

APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

No. 22-1343
JENNIFER REINOEHL—
PETITIONER/PLAINTIFF-APPELLEE
VS.
GOVERNOR GRETCHEN WHITMER, ET AL.—
RESPONDENTS/DEFENDANT-APPELLANT

April 17, 2023

ORDER

Pro se litigant Jennifer J. Reinoehl appeals the district court's judgment dismissing her complaint claiming discrimination based on Michigan's mask mandate. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a). Because Reinoehl failed to state viable claims, we affirm the dismissal.

In 2021, Reinoehl sued Michigan Governor Gretchen Whitmer, Director of the Michigan Department of Health and Human Services Robert Gordon, and the Young Men's Christian Association of Greater Michiana, Inc. (YMCA). Although much of her complaint concerns her general thesis that cloth facemasks are an ineffective means to control the spread of COVID-19, her claim for discrimination centers around a single incident on January 4, 2021. Reinoehl, who has asthma and tachycardia, alleged that the YMCA denied her entry to its Niles branch to watch her daughter swim because she did not wear a facemask. She claimed that YMCA staff refused to

accept her word that she suffered from breathing problems despite showing them her inhaler and that they said they would rather follow Michigan's facemask guidance than the Americans Disabilities Act (ADA). Reinoehl therefore claimed that she was discriminated against based on her disability under Title II of the ADA; that her First Amendment rights to free speech and to the free exercise of religion were violated because facemasks make her words difficult to understand and force her to participate in a pagan cult; that her right against unlawful searches and seizures under the Fourth Amendment was violated; and that her Fifth and Fourteenth Amendment rights to substantive and procedural due process and to equal protection were violated by Michigan's mask mandate. She sought declaratory, injunctive, and monetary relief. The district court denied Reinoehl's motions for a temporary restraining order and preliminary injunction.

The defendants moved to dismiss the complaint, and a magistrate judge recommended granting the motion. *Reinoehl v. Whitmer*, No. 1:21-cv-61, 2022 WL 1110273 (W.D. Mich. Feb. 3, 2022). Reinoehl then moved for leave to file a second amended complaint. Over Reinoehl's objections, the district court adopted the report and recommendation, denied leave to file a second amended complaint--because the motion was untimely and amendment would be futile--and dismissed the case. *Reinoehl v. Whitmer*, No. 1:21-cv-61, 2022 WL 855266 (W.D. Mich. Mar. 23, 2022).

On appeal, Reinoehl argues that she should have been allowed to pursue a claim under Title II of the ADA even though she explicitly invoked Title III; that Whitmer and Gordon should not be protected by qualified immunity in their individual capacities;

that her claims that facemasks violate her religious beliefs and stifle her speech are not frivolous; that the YMCA's refusal to grant her entry to their property is a seizure in violation of the Fourth Amendment; that her procedural due process rights are triggered because of the risk to her life posed by requiring her to wear a facemask; that requiring people to wear ineffective facemasks is tyrannical; that she should have been allowed to file the second amended complaint because its lateness was due to a mailing error and the proposed pleading stated her claims better than the first amended complaint; and that she should have been allowed to file a doctor's note under seal.

We review *de novo* a district court's judgment granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See *Bickerstaff v. Lucarelli*, 830 F.3d 388, 395-96 (6th Cir. 2016). To avoid dismissal, "a 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Whitmer and Gordon assert that Reinoehl lacks standing to sue them because she did not allege facts connecting their actions to the YMCA's decision to exclude her from their facility for not wearing a facemask. "Article III of the Constitution gives federal courts subject matter jurisdiction over actual cases or controversies, neither of which exists unless a plaintiff establishes [her] standing to sue." *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 748 (6th Cir. 2012). To establish standing, "[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 favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S.

330, 338 (2016). Although the YMCA, rather than Whitmer or Gordon, made the decision not to admit Reinoehl, she alleged that the YMCA told her that they were doing so in order to follow the state mask regulations. The YMCA itself claimed in its motion to dismiss that “Plaintiff was ultimately prevented entry to the YMCA based on Michigan directives then in place.” Given these allegations, Reinoehl’s claimed injury could be traced back to the state regulations to at least some degree, and we conclude that the district court correctly exercised jurisdiction.

