL 3468281, at *2 (6th Cir. June 24, 2020) (granting the Governor of Michigan's motion to stay enforcement of an injunction issued by the trial that enjoined executive orders closing gyms in certain parts of Michigan) (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012)). Indeed, "[i]n 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," which have "been the subject of numerous legal challenges, from coast to coast." *Id.* at *1.

Governor Ducey will not repeat the substantive bases of his Petition for Special Action, as that filing is attached hereto. Suffice it to say, the merits of this Petition are extremely important, Governor Ducey certainly has a strong basis for his position, and the Court of Appeals should have the opportunity to meaningfully review the Ruling.

B. <u>Irreparable Harm Will Result if Enforcement of the Ruling Is Not Suspended</u>.

If enforcement of the Ruling is not suspended, irreparable harm will result. Irreparable harm is harm that cannot be remedied by damages, and for which there is no other adequate legal remedy. *See IB Prop. Holdings, LLC v. Rancho Del Mar Apartments, Ltd.*, 228 Ariz. 61, 65 ¶ 10 (App. 2011).

"Enjoining the actions of elected state officials, especially in a situation where an infectious disease can and has spread rapidly, causes irreparable harm." *Whitmer*, 2020 WL 3468281 at *4; *see also Maryland v. King*, 567 U.S. 1301, 1301 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)) (bracketed alteration in original)); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."). Thus, by definition, the Court's Ruling enjoining enforcement of Governor Ducey's executive orders constitutes irreparable harm.

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Here, Governor Ducey issued the subject Executive Orders to protect the citizens of Arizona and the United States against the COVID-19 pandemic. However, if the Ruling is enforced before the Court of Appeals can rule on Governor Ducey's Petition for Special Action, the protections authorized by Governor Ducey will be meaningless. Indeed, Mountainside intends to open its doors and resume normal business hours on Tuesday, August 11, 2020, regardless of whether it follows the reopening requirements. *See* Aug. 4, 2020 Twitter Post by @Mountainsidefit, https://twitter.com/Mountainsidefit. Accordingly, staying enforcement of the Ruling is necessary under the circumstances to preserve the status quo and protect against the spread of the COVID-19 pandemic.

In addition to these grave health consequences, to comply with the Ruling, the Arizona Department of Health Services ("ADHS") will have to commit considerable resources to a mechanism for allowing fitness centers and gyms to petition for reopening immediately. The Ruling will necessarily require the State of Arizona to hear those petitions for reopening, apparently on an individualized basis. This will inevitably distract ADHS from responsibly committing its limited resources to the ongoing effort to contain and eliminate, in the State of Arizona, the deadliest virus we have seen in our lifetime.

C. <u>The Harm that Will Result from Enforcing the Ruling Outweighs Any Harm Plaintiffs May Suffer if Enforcement of the Ruling is Suspended</u>.

In this Motion, Governor Ducey is asking for a very modest stay of the Court's Ruling so as to give the Court of Appeals the opportunity to responsibly review these issues of critical importance. As with other similar cases across the country, a stay under the global pandemic circumstances is the norm. *See, e.g.*, *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020) (staying TRO issued by district court); *Whitmer*, 2020 WL 3468281, at *4 (granting emergency stay). Again, Governor Ducey is seeking a stay of the Ruling until one week after the appellate court declines special action jurisdiction or rules on the merits of the Petition for Special Action, whichever is later.

The alleged irreparable harm that Plaintiffs complain of is purely pecuniary. The loss of business revenue, for which no evidence was presented, is not an irreparable harm,

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particularly given that EO 2020-43 is temporary and Plaintiffs do not assert that any alleged monetary damages would be difficult to prove in this case. *See IB Prop. Holdings, LLC*, 228 Ariz. at 65 ¶ 10 (recognizing that damages are an adequate remedy if they are not difficult to prove with reasonable certainty); *see also Wolf*, 2020 WL 2564920, at *9 ("[E]conomic harms are generally insufficient to show irreparable harm in the context of such extraordinary [COVID-19 related] emergency relief"); *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 993 (N.D. Cal. 2013) ("[L]ost revenue does not establish irreparable harm.").

Certainly, any potential harm that may result from staying the Ruling pales in comparison to the harm that will result from the increased spread of COVID-19 (*e.g.*, sickness, increased pressure on the healthcare system, death, etc.). *See Whitmer*, 2020 WL 3468281 at *4 ("Though Plaintiffs bear the very real risk of losing their businesses, the Governor's interest in combatting COVID-19 is at least equally significant."). It also pales in comparison to the burdens necessarily associated with the directives in the Ruling, which will cause an immense diversion of critical and scarce resources at a time when the citizens of Arizona need their public employees to focus on immediate and emerging crises of public health.

D. <u>Public Policy Weighs Strongly in Favor of Staying Enforcement of the Ruling</u>.

Regarding the final factor, the public interest lies with public health. "Effects on interested parties and the public interest are closely related" and, therefore, "the public interest weighs in favor of a stay . . . for the same reason[s]" discussed above. *Whitmer*, 2020 WL 3468281 at *4.

"The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." *Newsom*, 140 S. Ct. at 1613. The "Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Id.* (bracketed alteration in original) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). "When those officials 'undertake[ ] to act in areas

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fraught with medical and scientific uncertainties,' their latitude 'must be especially broad,'" and "they should not be subject to second-guessing by" the "judiciary, which lacks the background . . . and expertise to assess public health." *Id.* at 1613-14 (bracketed alteration in original) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

Here, there can be no real debate that Governor Ducey's interest in slowing the spread of the COVID-19, and thereby protecting the health and safety of Arizona citizens, is paramount to Plaintiffs' commercial interests. *See Xponential Fitness v. Arizona*, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at *11 (July 14, 2020) ("Granting [a preliminary injunction against EO 2020-43] would pose serious risks to public health . . . The risks in doing so are too great."); *see also Wolf*, 2020 WL 2564920 at *9 (M.D. Pa. May 21, 2020) ("[W]hile we acknowledge that Petitioners have important financial equities at play in this case, they have failed . . . to prove that their losses outweigh the grave harms that could result . . . from a widespread COVID-19 outbreak.").

