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APPENDIX A

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No. 21-4123

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERICA BOJICIC, dba Evolve Dance Company, LLC, et al.,
Plaintiffs-Appellants,
v.
RICHARD MICHAEL DEWINE, individually and in his official capacity
as the Governor of the State of Ohio, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

OPINION

Before: BOGGS, MOORE, and GRIFFIN, Circuit Judges.

BOGGS, Circuit Judge. In the first months of the Covid-19 pandemic, Ohio ordered "non-essential businesses" to close. A group of owners of small businesses included in that category sued in federal court, alleging that various state and local officials violated their constitutional rights by issuing those

orders. The district court dismissed the complaint for failure to state a claim. We affirm.

I. Background

The Plaintiffs own dance studios throughout Ohio. Each owner faced various restrictions during the pandemic. From March 20, 2020 through May 22, 2020, businesses not deemed "essential" (including dance studios) were ordered to close. Thereafter, the Plaintiffs' businesses were allowed to open subject to certain restrictions, including having customers and staff wear masks.

Defendants are certain state and local officials in Ohio, ranging from the Governor and members of the Ohio Department of Health to county and municipal health officials. In response to the closure of their dance studios, the Plaintiffs brought three claims against these Defendants in their individual and official capacities: (1) violation of their "right to work" as protected by the Fourteenth Amendment; (2) violation of the Equal Protection Clause; and (3) a taking without just compensation. For relief, the Plaintiffs sought a declaration that their rights had been violated and damages pursuant to 42 U.S.C. § 1983.

Several Defendants moved to dismiss for failure to state a claim. One Defendant, Eric Zgodzinski (Health Commissioner for Toledo-Lucas County), filed a motion for judgment on the pleadings. Several other Defendants were voluntarily dismissed. Two of the motions were filed by groups of Defendants together: A group of municipal health commissioners (the "Local Defendants"), and a group of State health officials and the Governor of Ohio (the "State Defendants").

The district court granted Defendants' motions and dismissed the claims with prejudice. First, the

court held that the Plaintiffs had failed to sufficiently plead their claims by (1) lumping the Defendants together and failing to attribute any action to any specific Defendant; (2) failing to identify any specific pandemic-related orders; and (3) peppering the complaint with conclusory statements. The district court explained that it could dismiss on that basis alone, but went on to describe three other reasons for dismissal. The first of those was that the Plaintiffs lacked standing. While the court found that the Plaintiffs had stated an injury-in-fact, it held that they failed to meet their burden in showing that the harmful actions were traceable to any Defendants except for the former Ohio Director of Public Health, Amy Acton. Next, the court held that the three claims alleged in the complaint were substantively meritless. Then, the court held that the Eleventh Amendment barred the Plaintiffs from obtaining money damages from any of the Defendants in their official capacities and that, in any event, the defendants were protected by qualified immunity. Finally, the court criticized the Plaintiffs for filing what was, in its view, a frivolous brief.

II. Analysis

A. Whether the Plaintiffs Have Standing to Sue Each Defendant

To access federal courts, a litigant must establish the "irreducible constitutional minimum" of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). That minimum consists of three elements: that the plaintiff has suffered an "injury in fact," that the injury is "traceable" to the defendant's action, and that a favorable decision by the court will likely redress the harm. *Turaani v. Wray*, 988 F.3d 313,

316 (6th Cir. 2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo*, 578 U.S. at 338 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

The district court focused on the traceability element and observed that the Plaintiffs had not alleged any facts tying their injuries to any Defendant other than Amy Acton. We agree.

Traceability refers to "whether the defendant's actions have a 'causal connection' to the plaintiff's injury." *Turaani*, 988 F.3d at 316 (quoting *Lujan*, 504 U.S. at 560). The problem here is that, with one exception, the Plaintiffs did not (1) identify any specific shutdown orders that harmed them nor (2) attribute any individual actions to any individual defendant.

As the district court observed, the complaint fails to identify any public-health orders, except for referring once to orders issued on or around March 20, 2020. It is reasonable to infer, as the district court did, that at least one of the orders is the March 21, 2020 order issued by the Ohio Department of Health and signed by then-director Defendant Amy Acton. That document, originally submitted alongside Defendant Zgodzinski's motion to dismiss, has now been included with the Plaintiffs' opening brief. The order expressly commands all dance studios to close immediately to prevent the spread of Covid-19. The Plaintiffs also include two other orders in an addendum to their brief: a March 22, 2020 order requiring Ohio residents to stay at home and cease non-essential business activities and a May 22, 2020 order allowing dance studios to reopen with certain restrictions, both signed by Defendant Acton. Those orders, though, are never referred to with any

specificity in the complaint, and the Plaintiffs did not include them alongside the complaint or any filings in the district court.

Nevertheless, we join the district court in inferring that the complaint identifies the March 21, 2020 order issued by Amy Acton as a source of injury. That injury can therefore be "traced" to her. But the complaint failed to identify any orders issued by any other Defendant. Indeed, the complaint never identifies any specific action taken by any specific Defendant at all. Instead, the Plaintiffs lump the various Defendants together in a variety of vague, conclusory allegations. For example, the Plaintiffs claim:

- "Defendants issued Director's Order which designated certain businesses as essential in the state of Ohio and all other businesses as non-essential."
- "Defendants destroyed [the Plaintiffs'] businesses by the publication that [the Plaintiffs] were unsafe and were ordered closed and/or restricted and/or determined non-essential."
- "Defendants ordered that 'social distancing' be required."
- "Defendants DeWine, McCloud, Vanderhoff, Francis, Acton, and Himes ignored the requirements of law and acted as 'despots' as Ohio Revised Code Section 161 was violated by these Defendants."
- "The General Assembly of the State of Ohio was intentionally, maliciously ignored and deceived by a rouge [sic] governor and his appointees and staff."

Those allegations, and other similar ones, fall short of demonstrating that the Plaintiffs' injury is traceable to the Defendants other than Acton. *See Lanman v. Hinson*, 529 F.3d 673, 684 (2008) ("[C]laims against government officials arising from alleged violations of constitutional rights must allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted constitutional right.").

In response, the Plaintiffs first argue that the district court is treating them unfairly. They claim that, in a prior case, the district court admonished Plaintiffs' counsel to file shorter complaints. In their view, "[t]he district court cannot order [the Plaintiffs] to keep briefs concise and limit attachments on one hand and then dismiss for failure to include more facts on the other." In support of this argument, the Plaintiffs have filed a motion for this court to take judicial notice. With that motion, the Plaintiffs include two transcripts of discussions among the Plaintiffs' counsel and the district court in a separate, unrelated case. Presumably, the Plaintiffs want this court to take judicial notice of the fact that the judge told them he has an eye condition and therefore preferred more concise filings. Two sets of Defendants oppose this motion because it improperly seeks to supplement the record with evidence that was not before the district court.[1]

This motion does not appear to supplement the record or provide any new facts related to the actual claims. However, we can take notice of prior judicial acts. *See United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012). So, to the extent the Plaintiffs

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[1] One of the responses to this motion was incorrectly docketed as a motion for judicial notice.

seek judicial notice of the fact that the district court judge explained in a separate case that he has an eye condition and preferred shorter complaints, we grant the motion.

We do not, however, adopt the Plaintiffs' desired implication, which is that this statement somehow excuses their failure to plead specific facts. The judge's statements encouraging concision cannot be taken to allow a complaint to contain only conclusory statements and treat numerous defendants without distinction.

Next, the Plaintiffs argue in their brief that the State and Local Defendants *did* harm them. They point to various statutes that authorize penalties for failing to follow State public-health orders and authorize the Ohio Department of Health generally to make rules to combat the spread of contagious diseases. They continue that it "was common knowledge in March 2020 that civil and criminal penalties existed for failure to abide by the health department's orders." Even if the threat of enforcement could give the Plaintiffs standing to sue for damages as opposed to injunctive relief (an issue we do not decide), the complaint does not suggest that any Defendant actually sought to enforce those penalties against them. Therefore, any harm suffered by the Plaintiffs cannot be traced to that putative discretion.

The Plaintiffs go on to argue that "Ohio Officials admit that they acted as an arm of the state, which demonstrates traceability for the purposes of standing." The Plaintiffs are referring to a brief by a group of county health commissioners, who argued before the district court that the Eleventh Amendment bars suits against local government officials who carry out state orders. We understand that argument to mean that *even if* the local officials

had enforced the orders against the Plaintiffs, they would still have been immune from suit in their official capacities. It is not an admission that Defendants did in fact take any action against the Plaintiffs. Indeed, in that same brief those Defendants argued that the Plaintiffs had no standing to sue them.

Finally, the Plaintiffs argue that the Local Defendants all had "discretion" to adopt and enforce the orders, "and not every locality did so adopt and enforce them." Whether or not that statement is true, it does not change the fact that the Plaintiffs never claimed that their particular localities sought to enforce the orders against them.

The Plaintiffs do allege in their complaint that "each" Defendant threatened to enforce these orders and "did signal such intent by their communications and declarations to the public, including publishing the order(s) on their website to the public." They add that "some businesses were still limited further due to the orders of their local health departments." However, the Plaintiffs failed to include any specific instance of posting an order in the complaint. They have therefore failed to show that, even assuming that publicizing orders (state or local) could be actionable, any harm that might have come from such action is traceable to the Local Defendants.

In sum, the Plaintiffs have not pointed to any actions taken by any Defendant (other than Amy Acton) that harmed them. They have therefore failed to plead that the harm they complain of is traceable to the other Defendants. For that reason, they do not have standing to sue those Defendants, and the

district court correctly held those Defendants must be dismissed from this case.[2]

B. Merits of the Constitutional Claims

The district court also held that the Plaintiffs had failed to allege plausible § 1983 claims. We review dismissal on that basis de novo. *Doe v. Michigan State Univ.*, 989 F.3d 418, 425 (6th Cir. 2021). Because the Plaintiffs have demonstrated standing to sue only Acton, we consider the claims only insofar as they relate to her.

a. Eleventh Amendment Immunity

The complaint was brought against the Defendants in their individual and official capacities. Acton is immune in her official capacity. *Cady v. Arenac Cnty.*, 574 F.3d 334, 344 (6th Cir. 2009) ("[A]n official-capacity suit against a state official is deemed to be a suit against the state and is thus barred by the Eleventh Amendment, absent a waiver.") (quoting *Scott v. O'Grady*, 975 F.2d 366, 369 (7th Cir. 1992)). Ohio has not waived its sovereign immunity for these kinds of cases. *Mixon v. State of Ohio*, 193 F.3d 389, 397 (6th Cir. 1999). Acton is not, however, immune from suit in her individual capacity.

b. Substantive Due Process

1. Whether Strict Scrutiny Applies

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[2] The district court also dismissed the complaint against the Defendants (other than Acton) for failure to state a claim and for failure to comply with Rule 8's pleading standards. Because we hold that the Plaintiffs have not demonstrated standing to sue those Defendants, we need not reach those issues.

The Plaintiffs argue that Defendants violated their substantive-due-process rights by restricting their right to work. According to the Plaintiffs, because this right is a fundamental one, any restrictions against it must be analyzed with strict scrutiny. But the Plaintiffs do not cite any cases for that proposition. The Supreme Court has recognized that some version of what Plaintiffs style their "right to work" is guaranteed by the Fourteenth Amendment. *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) ("[T]he liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation."). Still, the Court has never recognized the "right to work" as a "fundamental" right such that actions inhibiting it are subject to strict scrutiny.

In response, the Plaintiffs note that the Constitution cannot be ignored, even during a public-health emergency. They then argue that the "pursuit of a common calling" is one of the fundamental rights protected by Article IV's Privileges and Immunities Clause and by "a parity of reasoning" also the Equal Protection Clause. Article IV's Privileges and Immunities Clause, though, does not protect the same rights as the Fourteenth Amendment's Equal Protection Clause. Instead, it is geared towards protecting citizens of one state from being discriminated against by a different state. *See McBurney v. Young*, 569 U.S. 221, 226 (2013). While the Privileges and Immunities Clause does guarantee a "right to work," reference to the phrase "fundamental right" in that context does not mean that we must apply strict scrutiny when analyzing the Plaintiffs' Fourteenth Amendment claims.

The Plaintiffs also conflate the substantive-due-process analysis with an equal-protection analysis, citing cases denying the right to work on the basis of race. But the Plaintiffs do not argue that they are being discriminated on the basis of race. And a bare citation to the Ninth Amendment and *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965), does not bridge the gap in support for the Plaintiffs' position.

Typically, when a challenged restriction "does not target a suspect class, burden a fundamental right, or 'shock the conscience,' [it] is therefore subject to rational basis review." *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 806 (6th Cir. 2005). The Plaintiffs do not claim to be a suspect class and a "right to work" has not been recognized as a "fundamental" right within the context of the Fourteenth Amendment. Nor do the Plaintiffs specifically argue that the orders "shock the conscience." Strict scrutiny, then, cannot be the appropriate standard of review.