Turning to Reinoehl’s ADA claim against Whitmer and Gordon, Title III prohibits discrimination on the basis of a disability by a person who owns, leases, or operates a place of public accommodation. *See 42 U.S.C. § 12182(a)*. Because Whitmer and Gordon do not personally own, lease, or operate the YMCA or a place of public accommodation, the ADA claim against them was correctly dismissed. *See Madej v. Maiden*, 951 F.3d 364, 372 (6th Cir. 2020) (noting that Title III covers private entities). In her proposed second amended complaint, Reinoehl attempted to raise this claim under Title II, which provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” *42 U.S.C. § 12132*. If Reinoehl meant to raise that claim instead of her Title III claim, it would still fail because she sued Whitmer and Gordon solely in their individual capacities, and Title II claims cannot be brought against public officials acting in their individual capacities. *See Everson v. Leis*, 556 F.3d 484, 501 n.7 (6th Cir. 2009). Reinoehl waited until her reply brief to raise related claims under Michigan law, and we

therefore need not consider them here. *See Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010); *Osborne v. Hartford Life & Accident Ins*, 465 F.3d 296, 301 (6th Cir. 2006).

Reinoehl's allegations against the YMCA might support a viable ADA Title III claim. *See Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008) (outlining the elements). But Title II does not provide for money damages to an aggrieved person except in a discrimination action brought by the Attorney General. *See Southwell v. Summit View of Farragut, LLC*, 494 F. App'x 508, 512 (6th Cir. 2012) (citing *Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 293 & n.5 (6th Cir. 1999)). Because Michigan's mask mandate has since been rescinded and Reinoehl does not allege an independent policy of the YMCA to exclude her, her Title III claim against the YMCA is moot. *See Resurrection School v. Hertel*, 35 F.4th 524, 527 (6th Cir. 2022) (en banc).

Reinoehl next claimed that her First Amendment rights to freedom of speech and the free exercise of her religion were violated by Michigan's masking rules. She based her free speech claim on her belief that a facemask muffles her voice and makes her difficult to understand. She based her freedom-of-religion claim on the fact that masks in some form "have been used since ancient times in pagan religious ceremonies" and that forcing her to participate in wearing a mask thus violates her faith. These theories stretch plausibility beyond the point of breaking. She also suggested that some people might refuse to wear a mask as a form of protest in and of itself, but she does not claim that was her purpose or allege facts suggesting that she was discriminated against on that basis.

Reinoehl also asserted that the defendants violated her Fourth Amendment right against

unreasonable searches and seizures. But she did not allege any facts suggesting that she was searched, whether by a state official or a YMCA employee, or that any defendant used force with the intent to restrain her. See *Torres v. Madrid*, 141 S. Ct. 989, 998 (2021). Neither do her allegations suggest that a reasonable person in her position would have believed she was not free to leave after being denied entry to the YMCA. See *United States v. Gross*, 662 F.3d 393, 398-99 (6th Cir. 2011). This claim was correctly dismissed.

Reinoehl next raised both procedural and substantive due process claims. There are “two steps for analyzing procedural due process claims: (1) ‘whether there exists a liberty or property interest which has been interfered with by the State’ and (2) ‘whether the procedures attendant upon that deprivation were constitutionally sufficient.’ *Bethel v. Jenkins*, 988 F.3d 931, 942 (6th Cir. 2021) (quoting *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). She does not identify any caselaw establishing that she had a right to enter a privately owned and run recreational facility, however. And individualized process is not required when the state issues a generally applicable law or order. See *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 596-97 (6th Cir. 2003).

Substantive due process protects only “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (cleaned up). To establish a substantive due process claim, a plaintiff generally must show the deprivation of a constitutionally protected liberty or property interest

without any reasonable justification in a legitimate governmental objective, *see Parrino v. Price*, 869 F.3d 392, 397 (6th Cir. 2017), or establish that the government engaged in conduct that shocks the conscience, *see Piftman v. Cuyahoga Cnty. Dep't of Child & Fam. Servs.*, 640 F.3d 716, 728 (6th Cir. 2011). Reinoehl cites no authority that she has a fundamental right to enter a privately owned recreational facility, and thus the public health regulation is subject to rational basis review, “requiring only that the regulation bear some rational relation to a legitimate state interest.” *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002); *see Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 692-93 (6th Cir. 2014).

Whitmer and Gordon had a legitimate interest in controlling the spread of COVID-19 in Michigan, and their mask mandate is rationally related to that interest. Reinoehl claims that cloth masks are not an effective means to curtail the spread of COVID-19, but under rational basis review a regulation “may be based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Comme ns, Inc.*, 508 U.S. 307, 314-15 (1993).