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Governor Ducey respectfully requests that the Court suspend enforcement of the Ruling until one week after the appellate court declines special action jurisdiction or rules on the merits of the Petition for Special Action, whichever is later.

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DATED this 5th day of August, 2020.

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EXHIBIT A

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

MOUNTAINSIDE FITNESS ACQUISITIONS, LLC, an Arizona limited liability company,

Plaintiff,

v.

DOUGLAS A. DUCEY, Governor of Arizona, in his official capacity;

Defendant.

FITNESS ALLIANCE, LLC, dba EOS Fitness, an Arizona limited liability company,

Plaintiff,

v.

DOUGLAS A. DUCEY, Governor of Arizona, in his official capacity;

Defendant.

No. CV2020-093916

DEFENDANT'S NOTICE OF APPEAL

Assigned to: Hon. Timothy Thomason

Notice is hereby given that Defendant Douglas A. Ducey (the "Governor") appeals to the Arizona Court of Appeals from the Order made and entered in this case on the 4rd day of August 2020. Specifically, the Governor is appealing the Court's order granting Plaintiffs' Renewed Application for Temporary Restraining Order and Preliminary Injunctive Relief.

DATED this 5th day of August, 2020.

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EXHIBIT B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DOUGLAS A. DUCEY, in his official capacity as the Governor of the State of Arizona,

Petitioner,

v.

THE HONORABLE TIMOTHY THOMASON, Judge of the Superior Court of the State of Arizona, County of Maricopa

Respondent Judge,

AND

MOUNTAINSIDE FITNESS ACQUISITIONS, LLC, an Arizona limited liability company; FITNESS ALLIANCE, LLC, dba EOS Fitness, an Arizona limited liability company

Real Parties in Interest.

No. 1 CA-SA_____

Maricopa County Superior Court
Case No.: CV 2020-093916
Case No.: CV 2020-007617
(Consolidated under CV 2020-093916)

APPELLANT DOUGLAS A. DUCEY'S PETITION FOR SPECIAL ACTION

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INTRODUCTION

This Petition for Special Action arises out of a superior court ruling (the "Ruling") granting Mountainside and EOS' (collectively, the "Gyms") request for preliminary relief against two Executive Orders (EO 2020-43 and EO 2020-52) issued by Defendant-Appellant Douglas A. Ducey (the "Governor") to combat the COVID-19 pandemic. The Petition seeks immediate, emergency relief to avoid the harmful public-health consequences of reopening gyms—against the advice of medical experts—in the midst of the unprecedented COVID-19 pandemic.

As Chief Justice Roberts recently opined in a concurring opinion denying an application to enjoin a COVID-19-related executive order, "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to politically accountable officials of the States 'to guard and protect.'" *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). The latitude of State officials "to act in areas fraught with medical and scientific uncertainties" is "especially broad." *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). The COVID-19 pandemic is undoubtedly an issue that is fraught with medical uncertainty; it has involved rapidly changing conditions—sometimes changing by the day, sometimes by the hour. Under these incredibly challenging circumstances, the Governor has exercised his broad latitude to combat COVID-19,

judiciously crafting executive orders that balance the lives and livelihoods of Arizonans.

EO 2020-43 and EO 2020-52 are integral parts of the Governor's battle against the virus, particularly in light of the outbreaks that have driven Arizona's case numbers up since June. As of July 2, 2020, when Mountainside filed its original motion for TRO challenging EO 2020-43, the Arizona Department of Health Services ("ADHS") reported 87,425 positive cases of COVID-19 in Arizona and 1,757 deaths. (APP038.) In the intervening month, case numbers and deaths have skyrocketed: as of August 3, 2020, Arizona had 179,497 cases and 3,779 deaths from COVID-19. (APP728.)

Due to the alarming increase in COVID-19 cases and deaths, Governor Ducey issued EO 2020-52 on July 23, 2020, upon the recommendation of the top national and state medical and emergency management experts. EO 2020-52 extended EO 2020-43's temporary closure of certain non-essential businesses, including gyms and fitness centers due to their high risk of transmission, for at least another two weeks. (APP044–APP048.)[1]

[1] Under Executive Order 2020-18, gyms were closed and community spread of COVID-19 decreased in Arizona. (APP161 at ¶ 48(a). However, once Arizona gyms began reopening, the number of COVID-19 cases began increasing, from 413 new cases on May 13, 2020 to 5,385 cases on June 29, 2020, with the 20–44 age demographic representing 47% of all positive tests and 22% of all hospitalizations. (APP161–APP162 at ¶ 48(c).) After EO 2020-43 closed gyms again, the number of

This latest order explained the public health reasons for the medically necessary extension, including (among other things) the July 19, 2020 policy recommendation from the White House Coronavirus Task Force that bars and gyms in Arizona remain closed. (APP047.) Also, on July 23, 2020, ADHS published an attestation form and draft safety requirements for gyms and indoor fitness centers relating to the eventual re-opening of those facilities.[2] (APP875–APP882.) On July 31, 2020 and August 1, 2020, ADHS published the attestation form and requirements respectively. (APP049–APP056.)

In the face of Arizona's disturbing COVID-19 statistics and clear guidance from the White House Coronavirus Task Force (among many other medical professionals at every level of government and the front-line health practitioners fighting COVID-19) recommending that Arizona's gyms remain closed, the Ruling misapplied the relevant legal standard for procedural due process, erroneously requiring post-deprivation due process without properly identifying the constitutionally protected property interest that is at stake. (APP067–APP075.) To

---

new cases declined and the percentage of positive tests declined by approximately 15%. (APP162 at ¶ 48(d).)

[2] The attestation form is publicly available at https://docs.google.com/forms/d/e/1FAIpQLSfcEkxSyXwK5d3b0J7uX7E1KMZ9BigjUuNriC8YsZA6AHcnvg/viewform. The draft requirements are publicly available at https://azdhs.gov/documents/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/novel-coronavirus/requirements-gyms-fitness-providers-7-22-2020.pdf.

be clear, there isn't one.