2. Jacobson *Standard*

Some Defendants argue that when the state acts to protect public health it is entitled to a special standard of review articulated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). That case concerned the constitutionality of a Massachusetts law requiring adults to take a smallpox vaccine or pay a fine. *Id.* at 12. The Court declined to second-guess the judgment of the legislature on the efficacy and propriety of the law, and suggested that it should be struck down only "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all

question, a plain, palpable invasion of rights secured by the fundamental law." *Id*. at 31.

Whether the *Jacobson* standard should be applied in this case is up for debate. The district court did not apply the *Jacobson* standard. And neither we nor any party has identified a case applying that standard when the restriction at issue would otherwise undergo rational-basis review. When cited recently in this circuit, the discussion centered on whether *Jacobson* authorizes more deferential review of restrictions burdening rights that had been recognized as fundamental. *See Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925–27 (6th Cir. 2020). And in a case similar to this one (discussing gym shutdowns) the court cited *Jacobson* only for the general proposition that state officials are afforded wide latitude in responding to pandemics, and then went on to apply rational-basis review. *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 127–28 (6th Cir. 2020) (per curiam) (order).

We need not decide here whether *Jacobson* establishes a more lenient standard than rational-basis review. Rational-basis review is itself highly deferential. "Under a rational basis review, a statute is valid if it rationally furthers a legitimate government interest." *LensCrafters*, 403 F.3d at 806. And "the statute will be accorded a strong presumption of validity, and we must uphold the statute 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Ibid.* (quoting *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001)). The State Defendants have not identified any case that treated the *Jacobson* standard differently than the rational-basis standard or applied the *Jacobson* standard to a restriction on a non-fundamental right. Therefore, we

need not address any application of the *Jacobson* standard and will apply rational-basis review

3. Applying Rational-Basis Review

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"Under rational basis scrutiny, government action amounts to a constitutional violation only if it is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational." *Michael v. Ghee*, 498 F.3d 372, 379 (6th Cir. 2007) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Township of Shelby*, 470 F.3d 286, 298 (6th Cir. 2006)). A court "will be satisfied with the government's 'rational speculation' linking the regulation to a legitimate purpose, even 'unsupported by evidence or empirical data.'" *Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011) (quoting *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002)). "Thus, if a [government action] can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny." *Ibid.*

The Plaintiffs baldly claim that the orders would not survive rational-basis review. Defendants, however, identify a rational explanation for why dance studios should be shut down in response to the sudden arrival of an airborne virus: dancing involves numerous people in close contact engaged in aerobic activity. Requiring masks (to the extent that the requirement limits the Plaintiffs' right to work, as alleged) similarly has the facially rational basis of minimizing the spread of the virus.

Defendants need not offer any empirical support for their explanation, nor need they demonstrate that ordering the shutdowns and requiring masks was

wise or efficacious. The bar for rational basis is low, and the Plaintiffs make no colorable argument that it has not been met here. The Plaintiffs' substantive-due-process claim, therefore, is meritless.[3]

c. Equal-Protection Claim

The Plaintiffs also argue that they have stated a valid equal-protection claim. In holding otherwise, the district court noted that (1) the Plaintiffs had failed to plead that similarly situated businesses were treated differently and (2) treating dance studios differently than designated essential businesses has a rational basis. We agree with the district court.

To establish an equal-protection violation, "a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (internal quotation marks omitted). As discussed above, the orders do not burden a fundamental right, nor do they target a

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[3] In addition to this substantive-due-process claim, the Plaintiffs seem to raise what might be termed a procedural-due-process claim by asserting that "the orders were enacted without proper legislative process and imposed without an opportunity for public comment on the proposed rules and with no opportunities to appeal the orders once they were enacted and enforced." The Plaintiffs did not argue this before the district court, and the district court did not rule on it. Although some version of that argument does arguably appear in the complaint, the Plaintiffs failed to raise the issue before the district court and it is therefore forfeited. *See Sheet Metal Workers Health & Welfare Fund of N.C. v. L. Off. of Michael A. DeMayo, LLP*, 21 F.4th 350, 355 (6th Cir. 2021).

suspect class. The appropriate standard of review is again rational basis.

The Plaintiffs do not identify any similarly situated businesses in their complaint. Instead, they generally complain that the shutdown orders arbitrarily distinguished between essential and non-essential businesses. Making a generous inference, the complaint can be read as arguing that the dance studios were treated differently than essential businesses without a rational basis for that distinction. In their briefing, the Plaintiffs identify grocery stores, gas stations, and dental offices as examples of businesses that were not shut down despite posing the same "alleged risks" as the dance studios.

Putting aside the fact that the Plaintiffs failed to include those allegedly similarly situated businesses in their complaint, Defendants persuasively argue that dance studios are not similarly situated to those businesses and that treating those businesses differently than dance studios has a rational basis. First, the Plaintiffs "cannot plausibly assert that the type of strenuous physical activity that occurs in dance studios typically occurs at a grocery store or gas station." "And even if any of those businesses had similar risks to dance studios, there are rational reasons to treat those businesses differently due to the critical services they provide." That is enough to pass the rational-basis test.

The Plaintiffs go on to point out what seems to be their thesis: the orders were based on "questionable scientific and political opinions and have not been demonstrated to be applied equally or with effectiveness to the ends in which they are allegedly directed, that is, stopping the spread of a communicable disease." But the orders need not have been applied equally—and need not have been

empirically demonstrated to reach a certain level of effectiveness—to survive rational-basis review. The Plaintiffs do not, for example, argue that the dance studios were treated differently than other businesses that host strenuous physical activity.

The Plaintiffs also seem to argue that their equal-protection rights were violated because there were no standards in place to prevent the orders from being enforced arbitrarily. This argument fails because the Plaintiffs do not plead that the orders actually *were* enforced arbitrarily. For those reasons, the Plaintiffs' equal-protection claim lacks merit, and we affirm the district court's dismissal of it.

d. Takings Claim

1. Whether Restrictions Issued Pursuant to Police Power are Takings

The Plaintiffs next argue that the orders were compensable takings under the Fifth Amendment. The district court disagreed. It first held that health-related orders issued pursuant to a state's police powers are not compensable takings, and then held that the Plaintiffs failed to allege that they had been deprived of all beneficial use of their property. We hold that the district court erred in its reasoning but affirm the result.

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The Supreme Court has also acknowledged "that government regulation of private property may, in some instances, be so onerous that its effect is

tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Ibid*. While the Court's "regulatory takings jurisprudence cannot be characterized as unified," the various tests each aim "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id*. at 539.

The Court has gone on to "stake[] out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Id.* at 538. The first is a permanent physical invasion of property. *Ibid*. The second category comprises "regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Ibid*. (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (alterations in original)). Beyond those two *per se* categories are other regulatory-takings challenges, which are analyzed pursuant to a standard outlined in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Ibid*.

In *Penn Central,* the Court first observed that it had "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124. It went on to identify three factors to aid in that inquiry: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation had interfered with the plaintiff's distinct investment-backed expectations; and (3) the character of the governmental action. *Ibid*.

Instead of treating the shutdowns as a regulatory taking and weighing the *Penn Central*

factors, the district court concluded that there is no taking when the state acts pursuant to its police powers to protect public health. In support, the court cited *United States v. Droganes*, in which we held that seizure and retention of property under the police power is not a public use. 728 F.3d 580, 591 (6th Cir. 2013). But that case involved the government's failure to return property the plaintiff had agreed to forfeit after being charged criminally. *Id*. at 585. It did not concern the kind of regulatory taking at issue here.

Defendants cite several other cases purportedly holding that exercises of the police power are not compensable takings. Principally, the Defendants rely on *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), decided after *Penn Central*. That case discussed whether the government must compensate property owners when it prevented them using their property for certain purposes. The Court explained 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." 480 U.S. at 491–92 (cleaned up) (quoting *Mugler v. Kansas*, 123 U.S. 623, 665 (1887)). And it added that "the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation." *Id*. at 492.

That language reaffirms the principle that the state has a strong interest in preventing harm to the public, and that public harm can in some instances outweigh an owner's interest in private property. Nevertheless, the Court went on to weigh those property owners' interests before concluding that the

record did not support a finding that a statute (as-yet unenforced) entitled the owners to compensation. *Id.* at 501-02.

In short, no appellate court seems to have applied the police-power language so broadly as to categorically declare that no state response to a public-health emergency could be a taking. True, this police-power exception has been applied in the context of criminal forfeitures and abating nuisances. But to hold that a regulation intended to benefit public health can *never* be a compensable taking would be an unwarranted extension of existing precedent.

We therefore analyze this issue under the *Penn Central* framework.

2. *Application of the* Penn Central *Factors*

The district court was right to conclude that this is not a *per se* regulatory taking because the Plaintiffs have not pleaded that they were left with no economically beneficial use of their property. We therefore apply the *Penn Central* factors. The first two factors—the economic impact of the regulation on the plaintiff and the extent to which the regulation had interfered with the plaintiff's distinct investment-backed expectation—weigh in favor of the Plaintiffs. While the Plaintiffs have only vaguely referenced the negative economic impact of the shutdown orders, no party seriously disputes that those factors have not been pleaded here.

But the third factor—the character of the government action—weighs even more heavily in the Defendants' favor. This factor is dispositive for two reasons. First, the action was taken to protect public health by reacting quickly in the face of a fast-spreading and novel virus. The Plaintiffs criticize

this conclusion as demonstrating "unconscious or implicit bias towards the official government narrative on the dangers posed by Covid-19 and the unscientific methods for its containment." This extraordinary assertion is presented without any factual support. And beyond the fact that it presupposes conspiratorial bad faith on the part of a variety of state officials, it ignores the fact that these orders were issued at the very beginning of the pandemic, when no government official could possibly have had the kind of information about the efficacy of its particular actions that the Plaintiffs demand.

Second, the shutdown orders were in effect for only a little over two months. "[T]he 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 Pres. Council, Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 302, 342 (2002). That case analyzed a *per se* regulatory taking, but the language applies equally here. The relatively short duration of the closure, while undoubtedly frustrating to the Plaintiffs, weighs in favor of the government. And the Plaintiffs make no specific argument that the post-reopening masking requirement constituted a taking.

Because the third factor weighs heavily in the Defendants' favor, there has been no regulatory taking. As the State Defendants laid out, every one of the many courts to have analyzed the *Penn Central* factors has concluded the same. *See, e.g.*, *TJM 64, Inc. v. Harris*, 526 F. Supp. 3d 331, 338–39 (W.D. Tenn. 2021). We therefore hold that under the *Penn Central* test, the Plaintiffs nevertheless failed to state a takings claim.

We sympathize with the Plaintiffs' frustration that they were forced to shut down their businesses,

give up income, and endure the uncertain difficulties of the pandemic. We also understand that they felt—rightly or wrongly—that some of the government's actions in response were arbitrary or misguided. But facing the unexpected arrival of a virus of unknown destructive capacity, the government was forced to act and to act quickly. The Plaintiffs have not demonstrated that those actions violated their constitutional rights. For that reason, the district court was correct to dismiss the complaint for failure to state a claim.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's dismissal of the complaint with prejudice.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:21-CV-00630-JGC

Erica Bojicic, *et al.*, Plaintiffs
v. Michael DeWine, *et al.*, Defendants.

ORDER

On October 27, 2021, I issued an order granting the defendants' motions to dismiss and motion for judgment on the pleadings. (Doc. 49). In that order, I set out the numerous respects in which the plaintiffs' complaint and opposition to the motions were severely lacking in merit – both as a matter of pleading rules and substantively. I invited defendants to seek an award of their fees and costs in responding to plaintiffs' counsel's actions and/or omissions in filing their pleadings.[1] Various defendants have filed two such motions. (Docs. 53, 54).

Pending is plaintiffs' Motion for a Stay Pending Appeal (Doc. 57). Plaintiffs ask that I stay proceedings on defendants' sanctions motions because they have filed a notice of appeal to the Sixth Circuit.

Though true that an appeal is pending, that does not matter. The law permits me to conduct an in-

[1] The law permits me to raise the question of sanctions *sua sponte*. *See Lemaster v. United States*, 891 F.2d 115, 121 (6th Cir. 1989) ("It is not only permissible for a judge to raise the question of sanctions *sua sponte,* but also expected and arguably required by Rule 11's mandatory language").

quiry into sanctions despite the pendency of an appeal. *See Ridder v. City of Springfield*, 109 F.3d 288, 292 n.4 (6th Cir. 1997) (denial of motion to stay sanctions proceeding was proper and conserved judicial resources by allowing consolidation of appeals regarding sanctions and the merits).

For the reasons discussed below, I deny plaintiffs' motion to stay.

Standard of Review

I accept plaintiffs' recitation of the factors I must consider when deciding whether to grant their motion. These are: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) the prospect that others will be harmed by the stay; and (4) the public interest in the stay." *Crookston v. Johnson,* 841 F.3d 396, 398 (6th Cir. 2016) (citing *Coal. To Defend Affirmative Action v. Granholm,* 472 F.3d 237, 244 (6th Cir. 2006)).