Reinoehl also raised an equal protection claim asserting that the mask mandate prevented her from enjoying the same access to public spaces as non-disabled persons. Medically disabled persons are not a suspect class [or purposes of an equal protection challenge, however. *See S.S. v. E. Ky. Univ.*, 532 F.3d 445, 457 (6th Cir. 2008). Because she does not allege that she was treated differently than other similarly situated individuals, and given that the masking regulation passes the rational basis test, this claim was also properly dismissed.

Insofar as Reinoehl still requests injunctive relief concerning the mask mandates, they have been

rescinded and the claims are thus moot. *See Resurrection School*, 35 F.4th at 527. And whether she should have been allowed to seal her doctor's note from public view is irrelevant to the dismissal of her claims.

Reinoehl also challenges the denial of her motion for leave to file a second amended complaint. A district court should "freely" grant a party leave to amend her complaint "when justice so requires." Fed. R. Civ. P. 15(a). But a court may deny leave "if there is 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" *Riverview Health Inst. V. Med. Mut. Of Ohio*, 601 F.3d 505, 520 (6th Cir. 2010) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

We ordinarily review the denial of a motion to amend a complaint for an abuse of discretion, see *Williams v. City of Cleveland*, 771 F.3d 943, 949 (6th Cir. 2014), but when the district court has denied leave based on its legal conclusion that amendment would be futile, we review whether the proposed amended complaint "contains 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Id.* (quoting *D'dmbrosio v. Marino*, 747 F.3d 378, 383 (6th Cir. 2014)).

The district court correctly determined that amendment would be futile because the proposed second amended complaint largely raised the same claims. Reinoehl's minor alterations—such as adding a claim under Title II of the ADA or referencing 21 U.S.C. § 360bbb-3(e)(1)(A)—do not save the complaint or raise new, viable claims for relief. Moreover, the district court determined that the eleventh-hour timing of Reinoehl's motion

demonstrated undue delay because she waited until long after the defendants had filed their motions to dismiss, as well as after the report and recommendation and objections to it had been filed. These claims were available to her from the time she filed her lawsuit, and mailing issues and a snowstorm do not explain this extended delay. The district court's denial of leave on this basis was not an abuse of discretion.

For the foregoing reasons, we AFFIRM the district court's judgment.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk

APPENDIX B
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

No. 1:21-cv-00061-JTN-PJG
JENNIFER REINOEHL—
PETITIONER/PLAINTIFF-APPELLEE
VS.
GOVERNOR GRETCHEN WHITMER, ET AL.—
RESPONDENTS/DEFENDANTS-APPELLANTS

March 23, 2022

OPINION & ORDER

Plaintiff Jennifer J. Reinoehl initiated this action against (1) Michigan Governor Gretchen Whitmer; (2) Director of the Michigan Department of Health and Human Services (MDHHS) Robert Gordon; and (3) the Young Men's Christian Association (YMCA) of Greater Michiana, Inc. The claims stem from Plaintiff not being allowed to enter the YMCA to watch her daughter swim because she refused to wear a mask.

Defendants have filed two separate motions to dismiss (ECF Nos. 19 and 22). The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R), recommending that the Court grant Defendants' motions and dismiss Plaintiff's First Amended Complaint (ECF No. 37). The matter is presently before the Court on Plaintiff's objections (ECF No. 38) to the Report and Recommendation and Plaintiff's Motion for Leave to File a Second Amended Complaint (ECF No. 47). In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and

Recommendation to which objections have been made. For the reasons stated below, the Court denies Plaintiff's objections and motion to amend.

I. Plaintiff's Objections

Plaintiff first argues that the Magistrate Judge erred in construing her ADA claims against the State Defendants under Title III as opposed to Title II. Count I of the First Amended Complaint is titled "Violation of American Disabilities Act" (ECF No. 16 at PageID.553). Below the heading, Plaintiff cites 42 U.S.C. § 12182, which is codified in Title III of the ADA (*id.*). There is no indication that Plaintiff intended to bring any claim under Title II of the ADA. In the motion to dismiss, the State Defendants identified the claims as Title III claims and argued that they were not "private entities" for the purposes of Title III (ECF No. 23 at PageID.630). In her response, Plaintiff elected not to address the State Defendants' argument (*See* ECF No. 26). Accordingly, Plaintiff has waived this argument. *See Murr v. United States*, 200 F.3d 895, 901 n.1 (6th Cir. 2000). Nonetheless, even if the Court construed Plaintiff's claims under Title II of the ADA, the claims fail as a matter of law. "Title II of the ADA does not . . . provide for suit against a public official acting in his individual capacity." *Everson v. Leis*, 556 F.3d 484, 501 n.7 (6th Cir. 2009). Plaintiff sues the State Defendants in their individual capacities (ECF No. 16 at PageID.518-519). Thus, Plaintiff's ADA claims fail.⁴