The Ruling also ignores the fact that in quasi-legislative proceedings such as this one, *no individualized process is required*. And, in any event, EO 2020-43 and EO 2020-52 do provide post-deprivation due process in the form of the ADHS attestation form, bi-weekly review as to when the orders can be lifted, and judicial review of the orders themselves.

If this Ruling is allowed to stand, its erroneous legal conclusion will open the floodgates to additional lawsuits against the Governor's COVID-related executive orders, and down the road during other emergency situations, which will hamper the Governor's ability to focus on the pressing battle against the pandemic. Put simply, the superior court's Ruling threatens the lives of Arizona citizens and should be reversed immediately.

JURISDICTIONAL STATEMENT

Special action relief is available when there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). So long as this requirement is met, the decision to accept special action jurisdiction lies within the sound discretion of this Court. *See Hull v. Albrecht*, 192 Ariz. 34, 36 ¶ (1998).

Here, the Governor does not have an equally plain, speedy, and adequate remedy by appeal. While the Governor could, in theory, appeal the Ruling, that appeal cannot deliver the *immediate, emergency* relief that is necessary to avoid the

harmful public-health consequences (i.e., the death of Arizonans) of reopening gyms against the advice of medical experts in the midst of the COVID-19 pandemic. The superior court has mandated that a process be in place ***next week*** for gyms and fitness centers to reopen. (APP075.) Even an accelerated appeal would take months to resolve, and a standard appeal would take more than a year. Thus, special action relief is essential. *See, e.g.*, *City of Phoenix v. Superior Court*, 158 Ariz. 214, 216 (App. 1988) (accepting special action jurisdiction to review a preliminary injunction even though the ruling was appealable).

The discretionary factors considered by this Court also favor acceptance of special action jurisdiction. Specifically, this "case presents novel constitutional issues of statewide importance" and "requires a swift determination" to avoid further escalation of the COVID-19 crisis. *See League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 4 (2009) (relying on the foregoing factors to exercise special action jurisdiction); *see also Ingram v. Shumway*, 164 Ariz. 514, 516 (1990) (exercising special action jurisdiction because the case "involve[d] a matter of statewide importance, great public interest, and require[d] a final resolution in a prompt manner"). EO 2020-43 and EO-2020-52 are critical elements of the Governor's response to the COVID-19 pandemic, which has already taken the lives of thousands of Arizonans and infected over 180,000. Consequently, the constitutionality of those executive orders is undoubtedly "a matter of substantial

public importance." *Randolph v. Groscost*, 195 Ariz. 423, 425 ¶ 6 (1999).

Special action relief also is appropriate to address whether the Ruling "was arbitrary and capricious or an abuse of discretion," *see* Ariz. R. Proc. Spec. Action 3(c), and when a dispute "raises only issues of law," *See Groscost*, 195 Ariz. at 425 ¶ 6 (1999); *accord Tobin*, 231 Ariz. at 193 ¶ 8 (2013) (accepting special action jurisdiction to consider "purely legal issues of statewide importance"). Here, the superior court's injunction did not turn on disputed questions of fact. Rather, the court incorrectly applied the law in finding that EO 2020-43 and EO 2020-52 violate the Gyms' procedural due process rights. *See, e.g.*, *Taylor v. Rancho Santa Barbara*, 206 F.3d 932 (9th Cir. 2000) (issue of whether a statute violates due process is "a question of law"); *Emmett v. McLoughlin Realty, Inc. v. Pima Cty.*, 212 Ariz. 351, 355 ¶ 16 (App. 2006) ("We review constitutional claims de novo."); *Shadid v. State*, 421 P.3d 160 (App. 2018) ("An error of law is an abuse of discretion").

To ensure EO 2020-43 and EO 2020-52 remain in effect, and thus continue to protect the lives of Arizona citizens, the Governor requests that the Court exercise special action jurisdiction over this emergency matter and immediately reverse the superior court's Ruling.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Under the procedural due process clause of the Arizona Constitution, Ariz. Const. art. II, § 4, do executive orders issued during a declared emergency

provide sufficient process when (1) the complaining party lacks a constitutionally protected property or liberty interest; (2) the executive orders are quasi-legislative and generally applicable; (3) the executive orders grant post-deprivation process; and (4) a post-deprivation process is available through the judiciary?

2. The superior court held that Governor Ducey's emergency executive orders violated procedural due process and issued an injunction requiring that indoor gyms and fitness centers be provided an opportunity for immediate reopening. Did the superior court err?

STATEMENT OF MATERIAL FACTS

"As all are painfully aware, our nation faces a public health emergency caused by the exponential spread of COVID-19." *In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020). "At this time, there is no known cure [for COVID-19], no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring).

A. COVID-19 Characteristics and Specific Risks of Gyms.

"The virus that causes COVID-19 is spreading very easily and sustainably between people." (APP081.). Because COVID-19 is highly infectious and can be fatal, it poses a severe threat to individual health, especially those individuals over

the age of 65. (APP086 at ¶ 9, APP087 at ¶ 14, & APP093 at ¶ 9.) The virus is mainly transmitted via respiratory droplets, including during coughing, sneezing, heaving breathing, talking or exercising. (APP086 at ¶ 9.) It may also be possible to contract COVID-19 by touching a surface or object. (APP081.) To limit the spread, the Centers for Disease Control and Prevention ("CDC") recommends that individuals stay at least six feet apart, avoid large gatherings, wear face coverings and wash or sanitize hands regularly. (APP082.) "[T[he more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread." (APP081) (emphasis omitted).