Discussion

1. Likelihood of Success on the Merits

In my view, it is unlikely that plaintiffs' appeal will be successful. In deciding to dismiss, I carefully considered the defendants' arguments and the plaintiffs' contentions. In doing so, I concluded that there were multiple independent grounds for dismissal. These were: lack of standing, *Iqbal/Twombly* failures, substantive failures with respect to the asserted claims, 11th Amendment immunity, and qualified immunity. *Bojicic v. DeWine*, No. 3:21-CV-00630-JGC, 2021 WL 4977018 (N.D. Ohio).

Given the number of grounds on which I found dismissal justified, I estimate the likelihood that plaintiffs will secure reversal of that dismissal to be very low.

Simply put, plaintiffs need to prevail on all of the enumerated grounds. It is unlikely they will do so on any one of those grounds; it is exponentially even more unlikely that they will do so on all of them.

This factor therefore weighs in favor of denying the motion.

2. Harm to Moving Party

The gravamen of plaintiffs' motion is that imposing sanctions on the parties plaintiff would cause them significant financial hardship. (Doc. 57, pgID 529-30).

That assertion rests upon counsel's misapprehension that a sanctions award, if any, would be directed at the plaintiffs. Sanctioning a party plaintiff is, at least theoretically, possible. It could occur if a court found that plaintiffs acted in bad faith in seeking and undertaking meritless litigation.

Absent evidence to the contrary, I presume that such was not the case here.[2] Accepting the accuracy of my assumption, the law is also clear that a court will impose the cost of an attorney's incompetence upon the attorney and not the client.

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[2] Even if a plaintiff, desiring to litigate a meritless claim, seeks representation to do so, the attorney has a professional responsibility and duty to the court to decline such representation. *See BDT Prod., Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 754 (6th Cir. 2010) ("[A]ttorneys have a responsibility to halt litigation *whenever* they realize that they are pursuing a meritless suit.") (emphasis in original).

This is so in our Circuit. *See, e.g.*, *Gibson v. Plymouth Locomotive Int'l, Inc.*, 14 F. App'x 480, 481 (6th Cir. 2001) (where a party advances "objectively groundless legal arguments, we believe that the additional costs imposed as sanctions should rest upon the attorney here, rather than the clients"); *Terrell v. Uniscribe Pro. Servs., Inc.*, No. 1:04 CV 1288, 2006 WL 8447027, at *1 (N.D. Ohio) (McHargh, J.) (imposing sanctions on counsel where sanctions motion raised solely issues regarding counsel's conduct).

It is also the rule elsewhere. *See*, *e.g.*, *Clark v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1011 (8th Cir. 2006) ("A court may require counsel to satisfy personally attorneys' fees reasonably incurred by an opposing party when counsel's conduct 'multiplies the proceedings in any case unreasonably and vexatiously.'") (citing 28 U.S.C. § 1927); *Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252, 1254 (11th Cir. 1996) ("Imposition of sanctions on the attorney rather than, or in addition to, the client is sometimes proper since it may well be more appropriate than a sanction that penalizes the parties for the offenses of their counsel.") (internal citations omitted); *Barrett v. Tallon*, 30 F.3d 1296, 1302-03 (10th Cir. 1994) ("Courts routinely direct sanctions for frivolous legal claims at attorneys rather than clients.").

There is, thus, no merit to the argument that I should stay this proceeding to avoid the risk of possible financial harm to the parties plaintiff. The motion mistakenly assumes that a sanctions proceeding normally focuses on the conduct of a party plaintiff. It does not – it focuses on the possible misconduct of the attorney. It is the attorney who induces, files, pursues, or continues meritless litigation, who is at risk.

Moreover, I see no reason, and counsel have offered none, that sanctions, if awarded, will irreparably harm them.

Therefore, this factor weighs in favor of denying the motion.

3. Harm to Others

As to this factor, plaintiffs assert that "an Order for Stay on the motions for sanctions will harm no others." But the motion points to no one who might be harmed by proceeding except the parties plaintiff. As to them, I have just rejected this contention. The parties plaintiff are at no presently apparent risk if I proceed. The motion, thus, fails to show that proceeding now potentially could harm others.

This factor weighs heavily in favor of denying the motion.

4. Public Interest

To date, plaintiffs' counsel has filed three meritless complaints in this court. Two before me, this case and *Renz v. Ohio*, No. 3:20CV1948, 2021 WL 485534 (N.D. Ohio) (finding complaint, among other things, "well-nigh incomprehensible" and *sua sponte* granting leave to file an amended complaint, which was not forthcoming), and one before Judge James R. Knepp II, *see Ohio Stands Up! v. U.S. Dep't of Health & Hum. Servs.*, No. 3:20 CV 2814, 2021 WL 4441707 (N.D. Ohio) (dismissing complaint for failure to allege standing).

The public interest strongly disfavors meritless litigation. That being so, the public has an interest in prompt determination as to whether sanctions are appropriate.

A decision on the plaintiffs' appeal may take upwards of a year. Accordingly, proceeding now, rather than postponing whatever decision I may reach, might serve a salutary purpose, namely, to emphasize the unacceptability of repeated filings of meritless complaints.

Alternatively, were I to find sanctions inappropriate, counsel would be relieved of any intervening concern about the suitability of their conduct. Better for that to happen now, rather than later.

Finally, as the Sixth Circuit prefers, counsel could consolidate a challenge to an adverse decision regarding sanctions with the substantive appeal now pending. *See Ridder*, *supra*, 109 F.3d at 292 n.4. This would conserve judicial resources and further serve the public interest. As with the other three factors, this factor weighs heavily in favor of denying the motion.

Conclusion

Sanctions can serve a two-fold purpose: compensating an unjustly sued party and deterring future misconduct by errant counsel.

I see no reason to delay determining whether an award of sanctions in this case would fulfill either or both of these purposes.

Accordingly, there is no reason to grant the motion to stay this proceeding, which shall go forward as previously scheduled.

Plaintiffs' counsel shall file their response on or before January 10, 2022; defendants shall file their replies on or before January 30, 2022.

It is, therefore, hereby

ORDERED THAT

1. Plaintiffs' Motion for a Stay Pending Appeal (Doc. 57) be, and the same hereby is, denied; and
2. The prior briefing schedule is confirmed.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge

APPENDIX C

Filed: 10/27/21

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:21-CV-00630-JGC

Erica Bojicic, *et al.*, Plaintiffs
v. Michael DeWine, *et al.*, Defendants.

ORDER

In this action, fifteen dance studio owners challenge "the numerous orders, rules, and regulations issued by the State of Ohio in response to COVID-19." (Doc. 1, pgID 16). They have named as defendants Governor Michael DeWine, the Ohio Department of Health's present and former Directors, Ohio, and fifteen city and county Health Commissioners. Plaintiffs have sued all defendants in both their official and personal capacities.[2] They have raised three claims against all defendants: 1) substantive due process; 2) equal protection; and 3) taking without just compensation. Plaintiffs seek a declaratory judgment, just compensation for the defendants' alleged taking of their properties, and $1,000,000 in compensatory damages for each of the fifteen plaintiffs.

Various individual defendants and groups of defendants have filed five motions to dismiss. (Docs.

[2] To date, plaintiffs have dismissed their claims against seven of the fifteen city and county Health-Commissioner defendants voluntarily.

24-27, 32). Defendant Eric Zgodzinski has filed a motion seeking judgment on the pleadings. (Doc. 21).

For the reasons discussed below, I grant each of those motions.

Background

Plaintiffs' complaint only mentions two Covid-related orders. Plaintiffs first challenge an order that they allege (without citation or attaching the order as an exhibit) was issued "[O]n or about March 20, 2020." (Doc. 1, pgID 14). Plaintiffs do not specify who issued that order. There are several orders that Amy Acton, the then-Director of the Ohio Department of Health (the "Health Director"), issued around that time to which plaintiffs could be referring.[2]

The effect of those orders was that plaintiffs had to close their dance studios for the duration of the Governor's declared Covid-related state of emergency (Doc. 20-1). This is because the orders did not designate dance studios as essential businesses, and

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[2] Although plaintiffs failed to identify any of the orders they mention in their complaint, defendant Zgodzinski has attached copies of three orders to his answer, (Doc. 20), that appear relevant to plaintiffs' allegations. Those orders are: 1) Order to Cease Business Operations and Close Venues (March 21, 2020) (Doc. 20-1); 2) Director's Stay at Home Order (March 22, 2020) (Doc. 20-2); and 3) Director's Order that Reopens Gyms, Dance Instruction Studios, and Other Personal Fitness Venues, with Exceptions (May 22, 2020) (Doc. 20-3).

I may consider documents that a defendant attaches to a pleading if the complaint refers to those documents and they are central to the plaintiffs' claims. *Weiner v. Klais & Co., Inc.,* 108 F.3d 86, 89 (6th Cir. 1997). In addition, I may consider public records and matters of which a court may take judicial notice. *See Jackson v. City of Columbus,* 194 F.3d 737, 745 (6th Cir. 1999), *abrogated on other grounds, Swierkiewicz v. Sorema,* 534 U.S. 506 (2002); *New England Health Care Emps. Pension Fund v. Ernst & Young, LLP,* 336 F.3d 495, 501 (6th Cir. 2003).

all non-essential businesses had to cease operations. (Doc. 20-2).

Plaintiffs also mention (without citation or providing a copy) the Health Director's 2020 order that authorized reopening their facilities "so long as all safety standards [we]re met," specifically including social distancing, (*id.*, pgID 184). (Doc. 1, pgID 15).[3]

Nevertheless, plaintiffs purport to challenge "[c]ollectively, the numerous orders, rules, and regulations issued by the State of Ohio in response to COVID-19." (Doc. 1, pgID 16). They do so without even identifying those "numerous orders" or discussing their contents.

Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

When considering a Rule 12(b)(6) motion, I must "construe the complaint in the light most favorable to

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[3] Plaintiffs appear to be referring to the Director's May 22, 2020 Order that Reopens Gyms, Dance Instruction Studios, and Other Personal Fitness Venues, with Exceptions. (Doc. 20-3).

the plaintiff." *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002). A plaintiff, however, must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, *supra*, 550 U.S. at 555.[4]

Because "[t]he same standard applies to a rule 12(c) motion [for judgment on the pleadings] as to a rule 12(b)(6) motion to dismiss for failure to state a claim for relief," *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998), I will not distinguish those motions in my analysis. Applying this standard of review to plaintiffs' complaint, I conclude for the reasons that follow: 1) the complaint fails to meet the requirements of Fed. R. Civ. P. 8 and the *Iqbal/Twombly* mandates; 2) plaintiffs' complaint failed to demonstrate that they have standing to sue the defendants; 3) plaintiffs' substantive claims fail to state cognizable causes of action; and 4) in any event the defendants are immune from being held liable for monetary damages.

Discussion

1. The Complaint Fails to Comply with *Iqbal/Twombly*

In light of the foregoing pleading principles, I must first determine whether the complaint states a claim under the standards set forth by Federal Rule

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[4] Plaintiffs' attempt to lessen these pleading requirements is meritless because it relies on cases that have no relevant precedential value. In *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), the Court expressly applied "less stringent" pleading standards because the plaintiff proceeded *pro se*. Plaintiffs, here, are represented by counsel. Plaintiffs' second cited case on this issue is the Second Circuit's opinion in *Iqbal v. Hasty*, 490 F3d 143 (2d Cir. 2007). That is the very decision that the Supreme Court reversed in *Iqbal*.

of Civil Procedure 8 and in the Supreme Court's *Iqbal* and *Twombly* decisions. I conclude that it does not. Plaintiffs' complaint is riddled with conclusory statements and is almost completely devoid of factual support. While Rule 8(a) directs plaintiffs to submit a "short and plain statement of the claim," that does not give them license to omit crucial supporting facts from the complaint.

In *Iqbal*, the Supreme Court highlighted the difference between factual assertions entitled to the assumption of truth and conclusory statements:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555, 127 S. Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556, 127 S. Ct. 1955. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing

> court to draw on its judicial experience and common sense. 490 F.3d, at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

Iqbal, *supra*, 556 U.S. at 678-79.

The Sixth Circuit further emphasized the importance of factual allegations, stating that "a plaintiff cannot overcome a Rule 12(b)(6) motion to dismiss simply by referring to conclusory allegations in the complaint that the defendant violated the law. Instead, the sufficiency of a complaint turns on its 'factual content,' requiring the plaintiff to plead enough 'factual matter' to raise a 'plausible' inference of wrongdoing." *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013) (quoting *Iqbal*, *supra*, 556 U.S. at 678).