⁴ Plaintiff also contends that the Magistrate Judge erred in "conclud[ing] that Plaintiff] needed to prove her ADA claims" (ECF No. 38 at PageID.853). The Magistrate Judge did not require Plaintiff to prove

Plaintiff next argues that the Magistrate Judge erred in concluding that Plaintiff's First Amendment claims were "patently frivolous." The Magistrate Judge explained:

Plaintiff alleges that being compelled to wear a mask violates her right to free speech by "muffling [her] voice and making [her] words difficult to understand." Plaintiff also alleges that a mask mandate constitutes a religion which she cannot be mandated to follow and that she instead "has the right to freely exercise her religion according to the dictates of her own conscious (sic)." Plaintiff's claims are patently frivolous and diminish the protections the First Amendment and the Michigan Constitution afford to truly fundamental rights. (ECF No. 37 at PageID.847).

The Court finds no error in the Report and Recommendation. Plaintiff's argument fails to demonstrate any factual or legal error in the Magistrate Judge's analysis.

Plaintiff argues that the Magistrate Judge erred in concluding that the "Gatherings and Face Mask Order does not authorize the unlawful search or seizure of any person not wearing a mask" (ECF No. 38 at PageID.856). In support of this argument, Plaintiff cites a provision of the order providing that a person "may not assume that someone who enters the facility without a face mask falls within one of the exceptions . . ." (*id.* at PageID.857). Plaintiff, however, ignores other provisions of the order that

her ADA claims. And, as explained above, Plaintiff's ADA claims fail as a matter of law.

allow a place of public accommodation to accept a person's verbal representations that they qualified for an exception (ECF No. 23-1 at PageID.654-655). More importantly, as the Magistrate Judge correctly determined, Plaintiff never alleged that she suffered any unreasonable search or seizure. She did not have a right to enter the YMCA and was not prevented from leaving.

Plaintiff next argues that the Magistrate Judge erred in concluding that her due process claims be dismissed. In recommending the dismissal of the procedural due process claims, the Magistrate Judge relied on *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896 (S.D. Ohio April 21, 2020) and *Memphis A. Philip Randolph Institute v. Hargett*, 482 F. Supp. 3d 673, 684- 85 (M.D. Tenn. 2020). Plaintiff has failed to sufficiently distinguish these cases. "The fact that an agency's order 'may in its effects have been thought more disadvantageous by some . . . than by others does not change its generalized nature.'" *United States v. Florida East Coast Ry.*, 410 U.S. 224, 246 (1973). Nor has Plaintiff adequately advanced a protected interest to support her procedural due process claim.

In recommending the dismissal of the substantive due process claims, the Magistrate Judge explained that "[s]tate action involving public health emergencies will be struck down on substantive due process grounds only 'if it 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'" (ECF No. 37 at PageID.849 quoting *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 834-35 (W.D. Tenn. 2020)). The Magistrate Judge then determined that Plaintiff's allegations failed to meet this standard. The Court finds no error in the Magistrate Judge's analysis.

Finally, Plaintiff argues that the Magistrate Judge erred in “not accept[ing] the medically disabled as a class” (ECF No. 38 at PageID.860). Plaintiff does not adequately explain this objection. “The filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object.” *Cole v. Yukins*, 7 F. App’x 354, 356 (6th Cir. 2001). Therefore, the Court need not address this objection. To the extent that Plaintiff is arguing that the “medically disabled” be considered a suspect class, the Sixth Circuit has rejected such an argument. *S.S. v. E. Kentucky Univ.*, 532 F.3d 445, 457 (6th Cir. 2008)

Accordingly, this Court adopts the Magistrate Judge’s Report and Recommendation as the Opinion of this Court.