In light of the virus's characteristics, gyms pose a uniquely dangerous environment for facilitating its spread. ADHS has classified indoor gyms and fitness centers as "high risk." (APP160 at ¶¶39–41; APP168, APP170.) Other states, including Colorado, have similarly classified gyms as high-risk. (APP121 at ¶ 31. As Dr. Cara Christ, the Director of ADHS, explained in her testimony, "the risk is with the type of activity" and the "intensity of breathing" inherent in exercising. (APP704 at 14–20.) This is what make indoor gyms and fitness centers more dangerous than other types of businesses, such as grocery stores or hardware stores. *Id.*

In addition, the age group showing the largest increase in positive cases is persons aged 20-44, the same age group commonly known to regularly frequent

Gyms. (APP101 at ¶ 16; APP104 at ¶ 26; APP105 at ¶ 27; APP114 at ¶ 11; APP728 at 2–18.) The CDC has reported that COVID-19 spreads easily from person-to-person, and a person showing no symptoms can spread COVID-19. (APP081.) The CDC has also stated that due to heavy breathing, vigorous exercise can increase the likelihood that respiratory droplets spread the virus. (APP617 at ¶¶ 25–29.) Furthermore, the White House Coronavirus Task Force *specifically recommended on July 19, 2020 that Arizona's gyms remain closed*. (APP129 at ¶ 18; APP300–APP301.)

B. <u>The State's Response to COVID-19.</u>

Due to the flattening of the curve indicating that spread of COVID-19 was slowed, Governor Ducey directed on May 12, 2020, as part of EO 2020-36 (Stay Healthy, Return Smarter, Return Stronger), that ADHS provide guidance as to the re-opening of gyms. (APP398 at ¶¶26–29.) In issuing the guidance, ADHS made clear that the guidance was subject to change, such as due to a change in the trajectory of COVID-19. (APP398 at ¶ 29.)

Unfortunately, the trajectory of COVID-19 in Arizona took a turn for the worse toward the end of June 2020, with the State experiencing a large increase in case numbers. (APP609 at ¶ 14.) To slow the spread of the virus, Governor Ducey issued EO 2020-43, which, among other things, paused operations of high-risk businesses like bars and gyms until at least July 27, 2020. (APP609 at ¶ 17.) Because

COVID-19 was still spreading rapidly in late July, Governor Ducey issued EO 2020-52 on July 23, 2020. (APP047–APP048.) EO 2020-52 extends EO 2020-43's temporary closure of certain non-essential businesses, including gyms and fitness centers, for at least another two weeks. (*Id.*) This latest order noted the July 19, 2020 policy recommendation from the White House Coronavirus Task Force *that bars and gyms in Arizona remain closed*. (APP047) (emphasis added); *see also* (APP300–APP301.) In conjunction with EO 2020-52, ADHS published an attestation form and requirements for gyms and indoor fitness centers relating to the eventual re-opening of those facilities. (APP875–APP882.)

The importance of keeping EO 2020-43 and EO 2020-52 in place cannot be overstated. Since these orders were implemented, Arizona has seen a decline in the number of new COVID-19 cases—a sign that these orders are having the intended effect. (APP728 at 2–24; APP249 at ¶¶ 2–3.) But Arizona still has a long way to go in the fight against this deadly virus. If gyms and other high-risk businesses are allowed to fully reopen before State and federal public health experts believe it is safe to do so, the public health consequences could be enormous. Death, serious physical illness, and a lack of hospital beds might result. (APP114 at ¶ 12; APP133 at ¶ 12; APP134 at ¶ 14; APP155 at ¶¶ 12 & 17; APP156 at ¶ 18; APP161 at ¶ 48(c); APP164 at ¶¶ 57(d) & 57(h); APP239 at ¶ 3; APP242 at ¶ 12; & APP295 at ¶ 46.)

C. Procedural History.

On June 30, 2020, Mountainside filed its verified application for temporary restraining order in Maricopa County Superior Court seeking to enjoin EO 2020-43. EOS Fitness ("EOS") filed a separate complaint requesting relief similar to the relief sought by Mountainside on July 2, 2020. EOS' complaint was consolidated with Mountainside's complaint by order of the Court dated July 2, 2020. The superior court entered an order denying both TRO applications on July 7, 2020. (APP594–595.) Mountainside and EOS filed a notice of appeal of this ruling, thus divesting the Court of jurisdiction over the original TRO application.

On July 22, 2020, Mountainside filed a "renewed" application for a temporary restraining order and preliminary injunction along with a petition for an order to show cause hearing, which did not even raise a procedural due process argument. On July 23, 2020, EOS Fitness filed a motion joining Mountainside Fitness's renewed application which stated, without any supporting authority, that "no real post-deprivation process has been provided to gyms." The superior court denied Mountainside and EOS Fitness's "renewed" applications for a temporary restraining order on July 27, 2020, and then ordered an evidentiary hearing regarding Mountainside and EOS' requests for preliminary relief on August 3, 2020. *See* Exhibit M, Minute Entry (July 27, 2020).

At the August 3, 2020 hearing, the Governor provided declaration testimony

from a number of medical experts and community leaders in support of EO 2020-43 and EO 2020-52. These experts included the following: (1) Jeremy P. Feldman, MD, FCCP, Director of Pulmonary Hypertension Program, Arizona Pulmonary Specialists; (2) Marjorie Bessel, MD, Chief Clinical Officer, Banner Health; (3) Cara Christ, MD, Director, ADHS; (4) Jessica Rigler, MPH, CHES, Assistant Director, ADHS; (5) Luis Manual Tumialán, MD, Lead Physician HonorHealth COVID-19 Mitigation Task Force; (6) Andrew J.P. Carroll, MD, FAAFP, Family Physician and Board Member of the American Academy of Family Physicians; (7) Paloma Beamer, Ph.D., Associate Professor, University of Arizona, Former Scientific Counselor Board Member for the CDC; (8) Major General Michael McGuire, Adjutant General, Arizona National Guard and the Director of the Arizona Department of Emergency and Military Affairs; (9) Michael Wisehart, Director, Arizona Department of Economic Security; (10) Sandra Watson, Arizona Commerce Authority President and CEO; and (11) Lauren Bouton, Director of Stakeholder Engagement for the Office of Arizona Governor Douglas Ducey. (APP602–APP603.)

These witnesses emphasized that Arizona is in the midst of a pandemic that must be mitigated to protect public health and welfare. (APP083–APP125; APP131–137; APP149–APP170; APP178–APP183; APP234–APP243; APP248–APP312). The witnesses also highlighted the economic support efforts for both individuals and

companies to assist in alleviating the unfortunate impacts related to the necessary and legitimate response to limit the spread of COVID-19. (APP138–APP148.)