A. Identification of Defendants' Specific Actions

One glaring deficiency in the complaint is that plaintiffs do not attribute any actions to specific defendants. Instead, they lump the defendants together, making their allegations against "the Defendants" collectively. Even when plaintiffs discuss the March 2020 and May 2020 orders, they state that "Defendants" collectively were responsible for issuing them. As discussed *infra* in Section 2(B), the orders, which Director Acton alone issued, bely that statement.

Plaintiffs attempt to invoke joint liability against the defendants with the following statement:

"Defendants have acted jointly and severally and with malice in violating the rights of the Plaintiffs and are listed here." (Doc. 1, pgID 10). However, this sweeping statement does not cure their failure to link individual defendants with specific actions because the law requires more.

Plaintiffs bring their claims pursuant to 42 U.S.C.A. § 1983. "'[T]o establish liability under section 1983, against an individual defendant, [the] plaintiff must plead and prove that the defendant was personally involved in the activity that forms the basis of the complaint.'" *Slusher v. Carson*, 488 F. Supp. 2d 631, 638 (E.D. Mich. 2007) (quoting *Eckford-El v. Toombs*, 760 F. Supp. 1267, 1272 (W.D. Mich. 1991)). "It is well-settled that to state a cognizable Section 1983 claim, the plaintiff must allege some personal involvement by [ ] each of the named defendants." *Bennett v. Schroeder*, 99 F. App'x 707, 712-13 (6th Cir. 2004) (same); *see also Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008) ("This Court has consistently held that damage claims against government officials arising from alleged violations of constitutional rights must allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted constitutional right."). Further "[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Boddie v. City of Lima, Ohio*, No. 16-CV-1850, 2018 WL 1847934, at *2 (N.D. Ohio) (Helmick, J.) (emphasis in original) (quoting *Iqbal*, *supra*, 556 U.S. at 676).

With the exception of Director Acton, the complaint fails to identify conduct fairly attributable to any specific defendant. As a result, plaintiffs' claims against those other defendants must fail. I

therefore dismiss all claims against the city and county defendants and against the state defendants other than Director Acton for this reason.

B. Unidentified Orders

In addition, as I have already noted, plaintiffs do not sufficiently identify the offending order or orders in their complaint. They state only that "Defendants" issued a "Director's Order . . . [o]n or around March 20, 2020." (Doc. 1, pgID 14).

According to the Ohio Department of Health's website, the only Covid-related order issued on March 20 related to the closure of hair salons, day spas, and nail salons.[5] This does not appear relevant to plaintiffs.

The Ohio Department of Health issued a total of eighteen Covid-related orders between the middle and end of March 2020. There are several that could implicate plaintiffs' interests, including the Director's March 21, 2020 Order to Cease Business Operations and Close Venues and the Director's March 22, 2020 Stay at Home Order. The former ordered all dance studios to close, and the latter outlined the distinction between essential and non-essential businesses and ordered all non-essential business closed.

While I can make an educated guess, I cannot determine with certainty which order or orders plaintiffs meant to reference. They do not attach any orders to their filings and otherwise fail to provide sufficient information in the complaint for me to identify them.

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[5] https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/public-health-orders/public-health-orders (last visited October 22, 2021).

It is not my job to sift and sort through a complaint's onrushing stream of conclusory allegations, attempting to discover something of assayable value. *Cf. D.H. v. Matti*, No. 3:14-CV-732-CRS, 2016 WL 5843805, at *3 n.2 (W.D. Ky.) ("It is not the duty of this Court to independently investigate matters outside the complaint on a Rule 12(b)(6) motion to dismiss.").

I will not, and should not, try to guess at what plaintiffs meant to say. Rather, I must evaluate the complaint that is before me.

As I earlier explained to plaintiffs' attorneys Thomas Renz and Robert Gargasz in *Renz v. Ohio*, No. 3:20CV1948, 2021 WL 485534, at *3 (N.D. Ohio), plaintiffs are the masters of their complaint. They must ensure that it passes muster under Rule 8, which requires that they support their claims with sufficient facts. In this case, where plaintiffs challenge a government action, they must identify the government action.

Plaintiffs' complaint purports to challenge, "[c]ollectively, the numerous orders, rules, and regulations issued by the State of Ohio in response to Covid-19." (Doc. 1, pgID 16). In their prayer for relief, plaintiffs seek declarations that all of those orders are unconstitutional. (*Id.*, pgID 23). To the extent that these orders differ from the ones I have already discussed, I cannot issue a ruling on unarticulated challenges to unidentified orders. Plaintiffs' failure to identify the orders they seek to challenge is an additional ground for dismissal.

C. Legal and Factual Conclusions

Plaintiffs' complaint suffers from additional pleading deficiencies, as it is endlessly replete with legal and factual conclusions that offer no

substantive support for the claims they allege. While plaintiffs repeatedly allege that defendants violated their constitutional rights, they provide almost no concrete information as to how, even collectively, defendants have done so.

Plaintiffs incorporate a variety of legal buzzwords in their complaint but do not back them up with specific facts. For example, they allege that defendants acted without a "rational basis," that their actions were "arbitrary and capricious," and that they acted in an "unconstitutional, illegal, and unlawful fashion." (*Id.*, pgID 7, 16). Allegations such as these litter the complaint, but they are mere legal conclusions.

While it may be necessary to include these phrases in the complaint, plaintiffs must go beyond them in order to state a claim. *See Twombly*, *supra*, 550 U.S. at 555 (a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). I am not required to, nor will I, accept these allegations at face value. *See Iqbal*, *supra*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

Plaintiffs also include a welter of factual conclusions that similarly are not entitled to deference. For example, plaintiffs allege multiple times that defendants' unlawful behavior "destroyed" their lives. (Doc. 1, pgID 7, 16). But plaintiffs fail, as they do repeatedly throughout their complaint, to explain how this is so.

Another example of a factual conclusion from plaintiffs' complaint is their assertion that "[i]t is well established in science and under regulatory guidelines that strenuous activities should not be performed with masks on." (*Id.*, pgID 15). One cannot

simply state, without supporting facts or citations, that something is scientifically well-established and expect a court to accept uncritically such contention as well-pled.[6]

2. Standing

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. The standing doctrine distinguishes between justiciable cases and controversies and "those disputes that are not appropriately resolved through judicial process." *Kiser v. Reitz*, 765 F.3d 601, 606 (6th Cir. 2014). It essentially asks "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

Standing has three elements: "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a

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[6] In *Renz*, *supra*, 2021 WL 485534, I considered a similar complaint that Thomas Renz and Robert Gargasz, the attorneys in this case, filed against Ohio. It was eighty-one pages long and incorporated voluminous exhibits, affidavits, and declarations. I ordered plaintiffs to show cause why I should not dismiss the complaint because it was overly verbose, incorporated irrelevant facts, and was not a "short and plain statement" of the claim. *Id.*; *see* Fed. R. Civ. P. 8(a)(2). The complaint in this case is much shorter. But the fundamental problem is the same. It does not give defendants fair notice of the claims against them. While the attorneys did seemingly consolidate the complaint, they did not address one of my primary concerns, which was the abundance of conclusory and speculative allegations.

favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Further expounding on these elements, the Supreme Court has explained that an injury in fact is an "invasion of a legally protected interest" that is "concrete and particularized," not "conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Traceability requires "a causal connection between the injury and the conduct complained of" and that the conduct not be a result of "the independent action of some third party." *Id.* (internal quotation marks omitted). And for an injury to be redressable, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted).

The plaintiff bears the burden of establishing standing. *Id.* At the pleading stage, the plaintiff must "clearly allege facts demonstrating each element." *Spokeo*, *supra*, 578 U.S. at 1547.

Several city and county defendants argue that the plaintiffs lack standing to bring this case. They primarily contend that plaintiffs cannot satisfy the causation prong of the standing analysis. This is because plaintiffs have failed to allege that any local defendant took any specific action that caused harm to them. According to these defendants, only the state defendants were responsible for issuing the orders that affected plaintiffs' businesses, and therefore, plaintiffs only have standing to bring their claims against the state defendants.

Plaintiffs respond in a conclusory fashion, arguing that they have standing because their injuries were "a direct result of the Defendants' policy and enforcement of a three-months long order of closure and other continuing mandates." (Doc. 36, pgID 366).

A. Injury in Fact

Regarding the first element of standing, I find that plaintiffs have sufficiently alleged an injury in fact. They allege that they suffered financial harm due to their designation as a "non-essential" business in a March 2020 "Director's Order." Plaintiffs allege that defendants forced them to close their businesses, and therefore, they were unable to earn any money.

Economic injury is the quintessential injury in fact. *See Lambert v. Hartman*, 517 F.3d 433, 437 (6th Cir. 2008) (plaintiff's "actual financial injuries are sufficient to meet the injury-in-fact requirement"); *Polyweave Packaging, Inc. v. Buttigieg*, No. 4:21-CV-00054-JHM, 2021 WL 4005616, at *3 (W.D. Ky.) ("Tangible injuries are the most common injury-in-fact: personal, property, or financial injuries all qualify as tangible injuries-in-fact.").

The injury that plaintiffs allege here certainly is economic. They complain of lost profits and revenue due to the closure of their businesses.

Furthermore, the economic harm that plaintiffs allege here is not speculative or hypothetical. The government ordered plaintiffs to close their businesses, and they allege that they did so. Therefore, any economic harm they sustained already occurred and is measurable.

While defendant Roberts fairly points out that plaintiffs' allegations regarding financial injury are vague, it is undisputed that plaintiffs were considered "non-essential" businesses and were forced to close for at least some time. Such closure almost inevitably would lead to financial harm, and plaintiffs allege that it did. Therefore, I find their allegations regarding injury in fact sufficient at this stage.

B. Traceability

Regarding the second element of standing, I find that plaintiffs have failed to sufficiently allege traceability against any of the defendants except the former Director Acton. To satisfy the traceability requirement, plaintiffs must allege that the defendants' specific actions caused their harm. *See Lujan, supra*, 504 U.S. at 560. They have failed to do so for any defendant other than Director Acton.

Plaintiffs primarily link their harm to the March 2020 "Director's Order." (Doc. 1, pgID 14). As discussed above, while plaintiffs do not attach this order to their complaint or opposition brief, they appear to be referring to the Health Director's March 21, 2020 Order to Cease Business Operations and Close Venues or the Health Director's March 22, 2020 Stay at Home Order.

Assuming for the sake of argument that plaintiffs intended to reference one of these orders, it is clear from the face of the orders that Director Acton issued them. Both have Ohio Department of Health letterheads, and Director Acton was the head of that department. She is also the only person who signed the orders.

There is no indication from the orders themselves that the other defendants named in this lawsuit were involved with them.[7] Furthermore, plaintiffs' complaint does not sufficiently tie the "Director's Order" to the other defendants. For example, plaintiffs do not allege that defendants took

[7] While the Ohio Department of Health letterhead contains Governor Mike DeWine's name, it appears to be a form letterhead for the department. I cannot infer his involvement based on that reference alone and where there are no allegations specific to him in the complaint. Therefore, I dismiss all claims against Governor DeWine.

actions to enhance the impact of the order or that they took specific measures to implement the order.

Plaintiffs assert that "Defendants" as a group "threatened to enforce this order against a Plaintiff." (*Id.*, pgID 15). But that is a conclusory assertion. To sufficiently allege standing, plaintiffs must provide facts supporting that conclusion and ultimately supporting plaintiffs' position that they have a cognizable cause of action.

The only factual support they provide for this allegation is that defendants "did signal such intent [to enforce the order] by their communications and declarations to the public, including publishing the order(s) on their website." (*Id.*). However, plaintiffs fail to explain how this action injured them. That is presumably because they cannot show that the ministerial act of posting an order on a website caused any concrete harm.

A similar set of facts arose in a recent case related to school closures during the Covid-19 pandemic. There, a group of parents sued the New Mexico Governor, Secretary of Education, and Secretary of Health, challenging the constitutionality of Covid-related school closure orders. *Hernandez v. Grisham*, 494 F. Supp. 3d 1044 (D.N.M. 2020). The court found that plaintiffs lacked standing to sue the Governor and Secretary of Health because only the Secretary of Education had control over the reentry process for schools. *Id.* at 1132-33. Plaintiffs' conclusory allegations about the three officials "working together" were not sufficient to establish standing against the Governor and Secretary of Health. *Id.*

Similarly here, plaintiffs have grouped defendants together in the complaint. They do not attribute specific actions to specific defendants, instead referring collectively to "Defendants" in

almost every allegation. In fact, plaintiffs do not even allege that any specific defendant issued the Director's Order. Plaintiffs must show that each defendant harmed them. As I have already explained, it is insufficient to attribute harm to "defendants" as a group.[8]

Further, plaintiffs' allegation that "Defendants" posted the order on their websites does not give them standing against defendants where it would not otherwise exist. As the court explained in *Hernandez*, "[t]he Plaintiffs point to no legal authority turning press conferences and Twitter updates into binding executive orders." *Id.* at 1135. The same reasoning applies here. The mere posting of an order on a website has no legal effect. Even if none of the defendants posted the Director's Order online, it still would have been binding on plaintiffs and required them to close their businesses. The issuance of the order is the action that is traceable to plaintiffs' financial harm, not the act of posting it online.