II. Plaintiff’s Motion for Leave to File Second Amended Complaint

After Plaintiff filed objections and Defendants responded, Plaintiff filed a Motion for Leave to File a Second Amended Complaint (ECF No. 47). Rule 15 of the Federal Rules of Civil Procedure mandates that the Court “freely give leave” to amend when it is in the interests of justice. FED. R. CIV. P. 15(a)(2). However, courts may deny a request to amend if there has been undue delay in filing, if the amendment would cause undue prejudice to the opposing party, or if the amendment would be futile. *Brumbalough v. Camelot Care Centers*, 427 F.3d 996, 1001 (6th Cir. 2005).

Having reviewed the motion and the proposed second amended complaint, the Court denies Plaintiff leave because the proposed amendment is futile and untimely. A proposed amendment is futile if the amendment could not withstand a FED. R. CIV. P 12(b)(6) motion to dismiss. *Rose v. Hartford*

Underwriters Ins. Co., 203 F.3d 417, 420 (6th Cir. 2000)). In this case, the eightytwo- page proposed second amended complaint and 177 pages of exhibits fail to state a claim for many of the same reasons the First Amended Complaint failed to state a claim. For example, the ADA claims against the State Defendants still fail because Plaintiff is suing those individuals in their individual capacities (ECF No. 47-2 at PageID.931). Similarly, Plaintiff has still not alleged that she had a right to enter the YMCA or that she was prevented from leaving when she was “interrogated” by an employee of the YMCA (*id.* at PageID.989).

Furthermore, Plaintiff’s proposed second amended complaint is untimely. A party seeking leave to amend “must act with due diligence if it wants to take advantage of the Rule’s liberality.” *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000) (internal quotation marks omitted). Here, Plaintiff filed the original complaint in January 2021 (ECF No. 1). She moved to amend the original complaint on February 3, 2021 (ECF No. 8). The motions to dismiss have been pending since March 2021. Plaintiff claims that she discovered new information in October 2021 (ECF No. 47 at PageID.924). Despite the new information, Plaintiff waited another four months to seek leave to file the second amended complaint. Plaintiff waited until after the Report and Recommendation, the objections, and the responses to the objections were filed. Plaintiff has failed to adequately explain the delay.

Accordingly:

IT IS HEREBY ORDERED that the Objections (ECF No. 38) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No.

37) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the Defendants' motions to dismiss (ECF No. 19 and 22) are GRANTED. A Judgment will be entered consistent with this Opinion and Order. *See* FED. R. CIV. P. 58.

IT IS FURTHER ORDERED that the Plaintiff's motion for leave to file a second amended complaint (ECF No. 47) is DENIED.

Dated: March 23, 2022

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

APPENDIX C
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

No. 1:21-cv-00061-JTN-PJG
JENNIFER REINOEHL—
PETITIONER/PLAINTIFF-APPELLEE
VS.
GOVERNOR GRETCHEN WHITMER, ET AL.—
RESPONDENTS/DEFENDANTS-APPELLANTS

February 3, 2023

REPORT AND RECOMMENDATION

This matter is before the Court on Defendant's Motion to Dismiss (ECF No. 19) and Defendants' Motion to Dismiss (ECF No. 22). Pursuant to 28 U.S.C. 636(b)(1)(B), the undersigned recommends that both motions be granted and this action terminated.

BACKGROUND

Plaintiff, proceeding pro se, initiated the present action against: (1) Michigan Governor Gretchen Whitmer; (2) Director of the Michigan Department of Health and Human Services (MDHHS) Robert Gordon; and (3) the Young Men's Christian Association (YMCA) of Greater Michiana, Inc. In her 337-page complaint (ECF No. 1) Plaintiff alleged the following.

On December 18, 2020, Robert Gordon issued a Gatherings and Face Mask Order (the "Order"), which provided, in part, that: (1) the requirement to wear a face mask does not apply to individuals who "cannot medically tolerate a face mask"; (2) the Gatherings and Face Mask Order does not modify,

limit, or abridge state or federal protections afforded to persons with disabilities; and (3) a person's "verbal representation that they are not wearing a face mask because they fall within a specified exception. . .may be accepted."

Gordon permitted the MDHHS to publish on its website a pamphlet informing asthma sufferers, in part, that "if [your] doctor does give you a pass not to wear a mask, you may not be able to go to places that require them." The MDHHS has also advised medical providers that "the decision to give face mask exemptions should not be taken lightly and should be considered only in extreme circumstances" and, moreover, that "during the pandemic, people who are having active breathing problems should stay home except to seek medical care."