By contrast, the Gyms presented absolutely *no evidence* at the hearing that their procedural due process rights had been violated. (APP830 at 11–25; APP831 at 1–4.) Indeed, the entire focus of the hearing was whether EO 2020-43 and EO 2020-52 violated *substantive* due process. *See id.*

Nevertheless, the superior court carried the Gyms' torch for them. Without the benefit of briefing or evidence—and without jurisdiction over the issue—the court concluded that (1) the Gyms had a constitutionally protected property interest in "goodwill"; (2) EO 2020-43 and EO 2020-52 are not legislative or quasi-legislative for purposes of due process because they "are not generally applicable orders"; and (3) the ADHS attestation form did not provide sufficient process to the Gyms.

STANDARD OF REVIEW

This Court reviews preliminary injunctions for an abuse of discretion. *Apache Produce Imports, LLC v. Malena Produce, Inc.*, 247 Ariz. 160, 164 ¶ 9 (App. 2019). To obtain special action relief, a petitioner "must establish that the superior court's ruling is arbitrary, capricious, or an abuse of discretion." *Tobin v. Rea*, 231 Ariz. 189, 194 ¶ 14 (2013). "Misapplication of law or legal principles constitutes an abuse of discretion." *Id.* The Court of Appeals reviews constitutional due process claims

and the superior court's legal decisions concerning preliminary injunctions *de novo*. *Emmett*, 212 Ariz. at 355 ¶ 16; *see also McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, 241 Ariz. 1, 3 ¶ 11 (App. 2016).

ARGUMENT

"[T]he police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts." *See League of Indep. Fitness & Trainers, Inc. v. Whitmer*, No. 20-1581, 2020 WL 3468281, at *2 (6th Cir. June 24, 2020). It follows that the executive orders issued by governors to combat the COVID-19 pandemic carry a presumption of constitutionality. *Id.* Courts must be particularly cautious in granting emergency relief enjoining COVID-related executive orders "while local officials are actively shaping their response to changing facts on the ground." *See S. Bay United Pentecostal*, 140 S. Ct. at 1614.

With that in mind, the legal standards for obtaining a TRO and a preliminary injunction are essentially the same. A party seeking a TRO and preliminary injunction must show: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable harm if the relief is not granted; (3) the balance of hardships favors the party seeking injunctive relief; and (4) public policy favors granting the injunctive relief. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). Courts apply a sliding scale to assess these factors. *Smith v. Ariz. Citizens Clean Elections Comm'n*,

212 Ariz. 407, 410-11 ¶¶ 9-10 (2006). This scale requires "either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and the balance of hardships tips sharply in his favor." *TP Racing, L.L.L.P v. Simms*, 232 Ariz. 489, 495 ¶ 21 (App. 2013) (internal quotation marks omitted). Under this sliding scale, the less the irreparable harm, the greater the showing of a strong likelihood of success on the merits must be (and vice versa). *Smith*, 212 Ariz. at 411 ¶ 10. Here, all four factors weigh strongly in favor of denying the requested TRO and preliminary injunctive relief and the superior court abused its discretion by granting that relief.

I. The Trial Court Erred in Concluding that Appellees Are Likely to Succeed on the Merits of their Procedural Due Process Claim.

The Gyms' briefing and argument in the superior court on the renewed TRO barely mentioned procedural due process. Indeed, they did not present any evidence on the issue at the August 3, 2020 hearing. Instead, the superior court made the Gyms' argument for them, without full briefing, presentation of evidence, and argument on the issue. This is not how the adversarial system is supposed to work. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("[A]s a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'") (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003)).

With the benefit of briefing and argument supported by actual evidence, this erroneous ruling could have been avoided. Specifically, the Governor would have had the opportunity to point out that (1) the Gyms do not have a constitutionally protected property interest; (2) EO 2020-43 and EO 2020-52 were quasi-legislative, generally applicable orders; and (3) the attestation form provided adequate process to the Gyms.

A. There is no constitutionally protected property interest at stake.

The threshold inquiry in a due process challenge—which the superior court misconstrued—"is whether a constitutionally protected property interest exists." *Alpha, LLC v. Dartt*, 232 Ariz. 303, 305 ¶ 11 (App. 2013). A property interest is not constitutionally protected unless it is "substantial and present" and the plaintiff has "more than a unilateral expectation of it." *Shelby Sch. v. Ariz. State Bd. of Educ.*, 192 Ariz. 156, 168 ¶ 55 (App. 1998) (internal citations omitted).[3]

Here, the Ruling mistakenly concluded that the Gyms have a constitutionally protected property interest. Multiple federal courts, including the United States Supreme Court, have addressed this issue under the federal due process clause,

[3] "[T]he Due Process Clauses of the [Arizona] and federal constitutions are construed similarly." *State v. Russo*, 219 Ariz. 223, 225 ¶ 5 (App. 2008); *see also Vong v. Aune*, 235 Ariz. 116, 120 ¶ 21 (App. 2014) ("We consider [Plaintiff's] state and federal due process claims together because the respective due process clauses 'contain nearly identical language and protect the same interests.'") (internal citation omitted). Because the Due Process Clauses are similar, federal case law is used throughout this Petition.

concluding that the Gyms' alleged interest is not constitutionally protected. For example, in *College Savings Bank*, the U.S. Supreme Court held that the assets of a business and its goodwill are property, but that "business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999); *see also In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 283 (4th Cir. 2007) (holding that the recognition of a broad "right to do business . . . would be akin to that [recognized] in *Lochner v. New York* . . . which the Supreme Court has long since refused to recognize").