It is worth noting that many of the defendants in this case work for city or county health departments. They have even less of a nexus to the conduct alleged in the complaint than the state officials whom plaintiffs have named. These local officials had no apparent involvement in issuing the Director's Order, and plaintiffs fail to allege that any defendant

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[8] In a similar Covid-related case filed by the same attorneys, another judge in this court found that plaintiffs could not establish the causation prong of the standing analysis. The court determined that plaintiffs' allegations of standing were insufficient because the alleged actions of defendants were "predicated on the voluntary and independent decisions of multiple third parties." *Ohio Stands Up! v. U.S. Dep't of Health & Hum. Servs.*, No. 3:20 CV 2814, 2021 WL 4441707, at *9 (N.D. Ohio) (Knepp, J.). Plaintiffs could not tie their purported injuries to any of the actions of the defendants in the case. Therefore, the court dismissed the complaint.

took specific action that on its own proximately caused or added to the injuries that resulted from Director Acton's orders. In fact, plaintiffs do not include any allegations specific to the city and county officials in the complaint. It is therefore completely unclear what role they played, if any, in contributing to plaintiffs' harm.

In a possible attempt to connect the local defendants with some action that independently caused or contributed to the alleged harms, plaintiffs allege that "some of the leaders of the various health departments issued additional orders of their own." (*Id.*). But they do not identify which defendants issued these orders, what these orders said, or how these orders impacted their businesses. Therefore, this allegation amounts to a mere conclusion. And while I must accept the allegations in plaintiffs' complaint as true, this directive does not apply to conclusions. *Iqbal*, *supra*, 556 U.S. at 678.

Plaintiffs have the burden of alleging specific facts demonstrating each element of standing. They have wholly failed to do so with respect to traceability. Therefore, I must dismiss plaintiffs' claims against all defendants other than Director Acton for a lack of standing.[9]

3. Plaintiffs' Substantive Claims Are Without Merit

Plaintiffs assert three substantive claims: 1) substantive due process; 2) equal protection; and 3) takings without just compensation. Plaintiffs contend that strict scrutiny review applies to their

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[9] Several defendants also argue that plaintiffs cannot satisfy the redressability prong of the standing analysis. Because I find that plaintiffs have not sufficiently alleged traceability, I need not address redressability.

substantive due process and equal protection claims. I disagree.

First, the right to work is not a fundamental right subject to strict scrutiny. *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999). It is subject only to rational basis scrutiny. Second, because the right to work is not a fundamental right, and dance studio owners are not a suspect class, plaintiffs' equal protection claim requires them to establish that the challenged orders "treat[ed] one individual differently from others similarly situated without any rational basis." *Taylor Acquisitions, L.L.C. v. City of Taylor*, 313 F. App'x 826, 836 (6th Cir. 2009).

A. Due Process and Equal Protection Claims[10]

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[10] In *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905), the Supreme Court held that when a state acts to respond to a public health emergency, a court reviews that action deferentially. It stated that such action only violates the right to substantive due process if it "has no real or substantial relation to [the public health emergency] or is beyond all question, a plain, palpable invasion of rights secured by fundamental law." *Id.* Numerous courts have applied *Jacobson* to administrative orders imposing restrictions in response to Covid-19.

See, e.g., *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 129 (6th Cir. 2020); *accord Klaussen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021); *Big Tyme Investments, LLC v. Edwards*, 985 F.3d 456, 465-67 (5th Cir. 2021); *In re Rutledge*, 956 F.3d 1018, 1032 (8th Cir. 2020); *AJE Enter., LLC v. Justice*, 2021WL 4241018, at *2-5 (N.D. W. Va.) (collecting cases).

Against this overwhelming precedent, plaintiffs rely on *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 897 (W.D. Pa. 2020). In that case, a district court judge held that the deferential *Jacobson* standard is no longer good law. (*Id.*). That decision has never been subjected to direct appellate review. The Third Circuit initially stayed that judge's order, No. 20-2936, 2020 WL 5868393 (3d. Cir.), and subsequently vacated the trial court's opinion and remanded with instructions to dismiss the case as moot, 8 F.4th 226, 230 (3d. Cir. 2021). "[A] judgment that is

'unreviewable because of mootness' should not 'spawn[ ] any legal consequences' for the party who sought reversal on appeal." *Butler*, 8 F.4th at 231-32 (quoting *United States v. Munsingwear*, 340 U.S. 36, 41 (1950)).

In addition, a large majority of courts have rejected *Butler*. *See Stewart v. Justice.*, 502 F. Supp. 3d 1057, 1069 (S.D.W. Va. 2020) (*Butler* "is an outlier in COVID-related caselaw"); *AJE Enter., supra*, 2020 WL 6940381, at *2 (rejecting *Butler* because "the vast majority of courts have looked to *Jacobson* in their analysis of various pandemic responses"); *Lewis v. Walz*, 491 F. Supp. 3d 464, 470 n.5 (D. Minn. 2020) (same); *Underwood v. City of Starkville, Miss.*, No. 1:20-CV-00085-GHD-DAS, 2021 WL 1894900, at *5 (N.D. Miss.) (declining to apply *Butler*); *Disbar Corp. v. Newsom*, 508 F. Supp. 3d 747, 753 (E.D. Cal. 2020) (same); *see also M. Rae, Inc. v. Wolf*, 509 F. Supp. 3d 235, 246 (M.D. Pa. 2020) (rejecting *Butler* because "[t]he bottom line for our purposes is that *Jacobson* is controlling precedent until the Supreme Court or Third Circuit Court of Appeals tell us otherwise"); *Bimber's Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 775 (W.D.N.Y. 2020) ("until the Supreme Court overrules *Jacobson*, it remains good law, and it governs here.").

In any event, the reasoning in *Butler* is unpersuasive. Moreover, and most importantly for me, to adopt plaintiffs' contentions would be to disregard the Sixth Circuit's decision in *Independent League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020) Aside from the compelling persuasiveness of the Circuit's reasoning and rationale, *that* is a decision I am bound as a District Court Judge to follow. Plaintiffs devote much of their brief to arguing that *Jacobson* has been limited, is no longer good law, or is distinguishable on its facts. *See* (Doc. 36, pgID 368-72). Those efforts are wasted. It is simply not necessary to rely on *Jacobson*'s standard to resolve this case because the complaint also fails under the more modern rational basis standard. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, --- U.S. --,141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring); *ARJN #3 v. Cooper*, 517 F. Supp. 3d 732, 744 (M.D. Tenn. 2021). Accordingly, I will not rely on *Jacobson's* standard as a basis for my decision.

In any event, as I read plaintiffs' complaint, they are not in this case challenging the constitutionality of the Health Director's authority to issue her closure orders. Instead, they challenge the constitutionality of the consequences of those

(i) Plaintiffs' Due Process and Equal Protection Claims Are Subject to Rational Basis Review

Plaintiffs argue I must apply strict scrutiny to their denial of the right to work and equal protection claims. For the reasons that follow, that contention is meritless.[11]

First, in support of their substantive due process claim, plaintiffs mistakenly argue that strict scrutiny review applies. They claim this is so because, they assert, the right to work is a fundamental right. They are mistaken.

In support of their assertion, plaintiffs offer only a Supreme Court opinion in which the Court actually applied rational basis scrutiny. (Doc 36, pgID 366) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). In a footnote, the Court speculated in dictum that "there may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments." *Caroline Prods., supra*, 304 U.S. at 152 n.4. The Court then expressly declined to consider the issue. In addition, nowhere in that dictum did the Court discuss a right to work.

Although the law recognizes "some generalized due process right to choose one's field of private

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orders on the plaintiffs. Thus, *Jacobson* has little, if anything, to do with this case.

[11] In their brief, plaintiffs assert (without citation or explanation) that defendants violated their right to freedom of association. (Doc. 36, pgID 366). Their complaint, however, does not mention a right of freedom of association. Instead, it specifically alleges that each plaintiff "was deprived of his [or her] right to work." (Doc. 1, pgID 8-10). I will not address a claim that the complaint does not state.

employment," it is not a fundamental right; instead it is subject to "reasonable government regulation." *Conn*, *supra*, 526 U.S. at 291-92; *accord Lawrence v. Pelton*, No. 20-2011, 2021 WL 1511664, at * 4 (6th Cir.); *Proctor v. Krzanowski*, 820 F. App'x 436, 439 (6th Cir. 2020); *see also Prynne v. Settle*, 848 F. App'x 93, 104 (4th Cir. 2021) ("There is no broadly defined fundamental right to work.").[12] Even the decision in *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 920-21 (W.D. Pa. 2020), on which the plaintiffs rely heavily, held that the right to work is not a fundamental right. In the absence of a fundamental right, government action is subject only to rational basis review. *See id.*; *Blau v. Fort Thomas Public Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005).

Second, plaintiffs' equal protection claim requires them to show the health Director's challenged orders "treat[ed] one individual differently from others similarly situated without any rational basis." *Taylor Acquisitions, supra*, 313 F. App'x at 836. For the same reasons that their substantive due process claim failed under rational basis scrutiny, plaintiffs' equal protection claim fails because they cannot show that the orders treated them differently than other, similarly situated business owners without a rational basis for doing so.

(ii) Rational Basis Review

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[12] Moreover, "Supreme Court cases finding a cognizable liberty right 'all deal with a complete prohibition of the right to engage in a calling,' not a 'brief interruption' of the right." *Proctor, supra*, 820 F. App'x at 439 (quoting *Gabbert, supra*, 526 U.S. at 291-92). Here, the government closed plaintiffs' studios for a total of three months. It then permitted them to open again subject to certain safety regulations, such as social distancing. There has not been a complete prohibition of plaintiffs' ability to practice their professions.

Plaintiffs assert that the Health Director's orders lacked a rational basis because "[d]ata shows that intentionally misleading information being is [sic] to invalidate Constitutional rights under the guise of public health." (Doc. 36, pgID 371). Apart from the inadequacy of that conclusory pronouncement under *Iqbal* and *Twombly*, it also reflects a fundamental misunderstanding of the law.

As the Sixth Circuit has explained,

> to pass rational-basis scrutiny, ordinances need not be supported by scientific studies or empirical data; nor need they be effective in practice. Rather, [i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it . . . . [W]e will be satisfied with the government's rational speculation' linking the regulation to a legitimate purpose . . . .

Sheffield v. City of Fort Thomas, Ky., 620 F.3d 596, 614 (6th Cir. 2010) (citations and internal quotation marks omitted).

"Thus, if a [government action] can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny." *Am. Express Travel Related Servs. Co v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011). The defendant "has no obligation to produce evidence to sustain the rationality of its actions; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data." *Taylor Acquisitions, supra*, 313 F. App'x at 836. Instead, "the party challenging [a government action] must 'negate every conceivable

basis which might support it." *Am. Express, supra*, 641 F.3d at 690 (internal quotation marks omitted).

"Under this test, [government] action 'is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020) (quoting *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993)). "In fact, '[t]he assumptions underlying these rationales may be erroneous, but the very fact that they are "arguable" is sufficient ....'" *Tiwari v. Friendlander*, No. 3:19-CV-00884-GNS-CHL, 2021 WL 1407953, at *6 (W.D. Ky.) (quoting *Beach Commc'ns, Inc., supra*, 508 U.S. at 315).

"Ultimately, 'litigants may not procure invalidation of [administrative orders] merely by tendering evidence in court that the [government official] was mistaken.'" *Id.* (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)). "Shaping the precise contours of public health measures entails some difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people." *League of Indep. Fitness Facilities, supra*, 814 F. App'x at 129.

Thus, plaintiffs' vague reference to data and their bald assertion that Covid-19 "can now be shown to be roughly as dangerous as the yearly flu," (Doc. 1, pgID 7), entirely miss the point. Whether plaintiffs' view of this unidentified data may be superior to the government actor's view simply is not at issue here.

There is no question that responding to the Covid-19 pandemic represents a legitimate government interest. *Roman Catholic Diocese of Brooklyn v. Cuomo*, --- U.S.---, 141 S. Ct. 63, 67 (2020); *see also Neinast v. Bd. of Trs.*, 346 F.3d 585, 592 (6th Cir. 2003) (recognizing public health and safety as legitimate government interests).

The Health Director's orders were rationally related to fighting the spread of Covid-19. Dance studios bring dancers together in an environment that plaintiffs concede makes social distancing impracticable. Like the fitness facilities the Sixth Circuit addressed in *League of Indep. Fitness Facilities,* dance studios are a place where people engage in "heavy breathing and sweating in an enclosed space containing many shared surfaces." 814 F. App'x at 129. Preventing that activity is rationally related to the effort to minimize the harm from a pandemic that infects people through airborne droplets.

Whether the plaintiffs believe that effort is unnecessary or ineffectual simply is not relevant to rational basis review. So long as a court finds it plausible that the government's action "might be thought . . . a rational way to protect" against the threatened danger, the action does not violate due process. *Sheffield, supra*, 620 F.3d at 614. The Health Director's orders at issue easily meet that standard. Accordingly, plaintiffs' substantive due process claim must be dismissed.

Similarly, plaintiffs' equal protection claim fails because plaintiffs cannot show that Director Acton did not have a rational basis for treating dance studios differently from businesses that do not require clients to exercise vigorously in close proximity to one another in enclosed spaces.

In addition, plaintiffs' equal protection claim fails because of a basic pleading deficiency.

It is fundamental that, to state a claim for equal protection, the plaintiff must allege disparate treatment. *WCI Inc. v. Ohio Dep't of Pub. Safety*, 774 F. App'x 959, 963 (6th Cir. 2019) (""The threshold element of an equal protection claim is disparate treatment; . . ."" (quoting *Dixon v. Univ. of Toledo*,

702 F.3d 269, 278 (6th Cir. 2012))); *Ctr. for Bio-Ethical Reform, Inc. v. Napalitano*, 648 F.3d 365, 379 (6th Cir. 2011) (same). Specifically, a plaintiff must plead disparate treatment as compared to similarly situated persons. *Ctr. for Bio-Ethical Reform, supra*, 648 F.3d at 379. A plaintiff "'must allege that it and other individuals who were treated differently were similarly situated in all material respects.'" *Superior Commc'ns v. City of Riverview*, 881 F.3d 432, 446 (6th Cir. 2018) (quoting *Taylor Acquisitions*, *supra*, 313 F. App'x at 836).

Plaintiffs have failed to allege any facts that would show that the essential businesses that Ohio allowed to remain open were similarly situated to their dance studios. Indeed, the closest they come to alleging that defendants treated similarly situated parties differently comes in the introduction to their complaint, where they make the conclusory allegation that "businesses were treated differently without even a rational basis for such actions." (Doc. 1, pgID 7). They do not mention the issue again in the equal protection count in their complaint.

"[B]are allegations that 'other' [enterprises], even 'all other' [enterprises], were treated differently' is insufficient; a plaintiff must show that these 'other' [enterprises] were similarly situated to the plaintiff." *Taylor Acquisitions, supra*, 313 F. App'x at 836 (internal quotation marks omitted). It is plaintiffs' burden to plead facts that would allow me to find that defendants treated them unequally to similarly situated business owners. *Wymer v. Richland Cnty. Children Servs.,* 584 F. App'x. 283, 284 (6th Cir. 2014).

However, plaintiffs fail to allege that the Health Director allowed some dance studios to remain open. Indeed, they fail to allege that the directors allowed other enterprises such as gyms or fitness centers to

continue operating. Those who participate in such activities, like dance studio participants, typically engage in strenuous physical activity in close proximity to others doing likewise. Thus, gyms and physical fitness centers are comparable to dance studios.

Plaintiffs do not show that such non-essential enterprises, which, like dance studios, would be likely venues for the spread of Covid-19, remained open under Director Acton's regime. Nor do they allege that the essential enterprises the Ohio Health Director's orders allowed to remain open are similarly situated to their dance studios. Therefore, they have failed adequately to plead the essential equal protection element that Director Acton's orders treated similarly situated businesses more favorably than plaintiffs' dance studios.

(iii) Equal Protection Did Not Require the Orders Themselves to Explain the Basis for Distinguishing Between Essential and Non-Essential Businesses

Plaintiffs also argue that the orders violate equal protection because they do not state Director Acton's standard for determining which businesses qualified as essential. That argument, too, is meritless.

First, it is not true that the Health Director provided no explanation for how she divided businesses between essential and not. The March 20, 2021 order explains regarding the businesses it closed:

> These businesses encourage congregation in indoor spaces where the virus that causes COVID-19 can easily spread from person to person. Persons can also be exposed to the

> virus by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes.

(Doc. 20-1, pgID 157).

Second, there is no obligation for the Health Director's orders themselves to explain the bases for classifying businesses as essential. "The rational basis justifying a statute against an equal protection claim need not be stated in the statute or in its legislative history; it is sufficient that a court can conceive of a reasonable justification for the statutory distinction." *United States v. Dunham*, 295 F.3d 605, 611 (6th Cir. 2002) (quoting *Estate of Kunze v. Comm'r of Internal Revenue,* 233 F.3d 948, 954 (7th Cir. 2000)). Governmental actors are presumed to have acted constitutionally "even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald v. Bd. of Election Comm'rs,* 394 U.S. 802, 809 (1969).

Third, as the Sixth Circuit has explained, "[a] proffered explanation for the statute need not be supported by an exquisite evidentiary record; rather we will be satisfied with the government's 'rational speculation' linking the regulation to a legitimate purpose, even 'unsupported by evidence or empirical data.'" *Craigmiles¸ supra*, 312 F.3d at 224 (quoting *Beach Commc'ns, Inc., supra*, 508 U.S. at 313). The Health Director's explanations are "paradigmatic example[s] of "rational speculation" that fairly supports the [Director's] treatment of [dance studios]." *League of Indep. Fitness Facilities, supra*, 814 F. App'x at 129.

Here, I need not rely on the "reasonable speculation" standard because the Centers for

Disease Control and Prevention have explained the scientific basis for not allowing people to congregate, let alone to exercise, in enclosed spaces.[13]

Thus, plaintiffs' substantive due process and equal protection claims fail to state a claim upon which relief can be granted.

B. Takings Clause

Plaintiffs' third count alleges that the Health Director's orders constituted a taking without just compensation in violation of the Fifth Amendment. The Takings Clause provides in full: "nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V. Thus, "[t]he [Takings] [C]lause does not entitle all aggrieved owners to recompense, only those whose property has been taken for a public use." *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1152 (Fed. Cir. 2008).

The Sixth Circuit has explained the basic fallacy in plaintiffs' attempt to treat a health-related order issued under the police power as a taking.

> [Plaintiffs] fail[] to recognize that the law distinguishes between a taking for public use under the government's power of eminent domain, which is civil in nature, and the forfeiture of property under the government's police power, which is criminal in nature. *See AmeriSource v. United States,* 525 F.3d 1149, 1152–57 (Fed. Cir. 2008). While the former is subject to the Fifth Amendment, the latter is not because "the [g]overnment's seizure and retention of property under its police power

[13] *See*, *e.g.*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

> does not constitute a 'public use.' " *Innovair Aviation Ltd. v. United States,* 632 F.3d 1336, 1341 (Fed. Cir. 2011) (citing *AmeriSource,* 525 F.3d at 1152– 57). This rule does not admit of any exceptions.

United States v. Droganes, 728 F.3d 580, 591 (6th Cir. 2013).

Where a state "reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," the state is not required to provide just compensation to the citizens affected by the regulation. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978); *see also Lech v. Jackson*, 791 F. App'x 711, 719 (10th Cir. 2019) ("[S]o long as the government's exercise of authority was pursuant to some power other than eminent domain, then the plaintiff has failed to state a claim for compensation under the Fifth Amendment.") (quoting *Amerisource Corp., supra*, 525 F.3d at 1154-55)).

The Health Director did not take plaintiffs' properties for public use through eminent domain. Instead, she acted to protect public health through the police power. "It is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens.'" *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 476 (1996)); *see also TJM 64, Inc. v. Harris*, No. 2:20-CV-02498-JPM-TMP, 2021 WL 863202, at *3 (W.D. Tenn.) (applying the principle to covid-related closure of certain kinds of restaurants). Plaintiffs' takings claim fails on this basis alone.

Plaintiffs' takings claim also fails because plaintiffs have failed to allege facts that would support their conclusory assertion that the Health

Director's orders deprived them of "all beneficial use of their property." (Doc. 1, pgID 7). A regulatory taking only occurs in "'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (emphasis in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992)).

The only allegations that plaintiffs make related to this requirement are repetitive and conclusory. They allege that they "were denied all beneficial use of their property," were "deprived [] of any and all beneficial use of these businesses," and "they have been deprived of all economically beneficial use of their property." (*Id.*, pgID 7, 14, 22).

These are exactly the kind of "[t]hreadbare recitals of the elements of a cause of action" that courts consistently have found insufficient to state a claim. *Iqbal*, *supra*, 556 U.S. at 678. And plaintiffs do not allege any facts to support these bald assertions. The absence of any factual allegations to support the basic element of a regulatory takings claim – that the Health Director's orders deprived them of all beneficial uses of their property – also requires the dismissal of their takings claim.

C. All Defendants Are Immune to Monetary Liability

(i) 11th Amendment Immunity

It is basic law that the Eleventh Amendment bars a suit for damages against a State or official of the State in federal court. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 (1997); *Cady v. Arenac*

Cnty., 574 F.3d 334, 342 (6th Cir. 2009).[14] "'An official can . . . be sued in his *official* capacity. But an official-capacity suit against a state official is deemed to be a suit against the state and is thus barred by the Eleventh Amendment, absent a waiver . . . ." *Cady, supra*, 574 F.3d at 344 (emphasis in original) (quoting *Scott v. O'Grady*, 975 F.2d 366, 369 (7th Cir. 1992)). This is because a plaintiff who sues a state agent in his or her official capacity "seeks damages not from the individual officer, but from the entity for which the officer is an agent." *Id.* at 342.

Ohio has not waived its sovereign immunity from civil rights lawsuits in federal court. *Regenold v. Ohio State Bd. Of Educ.*, No. 2:21-CV-1916, 2021 WL 2895130, at *3 (S.D. Ohio) (citing *Mixon v. State of Ohio*, 193 F.3d 389, 397 (6th Cir. 1999)). And "Congress did not abrogate states' Eleventh Amendment immunity through § 1983." (*Id.*) (citing *Quern v. Jordan*, 440 U.S. 332, 337 (1979)).

Nevertheless, plaintiffs seek monetary damages from state defendants Governor DeWine, Amy Acton, Stephanie McCloud, and Lance Himes in their official capacities. (Doc. 1, pgID 3, 10). Plaintiffs' sole explanation for those claims in their brief is to declare baldly that "[t]he 11th Amendment has no legitimate application to immunize Defendants from the claims of the Plaintiffs and cannot be successfully asserted and raised by any Defendant against the

[14] Plaintiffs named Ohio as a defendant in its case caption, (Doc. 1, pgID 3) and have served it with process. (Doc. 14). Nevertheless, they left Ohio out in the list of entities they designated collectively defined as the "Defendants," (Doc. 1, pgID 10-13), and have failed to allege any conduct by the State or any factual basis on which they seek to hold the State liable. Moreover, a plaintiff may not sue a state for damages in federal court. *Regents, supra*, 519 U.S. at 430. Accordingly, I dismiss all claims against Ohio.

Plaintiffs' claims." (Doc. 36, pgID 372). That response reflects, not surprisingly, that plaintiffs are unable to provide any authority to support their novel assertion. To the extent plaintiffs seek monetary damages against these state officials, their claim is frivolous and must be dismissed.

The Eleventh Amendment also bars plaintiffs' claims for monetary damages against the city and county Health Directors.

Ohio statute unambiguously mandates that a city or county Health Director "shall" enforce quarantine and isolation orders, and the rules the department of health adopts." O.R.C. § 3709.11. When an Ohio city or county official is carrying out orders of the Health Director, he or she is acting as an arm or officer of the state and is entitled to immunity from suit under the Eleventh Amendment. *See Cady, supra*, 574 F.3d at 343 (the county prosecutor was acting "as a state agent when prosecuting state law criminal charges"); *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993) (a city official is considered a state agent when enforcing state law).

Moreover, when government actors "are sued simply for complying with state mandates that afford no discretion, they act as an arm of the State." *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999); *See also Ermold v. Davis*, 936 F.3d 429, 435 (6th Cir. 2019) (county clerk who acted pursuant to statute stating that she "shall" take certain action was immune to official capacity suit because she acted as state agent).

Accordingly, the Eleventh Amendment serves as additional grounds for dismissing all claims against the defendants in their official capacities for monetary damages.

(ii) Qualified Immunity

Defendants contend that the plaintiffs' claims are barred by qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). For a state actor to be liable, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011).

When the Health Director issued the orders in question, *Jacobson* endorsed the constitutionality of her having done so. Moreover, as discussed *supra*, Section 3(A)(i), even apart from the *Jacobson* standard, the basic rules of rational basis review amply support those orders.

Thus under the binding precedent, it is simply irrational to assert that a reasonable health official would have known that imposing business closings in response to a pandemic clearly violated Supreme Court precedent. The numerous decisions upholding such orders clearly demonstrate that a reasonable person in the Health Director's position would not have "known" that enacting the orders at issue here would violate the law.[15] *See, e.g.*, cases cited *supra* n.10.