More recently, in the *Talleywhacker* case, a federal district court refused to enjoin a COVID-19-related executive order that closed certain categories of businesses, including gyms and indoor exercise facilities. *Talleywhacker, Inc. v. Cooper*, --- F. Supp. ----, 2020 WL 3051207, *1, 4 (E.D.N.C. June 8, 2020). In addressing the plaintiffs' procedural due process argument, the court held that the plaintiffs had "fail[ed] to identify a constitutionally cognizable life, liberty, or property interest" because "the assertion of a 'general right to do business' has not been recognized as a constitutionally protected right." *Id.* at *12. Because the due process clauses of the Arizona and United States constitutions are "construed similarly," and their text is nearly identical, this Court should follow United States Supreme Court precedent and the *Talleywhacker* case and hold that the Gyms lack

a constitutionally cognizable property interest. *See Vong*, 235 Ariz. at 120 ¶ 21; *Russo*, 219 Ariz. at 226 ¶ 5.

Here, the trial court found—without any supporting evidence—that the gyms had a property interest in the "goodwill" of their business. But in Arizona, the existence of goodwill is a question of fact. *See, e.g.*, *Carriker v. Carriker*, 151 Ariz. 296 (App. 1986). Despite urgings during every hearing on this matter, the trial court failed to even cite *Talleywhacker*, let alone distinguish it here. Instead, the trial court erred by assuming, without a shred of evidentiary support, that the Gyms had suffered a loss of goodwill. The Gyms had an opportunity to present evidence on this issue at the August 3, 2020 hearing. They failed to do so. Absent a constitutionally protected property interest, the Gyms' procedural due process claim fails and Governor Ducey has a substantial likelihood of success on this issue.

B. Quasi-legislative acts do not create due process rights.

Even if the "right to conduct business lawfully" is somehow protected by Arizona's procedural due process clause, the Gyms still fail to allege a cognizable claim that they were entitled to any procedural protections. Because EO 2020-43 and EO 2020-52 apply prospectively to *all* Arizona indoor gyms and fitness clubs (as well as other types of businesses), the orders do not confer due process rights to the Gyms.

"Before due process rights attach, a person must show that the deprivation

occurred as a result of an adjudicatory process rather than a legislative process." *Blocktree Props. LLC v. Pub. Util. Dist. No. 2*, 380 F. Supp. 3d 1102, 1121 (E.D. Wash. 2019) (citing *Harris v. County of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990)). Courts have found "little guidance in formalistic distinctions" in applying this rule. *Harris*, 904 F.2d at 501. Instead, "[i]f the matter is one in which '*all are equally concerned*,' the matter is a legislative process and due process rights do not attach." *Blocktree*, 380 F. Supp. 3d at 1121 (emphasis added) (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)).

Notably, the fact that a government action "may in its effects have been thought more disadvantageous by some . . . than by others *does not change its generalized nature*." *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 246 (1973) (emphasis added). For example, in *Florida East Coast Railway*, the U.S. Supreme Court held that a law targeted at a specific industry—railroad carriers—did not implicate procedural due process because it was generally applicable. *Id.* Similarly, in *Halverson v. Skagit County*, 42 F.3d 1257 (9th Cir. 1994), the court held that a county policy diverting floodwater onto the plaintiffs' property was a legislative act that did not implicate procedural due process. *Id.* at 1258-59, 1261. The court reasoned that "governmental decisions which affect large areas and are not direct *at one or a few individuals* do not give rise to the constitutional due process requirements of notice and a hearing." *Id.* at 1261. Instead, the plaintiffs "receive all

the process due . . . when the . . . elected officials discharged their legislative responsibilities in the manner prescribed by law." *Id.* (quoting *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991), *vacated on other grounds by City of Rochlin v. Sierra Lakes Reserve*, 506 U.S. 802 (1992)).

By contrast, "[i]f the matter is one in which a 'relatively small number of persons [are] concerned, who [are] exceptionally affected, in each case upon individual grounds,' then the process is adjudicatory and due process rights attach." *Blocktree*, 380 F. Supp. 3d at 1121. Thus, due process rights do not attach to the "exercise of a quasi-legislative function" that "operates prospectively and establishes rules of general conduct binding upon many persons." *Brown v. Winter*, 50 F. Supp. 804, 806 (W.D. Wis. 1943).

Significantly, courts considering the same circumstances present in this case—the closure of classes of businesses like gyms and fitness clubs to protect the public from COVID-19—have held that "generally applicable" executive orders "do not give rise to the constitutional procedural due process requirements of individual notice and hearing; general notice as provided by law is sufficient." *Best Supplement Guide, LLC v. Newsom*, No. 2:20-CV-00965-JAM-CKD, 2020 WL 2615022 (E.D. Cal. 2020) (considering "State and County [COVID-19] orders prohibit[ing] the operation of all gyms and workout facilities within their respective jurisdictions"); *see also Hartman v. Acton*, --- F.Supp.3d ----, 2020 WL 1932896, at * 8 (S.D. Ohio

Apr. 21, 2020) ("The State's [COVID-19 stay-at-home] Order directing non-essential businesses to cease operating their physical locations did not violate Plaintiffs' due process rights because the Director's Order was a generally applicable order affecting thousands of businesses, and not a decision targeting an individual or single business.").

Based on these cases, EO 2020-43 and EO 2020-52 involve a quasi-legislative action in which "all [indoor gyms and fitness clubs] are equally concerned." *Bi-Metallic*, 239 U.S. at 445. These orders do not target any specific gym or fitness club, but instead apply to *all* of the more than 900 gyms and fitness clubs in Arizona. (APP760 at 10–13; APP833 at 6–10.) Moreover, they do not apply exclusively to indoor gyms and fitness clubs; they also apply to other categories of high-risk businesses including bars, movie theaters, water parks, and tubing operators. (APP044–APP048.)

The superior court concluded that EO 2020-43 and EO 2020-52 were not quasi-legislative because they only applied to specific categories of businesses, including gyms. (APP070–APP071.) But the superior court miscomprehends the nature of what makes an order quasi-legislative. Contrary to the Ruling, an executive order *can* be quasi-legislative if it only affects certain categories of businesses. Indeed, the order in *Hartman*, which the superior court attempts to distinguish, only applied to certain categories of businesses—those deemed "non-essential." *See*

Hartman, 2020 WL 1932896, at *1. Similarly, the governmental act at issue in *Florida East Coast Railway* applied to a narrow class of businesses (certain railway carriers), *see* 410 U.S. at 246, and the policy at issue in *Halverson* only applied to a few homeowners, *see Halverson*, 42 F.3d at 1261. Yet all these governmental acts were deemed "legislative" for purposes of procedural due process.