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[15] Plaintiffs seek to rely on *United Pet Supply, Inc. v. City of Chattanooga*, 768 F.3d 464, 488 (6th Cir. 2014), for the proposition that in "rare situations . . . the unconstitutionality of the application of a statute to a situation is plainly obvious" so that "no reasonable police officer would believe" applying the law to the facts would be constitutional. (Doc. 36, pgID 372). That case does not support plaintiffs' argument. The court's

Plaintiffs' sole response to defendants' qualified immunity defense is to declare, without citation or explanation, that "[d]efendants knew or should have known the well established law that prevented their unconstitutional behaviors." (Doc. 1, pgID 362). That is no argument at all, but merely a conclusion without explanation, citation, or supporting factual allegations.

Plaintiffs' claim that defendants are not entitled to qualified immunity is meritless. Qualified immunity requires that I dismiss all monetary claims against all defendants.

4. Violations of Ohio's Law

Plaintiffs' complaint makes numerous allegations that the defendants violated the Ohio Constitution, (Doc. 1, pgID 6, 13, 14, 22), Ohio statute, (*id.*, pgID 16-17), and Ohio caselaw, (*id.*, pgID 19-20, 22). Plaintiffs fail, however, to relate those allegations to any of their counts or even to mention them in any of the counts, with only one exception. In the complaint's last paragraph before the prayer for

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statement that such rare situations may exist provides no support for plaintiffs' suggestion that this is one of them. Nor does their complaint adequately so allege.

Moreover, *United Pet Supply* is inapposite. First, the case did not involve public health measures during a health emergency. During such an emergency and to the extent that the *Jacobson* doctrine has any applicability, it mandates deferential review. As discussed above, plaintiffs also cannot meet the standards for rational basis review.

Second, the case involved the permanent cancellation of a business license. *United Pet Supply, supra*, 768 F.3d at 488. The Health Director's orders that plaintiffs challenge here imposed only temporary restrictions, which the Health Director subsequently relaxed as she determined the circumstances justified.

relief, plaintiffs throw in a vague, passing reference to the Ohio Constitution: "Defendants [sic] seek a Declaratory Judgment that the Defendants . . . interfered with their rights to free expression under the 1st & 14th Amendments and the Ohio Constitution." (*Id.*, pgID 22).

That vague reference would be insufficient in any event, but here, it again reflects a failure of counsel to learn the basic legal principals governing their claims. "Case law is legion that the Eleventh Amendment to the United States Constitution directly prohibits federal courts from ordering state officials to conform their conduct to state law." *Johns v. Supreme Court of Ohio*, 753 F.2d 524, 526 (6th Cir. 1985). Section "1983 does not provide a remedy for violations of state law. Rather, the statute's reach is 'limited to deprivations of federal statutory and constitutional rights.'" *Neinast v. Bd. of Trs. of the Columbus Metro. Library*, 346 F.3d 585, 597 (6th Cir. 2003) (quoting *Huron Valley Hosp., Inc. v. City of Pontiac*, 887 F.2d 710, 714 (6th Cir. 1989)); *see also McCarthy v. City of Cleveland,* 626 F.3d 280, 283 n.1 (6th Cir. 2010) ("The violation of a provision of state law is not cognizable under § 1983.").

To the extent plaintiffs seek relief for violation of Ohio law, their claim is frivolous and must be dismissed.

5. Plaintiffs' Failure to Respond to Defendants' Arguments

Defendants have raised in their motions the deficiencies in plaintiffs' complaint that I have identified above. They supported their arguments with valid citations and reasoned analyses. Plaintiffs' fourteen-page "Consolidated Brief in Opposition"

fails entirely to respond substantively to those citations or analyses.

The defendants raised the pleading deficiencies discussed above. Plaintiffs' response was simply to declare that their "Complaint is proper and sufficiently pled in all respects to present the Plaintiffs' claims." (Doc. 36, pgID 361). Obviously, that declaration itself carries no weight. The only pleading deficiency plaintiffs attempted to address in any substance is the defendants' argument that they failed to plead adequately that they suffered loss. (*Id.*, pgId 365).

Most notably, plaintiffs declined to respond substantively to defendants' argument that the complaint failed to identify any action by any defendant other than Director Acton. At most, plaintiffs simply fault the defendants for not objecting to the Health Director's orders. (*Id.*, pgID 362). As discussed above, that response is entirely meritless.

Plaintiffs also repeat in their opposition, (*id.*, pgId 367), their complaint's sweeping assertion that the city and county Health Directors enforced Ohio Health Director Acton's orders. (Doc. 1, pgId 15). Plaintiffs do not respond to defendants' argument that they failed to identify any action that any individual defendant took to enforce the orders. As discussed above, plaintiffs' bald assertion is woefully inadequate to plead a claim against any of the defendants other than Director Acton.

Defendants' briefs pointed out that plaintiffs' failure to identify harmful conduct by each individual defendant meant that they had failed to allege grounds on which they had standing to sue each defendant.

As to two of those defendants, Melissa Howell and Kate Siefert, plaintiffs ultimately withdrew their

claims. They did so, however, only after those defendants pointed out in their motions that plaintiffs had made no allegation that any of them were subject to those defendants' health districts' jurisdiction. The time to determine whether plaintiffs had standing to sue each defendant – that is, whether each defendant took, or even had the jurisdiction to take, any action against them – was before plaintiffs served their complaint.

As to the remaining defendants other than Director Acton, plaintiffs' response to defendants' standing arguments was to repeat the same wholly inadequate allegation that the "Defendants" had failed to object to Director Acton's orders. They also repeated the conclusory allegation that the city and county defendants threatened to enforce Director Acton's orders. Rather than identify any action that any individual defendant other than Director Acton took to enforce those orders, they assert the untenable claim that city and county Health Directors' posting Ohio's Health Director's orders on their websites somehow was actionable conduct. As discussed above, it was not.

Moreover, while plaintiffs expounded at length on their own interpretation of *Jacobson*, they failed to respond to the defendants' argument that the Health Director's orders pass rational basis review. That is, other than just declaring that "[t]here is no rational basis for the orders." (Doc. 36, pgID 365).

Instead, plaintiffs chose to rely solely on their frivolous claim that the right to work is a fundamental right subject to strict scrutiny. As discussed above, any reasonable investigation would have taught plaintiffs that it is not. Thus, plaintiffs failed even to respond to defendants' arguments regarding the legal standard that plainly governs their claims.

In addition, after defendants informed plaintiffs through their motions that the right to pursue a chosen profession is not a fundamental right and is not subject to strict scrutiny, plaintiffs attempted to change their claim by arguing about their right to free association. (*Id.* pgID 366). If plaintiffs wished to amend their complaint to state a claim for violation of the right to free association, they should have sought leave to do so. They cannot amend their complaint in a brief opposing a motion to dismiss.

Defendants also pointed out to plaintiffs that they had failed to allege the basic element of an equal protection claim that the Health Director's orders treated similarly situated persons differently. Plaintiffs' response is to declare baldly that defendants had violated their right to equal protection because "[a]ll businesses were not treated equally under the orders." (*Id.*, pgID 368). They do not even attempt to argue that all or any of the businesses designated essential were similarly situated to their own even after defendants pointed out to them that such an allegation is an essential element of an equal protection claim.

Instead, they cite to Ohio law relating to the Ohio Constitution's protection of the right to property as an unalienable right. (*Id.*, pgID 367). They did so even after the defendants pointed out to them the basic rule that they cannot sue state officials in federal court for violating state law.

As to their takings claims, defendants pointed out to plaintiffs that a takings claim arises only when property is taken for public use and only when the government destroys all economically beneficial use of the property. Defendants pointed out that the complaint fails to plead either. Plaintiffs' sole response was to state baldly that the orders deprived them of all economically beneficial use of their

properties without any supporting factual allegations or analysis. *See* (*Id.*, pgID 368). They failed to address the public use requirement altogether.

Defendants also explained to plaintiffs in their motions that it is absurd to claim, as plaintiffs do, that the Health Director's orders were so clearly unconstitutional that their unconstitutionality would have been "plainly obvious" to any reasonable public health official. (*Id.*, pgID 372). Although defendants provided plaintiffs with ample citation to cases holding that orders like those at issue here are constitutional, plaintiffs simply responded by stating, without relevant case support or meaningful analysis, that I should deny defendants qualified immunity because it should have been obvious to them that the orders were unconstitutional. The fact that so many courts have upheld similar orders simply precludes any non-frivolous argument that a reasonable public health official would have known those cases are mistaken. Moreover, they are not.

Defendants also explained to plaintiffs that suing officials in their official capacity for damages actually means suing for payment from the State Treasury, which the Eleventh Amendment forbids. Characteristically, plaintiffs' sole response is to say that "[t]he 11th Amendment has no legitimate application" to defendants without providing any meaningful citation or analysis. (*Id.*)

Defendants also pointed out to plaintiffs that they had failed to allege facts in the complaint to establish standing to sue. Nevertheless, plaintiffs barely address standing in their opposition brief. They do not respond to any of defendants' specific arguments regarding standing, let alone cite to any cases or allegations in the complaint that they believe establish standing. Their entire response is

four sentences long and consists only of conclusory assertions.

Plaintiffs had the obligation to conduct a reasonable investigation of the legal basis for their claims before they filed the complaint. *See* Fed. R. Civ. P. 11. At the very least, they were obligated to learn if they had a factual basis for asserting standing to sue each of the twenty defendants they named. They also were obligated, at a minimum, to learn the basic elements of their claims before filing them.

Perhaps even worse, however, is their failure to change course when the defendants explained to them the obvious and fundamental deficiencies in their complaint and provided them with reasoned analysis and extensive legal authority. The plaintiffs' proper response would have been to seek leave to file an amended complaint to correct those deficiencies or to drop some parties and/or claims altogether.

Instead, they opposed the motions to dismiss without any reasoned response or relevant authority to address the errors the defendants had identified to them. By doing so, they forced the defendants to file additional briefs without justification and wasted a significant amount of my own time and resources to resolve motions to dismiss a complaint that they reasonably should have known could not possibly pass muster.

Conclusion

For the multiple and manifold reasons that I have discussed, this suit and plaintiffs' complaint were as hapless as they were hopeless. Plaintiffs utterly ignored basic pleading principles from *Iqbal* and *Twombly*.

I could have justified dismissal on that basis alone. But, given the deficiencies in light of well-established black-letter law that permeated every facet of plaintiffs' putative claims, I have made clear that, in the alternative, dismissal is well warranted because plaintiffs lack standing, their alleged substantive claims are entirely without any plausible merit, and basic immunity doctrines bar plaintiffs' claims for monetary recovery.

Dismissal thus rests on indisputable bedrock procedural and substantive grounds.

That being said, I leave it to the defendants and their attorneys to determine whether they desire to seek sanctions under Fed. R. Civ. P. 11, 18 U.S.C. § 1927, or this court's inherent power. If any party desires to pursue such a remedy on any or all of such grounds, I hereby grant leave to them to do so in accordance with the schedule set forth below.

In light of the foregoing, it is hereby ORDERED THAT:

1. Defendants' Motions to Dismiss (Docs. 24-27, 32) and defendant Zgodzinski's Motion for Judgment on the Pleadings (Doc. 21) be, and the same hereby are, granted;

2. Plaintiffs' complaint against each and every defendant be, and the same hereby is, dismissed with prejudice; and

3. Any party seeking, on any grounds, to recover, as sanctions, reasonable attorney's fees and costs incurred in the defense of this case shall, on or before November 30, 2020, file an appropriate motion and supporting memorandum; plaintiffs shall respond on or before January 10, 2022; and defendants shall reply on or before January 30, 2022. Any party seeking or opposing a hearing on any such motion

shall so indicate, and such request, and if filed, such opposition, shall be taken under advisement.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge

APPENDIX D

OHIO Department of Health

DIRECTOR'S ORDER

Re: Order to Cease Business Operations and Close Venues

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders ... for preventing the spread of contagious or infectious diseases" **Order** the following to prevent the spread of COVID-19 into the State of Ohio:

...

3. Effective immediately all dance studios and any location that provides dance lessons to adults of children in a group setting or one on one classes are closed.
4. These businesses encourage congregating in indoor spaces where the virus that causes COVID-19 can easily spread from person to person. ...
5. This Order takes effect immediately and remains in full force and effect until the State of Emergency declared by the Governor no longer exists or the Director of tbe Ohio Department of Health rescinds or modifies this Order.

...

COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-Co V-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can

easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.

...

On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States ...

On March 9, 2020, the Governor Declared a State of Emergency in Executive Order 2020-0lD.

...

Multiple areas of the United States are experiencing "community spread" of the virus that causes COVID-19. ...

Mass gatherings (50 or more persons) increase the risk of community transmission of the virus COVID-19.

Accordingly, to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population, including the elderly and people with weakened immune systems and chronic medical conditions, I hereby **ORDER** Effective immediately, [Herein follows a verbatim repeat of items 1-6, *supra,* including the closing of dance studios].