It appears that in the superior court's view, if the Governor ordered more categories of businesses to close (*e.g.* all "non-essential" businesses) the EOs would not implicate procedural due process, but because he only ordered high-risk businesses to close, which is a category in itself, the orders somehow implicate procedural due process. (APP070.) This conclusion fails to comprehend what actually makes an order quasi-legislative for purposes of procedural due process.

Accordingly, because EO 2020-43 and EO 2020-52 are quasi-legislative, due process rights do not attach to the alleged deprivation, and the Gyms cannot state a cognizable procedural due process claim.

C. EO 2020-43 and EO 2020-52 provide the Gyms with sufficient process.

Even if EO 2020-43 conferred Appellees with procedural due process rights, the order contains adequate protections. *See Brewster*, 149 F.3d at 982 (procedural due process claim requiring a showing of "a denial of *adequate* procedural protections") (emphasis added). Due process is flexible and calls for such procedural protections as demanded by the rights and interests at stake in the particular case.

See Gilbert v. Homar, 520 U.S. 924, 930 (1997).

To determine whether a particular post-deprivation procedure is adequate, courts look to the balancing test set forth in *Mathews v. Elridge*, 424 U.S. 319 (1976). *Benner v. Wolf*, --- F. Supp. 3d ---, 2020 WL 2564920, at *5 (M.D. Pa. May 21, 2020). That test considers three factors: "(1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state." *Id.* In addition, "the Supreme Court has held that a lower standard of procedural due process may be adequate in times of emergency." *Id.*; *see also Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981) ("Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action."). "Indeed, deprivation of property to protect the public health and safety is '[o]ne of the oldest examples' of permissible summary action." *Hodel*, 452 U.S at 300 (quoting *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950)).

In *Benner*, a federal district court in Pennsylvania applied the *Mathews* test and upheld that state's COVID-related executive order closing non-essential businesses. *Benner*, 2020 WL 2564920, at *1, 5. The court's application of *Mathews* focused on second and third factors, reasoning that the plaintiffs did not show that

additional procedures "would provide 'additional value' to the process," and that "requiring more detailed procedures could very well overwhelm an already taxed system." *Id.* at *5. As a result, the court concluded that the procedure provided by the executive order passed muster. *Id.*

Consistent with *Benner*, numerous federal courts have upheld executive orders—including EO 2020-43—that close *all* gyms for some period of time based on COVID-19 data and the advice of medical experts. *See, e.g.*, *Whitmer*, 2020 WL 3468281, at *2; *Xponential Fitness v. Arizona*, CV-20-01310-PHX-DJH, 2020 WL 3971908, at *6 (D. Ariz. July 14, 2020); *Best Supplement Guide, LLC v. Newsom*, 2020 WL 2615022, at *5; *see also Hartman v. Acton*, 2020 WL 1932896, at * 8.

Here, EO 2020-43 and EO 2020-52 provide post-deprivation process in three ways. First, Governor Ducey has set specific review dates—every two weeks—as to when the closure order can be lifted. This bi-weekly review will be published on the Governor's website to reflect the justification for continued closure, which is based on a large amount of input from various government and medical expert sources. Second, once the closure order is lifted when the health risk has subsided, the EOs include a procedure whereby affected businesses can attest to compliance with relevant guidance for safely reopening and not cause another spike that could devastate Arizona's already fragile health system. Appellees' claims regarding the unavailability of this form are mooted by ADHS' publication of the attestation form

on July 22, 2020. Third, judicial review is available for parties to challenge the executive orders, as applied to their businesses.

This procedure easily satisfies the *Mathews* factors, which the superior court completely disregarded. As to the *first* factor (private interest), the only harm the Gyms could allege is financial harm, which is important but not "compelling." *See Senior Life York, Inc. v. Azar*, 418 F. Supp. 3d 62, 76-77 (M.D. Pa. 2019) ("Business or pecuniary interests carry a less weighty private interest.").

The Gyms also failed to present any evidence that the *second* factor (value of additional procedural safeguards) weighs in their favor. Like the plaintiffs in *Benner*, the Gyms did not show that more process would provide any "additional value." *See Benner*, 2020 WL 2564920, at *5.

In contrast to the first two factors, the *third* factor—the State's interest in protecting public health—is of the utmost importance. Arizona is battling a once-in-a-century pandemic. As discussed above, Arizona has experienced a rapid increase in COVID-19 cases and deaths over the last two months. The Governor has taken strong, data-driven action to stem the spread of the virus, including the implementation of EO 2020-43 and EO 2020-52, and it is imperative to the health of Arizona citizens that these measures remain in effect.[4] Moreover, as in *Benner*,

[4] To the extent a more fulsome procedure is required, it is reasonable when fundamental rights are not at issue for the government to be deliberative in its process to investigate and establish procedures that address the actual root cause for the

requiring Arizona public health officials to consider waivers for all gyms (and bars, water parks, and tubing operations) would risk "overwhelm[ing] an already taxed system." And additional procedures are not necessary: in emergency situations like this, judicial review itself is an adequate post-deprivation remedy. *See Bayley's Campground Inc. v. Mills*, --- F. Supp. 3d ---, 2020 WL 2791797, at *12 (D. Me. May 29, 2020) ("Plaintiffs have not persuasively shown that they are denied access to quick and meaningful post-deprivation review of administrative action, *either through this very proceeding* or through some other action in state court . . . .") (emphasis added); *see also Howland v. State*, 169 Ariz. 293, 296-97 (App. 1991) (holding that judicial remedies can constitute adequate post-deprivation process).