/s/ Amy Acton March 21, 2020
Amy Acton, MD, MPH
Director of Health

APPENDIX E

OHIO Department of Health

<u>DIRECTOR'S STAY AT HOME ORDER</u>

Re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders ... for preventing the spread of contagious or infectious diseases" **Order** the following to prevent the spread of COVID-19 into the State of Ohio:

1. Stay at home or place of residence. With exceptions as outlined below, all individuals currently living within the State of Ohio are ordered to stay at home or at their place of residence except as allowed in this Order. ... All persons may leave their homes or place of residence only for Essential Activities, Essential Governmental Functions, or to participate in Essential Businesses and Operations, all as defined below. ...

2. Non-essential business and operations must cease. All businesses and operations in the State, except Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations, as defined below. ...

3. Prohibited activities. All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited,

except for the limited purposes permitted by this Order. Any gathering of more than ten people is prohibited unless exempted by this Order. ...

4. Prohibited and permitted travel. Only Essential Travel and Essential Activities as defined herein, are permitted. ...

5. Leaving the home for Essential Activities is permitted. For purposes of this Order, individuals may leave their residence only to perform any of the following Essential Activities:

a. **For health and safety.** ...

b. **For necessary supplies and services.** ...

c. **For outdoor activity.** To engage in outdoor activity, provided the individuals comply with Social Distancing Requirements, as defined below, such as, by way of example and without limitation, walking, hiking, running, or biking. Individuals may go to public parks and open outdoor recreation areas. However, public access playgrounds may increase spread of COVID-19, and therefore shall be closed.

d. **For certain types of work** To perform work providing essential products and services at Essential Businesses or Operations ...

e. **To take care of others.** To care for a family member, friend, or pet in another household, and to transport family members, friends, or pets as allowed by this Order. This includes attending weddings and funerals.

...

7. Healthcare and Public Health Operations. ... individuals may leave their residence to work for or obtain services through Healthcare and Public Health Operations. ...

Healthcare and Public Health Operations does not include fitness and exercise gyms, spas, salons, barber shops, tattoo parlors, and similar facilities.

8. Human Services Operations. ... individuals may leave their residence to work for or obtain services at any Human Services Operations, including any provider funded by the Ohio [Departments of Aging, Developmental Disabilities, Health, Job and Family Services, Medicaid, Mental Health and Addiction Services], Opportunities for Ohioans with Disabilities, Department of Veterans Services, and Department of Youth Services that is providing services to the public and including state-operated, institutional, or community-based settings providing human services to the public. ...

9. Essential Infrastructure. For purposes of this, individuals may leave their residence to provide any services or perform any work necessmy to offer, provision, operate, maintain and repair Essential Infrastructure. ...

10. Essential Governmental Functions. For purposes of this Order, all first responders, emergency management personnel, emergency dispatchers, legislators, judges, court personnel, jurors and grand jurors, law enforcement and corrections personnel, hazardous materials responders, child protection and child welfare personnel, housing and shelter personnel, military, and other governmental employees working for or to support Essential Businesses and Operations are categorically exempt from this Order. ...

12. Essential Businesses and Operations. For the purposes of this Order, Essential Businesses and Operations means Healthcare and Public Health Operations, Human Services Operations, Essential

Governmental Functions, and Essential Infrastructure, and the following:

a. **CISA List.** On March 19, 2020, the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency (CISA), issued a *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response.* The definition of Essential Businesses and Operations in this Order includes all the workers identified in that Memorandum.

b. **Stores that sell groceries and medicine.** ...

c. **Food, beverage, and licensed marijuana production and agriculture.** ...

d. **Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, ...

e. **Religious entities.** Religious facilities, entities and groups and religious gatherings, including weddings and funerals.

f. **Media.** Newspapers, television, radio, ...

g. **First amendment protected speech.**

h. **Gas stations and businesses needed for transportation.** ...

i. **Financial and insurance institutions.** ...

j. **Hardware and supply stores.** ...

k. **Critical trades.** ...

l. **Mail, post, shipping, logistics, delivery, and pick-up services.** ...

m. **Educational institutions.** Educational institutions—including public and private pre-K-12 schools, colleges, and universities-for purposes of

facilitating distance learning, performing critical research, or performing essential functions, ...

n. **Laundry services.** ...

o. **Restaurants for consumption off-premises.** ...

p. **Supplies to work from home.** ...

q. **Supplies for Essential Businesses and Operations.** ...

r. **Transportation.** ...

s. **Home-based care and services.** ...

t. **Residential facilities and shelters.** ...

u. **Professional services.** ...

v. **Manufacture, distribution, and supply chain for critical products and industries.** ...

w. **Critical labor union functions.** ...

x. **Hotels and motels.** ...

y. **Funeral services.** ....

14. Essential Travel. For the purposes of this Order, Essential Travel includes travel for any of the following purposes. ...

a. Any travel related to the provision of or access to Essential Activities, Essential Governmental Functions, Essential Businesses and Operations, or Minimum Basic Operations.

b. Travel to care for elderly, minors, dependents, persons with disabilities, ...

c. Travel to or from educational institutions ...

d. Travel to return to a place of residence from outside the jurisdiction.

e. Travel required by law enforcement or court order, ...

f. Travel required for non-residents to return to their place of residence outside the State. ...

15. Social Distancing Requirements. For purposes of this Order, Social Distancing Requirements

includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, ... regularly cleaning high-touch surfaces, and not shaking hands. ...

16. Intent of this Order. The intent of this Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, ...

17. Enforcement. This Order may be enforced by State and local law enforcement to the extent set forth in Ohio law. ....

22. Duration. This Order shall be effective at 11:59 p.m. on March 23, 2020 and remain in full force and effect until 11:59 p.m. on April 6, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date.

...

Mass gatherings (10 or more persons) increase the risk of community transmission of the virus COVID-19.

... I hereby **ORDER** effective at 11:59 p.m. on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations ...

/s/ Amy Acton — March 22, 2020

Amy Acton, MD, MPH
Director of Health

APPENDIX F

OHIO Department of Health

DIRECTOR'S ORDER

Re: Director's Order that Reopens Gyms, Dance Instruction Studios, and Other Personal Fitness Venues, with Exceptions

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders ... for preventing the spread of contagious or infectious diseases" Order the following to prevent the spread of COVID-19 into the State of Ohio:

...

2. Gyms, Dance Instruction Studios, and Other Personal Fitness Venues to reopen. All gyms, fitness-based recreation centers, dance instruction studios, and other personal fitness venues are permitted to reopen within the State so long as all safety standards are met. These businesses and operations are encouraged to reopen. Businesses and operations shall continue to comply with Social Distancing Requirements as defined in this Order, including by maintaining six-foot social distancing for both employees and members of the public at all times, including, but not limited to, when any customers are standing in line.

...

4. Facial Coverings (Masks). Businesses must allow all customers, patrons, visitors, contractors, vendors and similar individuals to use facial coverings, except for specifically documented legal, life, health or safety considerations and limited doc-

umented security considerations. Businesses must require all employees to wear facial coverings, except for one of the following reasons:

a. Facial coverings in the work setting are prohibited by law or regulation;
b. Facial coverings are in violation of documented industry standards;
c. Facial coverings are not advisable for health reasons;
d. Facial coverings are in violation of the business's documented safety policies;
e. Facial coverings are not required when the employee works alone in an assigned work area; or
f. There is a functional (practical) reason for an employee not to wear a facial covering in the workplace.

Businesses must provide written justification, upon request, explaining why an employee is not required to wear a facial covering in the workplace. At a minimum, facial coverings (masks) should be cloth/fabric and cover an individual 's nose, mouth, and chin.

...

6. Social Distancing Requirements. For purposes of this Order, Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

a. Required measures. Businesses and Operations and businesses must take proactive measures to ensure compliance with Social Distancing Requirements, including where possible:

- **i. Designate six-foot distances.** Designating with signage, tape, or by other means six-foot spacing for employees and customers in line to maintain appropriate distance;
- **ii. Hand sanitizer and sanitizing products.** Having hand sanitizer and sanitizing products readily available for employees and customers; and
- **iii. Online and remote access.** Posting online whether a facility is open and how best to reach the facility and continue services by phone or remotely.

7. Enforcement. This Order may be enforced by State and local law enforcement to the extent set forth in Ohio law. Specifically, pursuant to R.C 3701.352 "[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event." R.C. 3701.56 provides that "[b]oards of health of a general or city health district, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and other officers and employees of the state or any county, city, or township, shall enforce quarantine and isolation orders, and the rules the department of health adopts." ...

8. Penalty. A violation of R.C. 3701.352 is guilty of a misdemeanor of the second degree, which can include a fine of not more than $750 or not more than 90 days in jail, or both.

...

10. Sector Specific COVID-19 Information and Checklist for Businesses/Employers Covered by

this Order. Businesses and employers, whether currently open or reopening, are to take the following actions:

a. Facilities

i. Spacing, Capacity, Numbers

1. Limit capacity (employees and members/clients) based on available space and ability to social distance with six feet between members/clients, except in facilities where instructor/student must be in close proximity (i.e. dance instruction, swimming, personal training, etc.).
2. Set facility up for social distancing by spacing equipment to provide a six foot radius (as measured from the center of the main operation of the specific piece of equipment) or by disabling equipment (bike, treadmill, elliptical, etc.) to provide a six foot radius.
3. For class settings, set up work areas before arrival of students, allowing at least a six foot radius around users.
4. Reinforce spacing through training with employees, and reinforcement with members/clients.
5. Remove excess seating throughout the facility to discourage lingering.
6. Reduce class sizes, if necessary, to accommodate the required six feet of social distancing.
7. Eliminate lost and founds.
8. Establish log-in procedures for members /clients, and maintain that information for potential contact tracing.
9. It is recommended that, if possible and when applicable, set aside specific hours for vulnerable populations.
10. It is recommended that, if possible, provide space at entrance or in lobby area to allow

spacing for coat racks and when used, kiosks for check-ins.

ii. Sanitation

1. Hand washing or sanitization upon entry to facility .
2. Use sanitizer products that meet the CDC guidelines.
3. Have sanitizer available throughout the facility for employees and members/ clients.
4. Provide cleaning products, EPA-approved disinfectants or disinfecting wipes for sanitizing equipment before and after use by clients, with equipment cleaning backed up by employees.
5. Routine disinfection of high-contact surfaces, desk workstations, restrooms, pool ladders, as well as, equipment.
6. Deep cleaning after hours or during low-use times for 24-hour facilities.

...

iii. Signage

1. In entry, post signs requiring social distancing and recommending face coverings.
2. Post reminder signage for hand-washing, sanitization of equipment, distancing, etc.

...

b. <u>Locker Rooms and Public Restrooms</u>

i. Disable, or mark every other or every third locker for non-use to enforce six-foot social distancing requirement. Facilities where lockers are assigned to members are not required to disable lockers but must enforce social distancing requirement.

ii. Remove any casual seating other than benches by lockers as necessary.

iii. Clean and disinfect public areas and restrooms every two hours using EPA-registered disinfec-

tants, particularly on high-touch surfaces such as faucets, toilets, doorknobs and light switches.

iv. If independent showers are available and used, they must be attended and sanitized between each use.

v. Disable or close-off communal style showers except for rinsing before and after any pool activity.

vi. Make sure supplies for handwashing, including soap and materials for drying hands are fully stocked every time the bathroom is cleaned.

vii. Disable or close-off steam rooms and saunas.

viii. If towels are provided, they are to be stored in covered, sanitized containers that are clearly delineated clean versus soiled. Appropriate temperatures are to be used when washing and drying towels to ensure sanitation (hot water for washing, ensure they are completely dried). Employees handling towels must wear gloves and face coverng.

ix. Restroom facilities should limit the number of users at any one time based on the facility size current social distancing guidelines. These facilities should be cleaned/sanitized per CDC recommended protocol along with established restroom cleaning schedules. ...

c. Employees ...

iii. Businesses must require all employees to wear facial coverings, except for one of the following reasons:

1. Facial coverings in the work setting are prohibited by law or regulation;
2. Facial coverings are in violation of documented industry standards;
3. Facial coverings are not advisable for health reasons;

4. Facial coverings are in violation of the business' documented safety policies; or
5. Facial coverings are not required when the employee works alone in an assigned work area.

iv. Businesses must provide written justification, upon request, explaining why an employee is not required to wear a facial covering in the workplace. At minimum,facial coverings (masks) should be cloth/fabric and cover an individual's nose, mouth, and chin.

v. Maintain at least six feet from other employees and members/clients unless instruction makes it impractical.

...

11. Duration. This Order shall be effective at 12 :01 a.m. on May 26, 2020 and remains in full force and effect until 11:59 p.m. on July 1, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date.

...

Accordingly, I hereby **ORDER** that gyms, dance instruction studios, and other personal fitness venues may reopen as set forth in this Order. This Order shall remain in full force and effect until 11:59 p.m. on July 1, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date. ...

/s/ Amy Acton May 22, 2020
Amy Acton, MD, MPH
Director of Health