Thus, the superior court's procedural due process analysis fails on all three levels: it erroneously concludes the Gyms have a constitutionally protected property interest, it misconstrues the legislative-adjudicative distinction, and it mistakenly finds that EO 2020-43 and EO 2020-52 do not provide sufficient post-deprivation

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necessary due process in the first place rather than causing upheaval. *See Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir. 1994)("…whatever the merits of Appellants' procedural challenges, the four and a half month ban was not clearly arbitrary and capricious and irrational…in order to give City officials time to investigate…"). In fact, the trial court here recognized the "taxing on the system" that it was requiring. (APP075 at n.9.) If a shutdown of an industry for four and half months was appropriate to address noise abatement, a similar or extended timeframe to investigate and create brand new procedures to address a global pandemic and save lives is not unreasonable or irrational here.

due process. The Ruling cannot be squared with the bulk of authority holding that blanket bans on the operation of gyms to protect the public from COVID-19 satisfy due process. It would effectively preclude the Governor from temporarily closing certain categories of businesses, no matter how much those businesses are contributing to the spread of the virus. This misapplication of the procedural due process standard is an abuse of discretion that should be reversed immediately.

II. The Superior Court Erred in Concluding that Appellees Showed a Likelihood of Irreparable Harm.

Irreparable harm is harm that is not remediable by damages, and for which there is no other adequate legal remedy. *See IB Prop. Holdings, LLC v. Rancho Del Mar Apartments, Ltd.*, 228 Ariz. 61, 65 ¶ 10 (App. 2011). The loss of business revenue is not an irreparable harm, particularly given that EO 2020-43 is temporary and the Gyms do not assert that any alleged monetary damages would be difficult to prove in this case. *See IB Prop. Holdings*, 228 Ariz. at 65 ¶ 10 (recognizing that damages are an adequate remedy if they are not difficult to prove with reasonable certainty); *see also Benner v. Wolf*, --- F.Supp.3d ----, 2020 WL 2564920, at *9 (M.D. Pa. May 21, 2000) ("[E]conomic harms are generally insufficient to show irreparable harm in the context of such extraordinary [COVID-19 related] emergency relief"); *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 993 (N.D. Cal. 2013) ("Ordinarily, lost revenue does not establish irreparable harm.").

Here, the only "harm" the Gyms allege is lost revenue, which is not

irreparable. Further, the trial court completely ignored the evidence presented which reflected the federal and state government efforts to minimize such economic harms via loan programs and increased unemployment benefits, among other incentives. (APP138–APP148). Because irreparable harm is a prerequisite to injunctive relief, the Gyms' request for such relief must be denied. *See Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990) ("The party seeking a preliminary injunction is *obligated* to establish … [t]he possibility of irreparable injury to him not remediable by damages if the requested relief is not granted").[5]

III. The Balance of Hardships and Public Interest Tips Sharply in Favor of Upholding EO 2020-34 and EO 2020-52.

When a government entity is a party to a lawsuit, it is appropriate to "consider the balance of equities and the public interest together." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). Here, the public interest in keeping EO 2020-43 and EO 2020-52 in place far outweighs the Gyms' desire to continue their preferred method of operations. As referenced, Plaintiffs failed to make any counterargument when Dr. Christ testified that gyms can provide virtual or outdoor programs much in the

[5] Moreover, the Gyms have not identified what efforts they have made to mitigate the financial impact of COVID-19, besides their alleged efforts to combat the spread of the virus within the indoor facilities. For example, although indoor gyms are ordered closed, there is no prohibition on the Gyms directing their employees to adapt by coordinating exercise outdoors that complies with social distancing requirements, in-home training, or the myriad adaptations other businesses have undertaken to ensure the safety of the entire population.

same way schools are being required to operate for the foreseeable future. (APP725 at 10–20). If gyms and other high-risk businesses are allowed to fully reopen before State and federal public health experts believe it is safe to do so, the public health consequences could be enormous. Death, serious physical illness, and a lack of hospital beds might result. *See* Exhibit H, Bessel Dec. ¶ 12 (July 24, 2020), Carroll Dec. ¶¶ 12, 14 (July 28, 2020), Christ Dec. ¶¶ 12, 17, 18, 48(c), 57(d), and 57(h) (July 29, 2020), Carroll Reb. Dec. ¶¶ 3, 12 (July 30, 2020), and Christ Reb. Dec. ¶ 46 (July 31, 2020); *see also Xponential*, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at *11 (July 14, 2020) ("Granting [a preliminary injunction against EO 2020-43] would pose serious risks to public health . . . The risks in doing so are too great."); *Benner*, 2020 WL 2564920, at *9 ("[W]hile we acknowledge that Petitioners have important financial equities at play in this case, they have failed to adduce evidence to prove that their losses outweigh the grave harms that could result . . . from a widespread COVID-19 outbreak.").

Although public interest is at its apex in relation to fighting COVID-19, the strong likelihood of success on the merits combined with the fact that the Gyms economic harm is diminished by the multitude of available government economic incentive programs only reinforces why the balance of hardships favors Governor Ducey. *See The Power P.E.O., Inc. v. Emps. Ins. of Wausau*, 201 Ariz. 559, 562 ¶ 16 (App. 2002).

CONCLUSION

The Gyms are highly unlikely to succeed on the merits because EO 2020-43 and EO 2020-52 do not implicate procedural due process. The Gyms do not have a constitutionally protected property interest and the orders are quasi-legislative. Even if procedural due process did apply, the orders provide adequate post-deprivation process. In addition, the balance of hardships weighs strongly in favor of the Governor, as this case pits the Gyms' pecuniary interest against the lives of Arizona citizens.

In weighing the realities of the COVID-19 pandemic, Governor Ducey must balance more than just the gyms' desire to reopen in crafting a statewide response to a global pandemic. The immensely difficult decisions he makes in balancing Arizonans lives with their livelihoods "should not be subject to second-guessing by a [court] which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. at 1613-14 (2020) (mem.) (Roberts, C.J., concurring). The superior court's Ruling disregarded this mandate, and will undoubtedly lead to a flood of new litigation based on its erroneous conclusion. The longer this Ruling remains in effect, the more it will distract the Governor from the critical issue at hand and drain the resources of his office. Accordingly, the superior court's Ruling

granting preliminary relief to the Gyms was an abuse of discretion and should be reversed immediately.

RESPECTFULLY SUBMITTED this 5th day of August, 2020.

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