Plaintiff suffers "breathing and heart issues, including but not limited to asthma and tachycardia" and experiences increased body temperature and decreased blood oxygen levels if she wears a mask for longer than 15 minutes. On January 4, 2021, Plaintiff attempted to enter the YMCA, presumably while not wearing a mask or face covering, but was denied entry. Plaintiff was attempting to enter the YMCA so she could watch her daughter swim. Plaintiff was informed by a YMCA official that the facility "would follow Robert Gordon's mask regulations and not follow the Federal Americans with Disabilities Act of 1990." Plaintiff alleges that the decision by the YMCA to deny her entry on the date in question, as well as the actions by Defendants Whitmer and Gordon to issue and implement the Gatherings and Face Mask Order and other Covid-related guidance and requirements, violated her rights under the Americans with Disabilities Act (ADA) as well as her First, Fourth, Fifth, and

Fourteenth Amendment rights. Plaintiff seeks \$100,000 in damages and “a free unlimited lifetime family membership for Plaintiff and her family” from Defendant YMCA. Plaintiff also seeks declaratory and injunctive relief.

Contemporaneous with her complaint, Plaintiff moved for a preliminary injunction and a temporary restraining order. (ECF No. 4). On January 22, 2021, the undersigned recommended that Plaintiff’s motion be denied on the ground that she was unlikely to prevail on any of the claims in her complaint. (ECF No. 7). This recommendation was adopted by the Honorable Janet T. Neff. (ECF No. 25). While Plaintiff has since amended her complaint (ECF No. 16), the claims therein mirror those advanced in her original complaint.

On March 16, 2021, Plaintiff stipulated to the dismissal of her claims against Defendant YMCA, save her claim under the ADA and her request for declaratory and injunctive relief. (ECF No. 17-18). Defendants YMCA, Gordon, and Whitmer now move to dismiss Plaintiff’s remaining claims. Plaintiff has responded to Defendants’ motions. The Court finds that oral argument is unnecessary to resolve the present motions. See W.D. Mich. LCivR 7.2(d).

LEGAL STANDARD

A claim must be dismissed for failure to state a claim on which relief may be granted unless the “[f]actual allegations [are] enough to raise a right for relief above the speculative level on the assumption that all of the complaint’s allegations are true.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). The Court need not accept as true, however, factual allegations which are “clearly irrational or wholly incredible.” *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

As the Supreme Court has held, to avoid dismissal, a 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, 677-78 (2009). This plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” If the complaint simply pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* As the Court further observed:

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. . Rule 8 marks a notable and generous departure from the hyper-technical, 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. . 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. 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.”

Id. at 678-79 (internal citations omitted).

The burden to obtain relief under Rule 12(b)(6), however, rests with the defendant. See, e.g., DirecTV, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007). The Court must “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” A motion to dismiss “should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.” *Ibid.*

ANALYSIS

I. Americans with Disabilities Act (ADA)

Plaintiff alleges that Defendants have violated her rights under Title III of the ADA which prohibits a place of public accommodation from discriminating against an individual on the basis of a disability. See, e.g., *Campbell v. Speedway LLC*, 225 F.Supp.3d 663, 669 (E.D. Mich. 2016). To prevail on this claim, Plaintiff must establish: (1) she is disabled as defined by the ADA; (2) the defendant is a private entity which operates a place of public accommodation; and (3) the defendant took adverse action against Plaintiff that was “based on [Plaintiff’s] disability.” *Smith v. Brookshire Brothers*, 2011 WL 13203044 at *2 (W.D. Tex., Apr. 5, 2011).

To the extent Plaintiff claims that Defendants Whitmer and Gordon violated her rights under the ADA, such claims fail because neither Defendant operates a place of public accommodation which denied Plaintiff access because of her disability. Plaintiff’s claim that the YMCA violated her rights

under the ADA fails because Plaintiff does not allege that she was denied entry to the YMCA based on any disability from which she may have been suffering. Rather, Plaintiff alleges she was denied entry because she refused to wear a mask. The Court is not aware of, and Plaintiff has failed to identify, authority establishing that refusal to comply with lawful public health requirements constitutes a disability under the ADA.

The Court recognizes that Plaintiff has submitted a note from her doctor, dated March 19, 2021, stating that Plaintiff “has asthma – has hard time breathing and can not wear a mask.” (ECF No. 29, PageID.777). This document, however, fails to advance Plaintiff’s cause. First, the fact that Plaintiff may experience asthma does not mean that she suffers from a disability as defined by the ADA. See, e.g., *Svoboda v. TimkenSteel Corp.*, 2020 WL 1513710 a7 *7 (N.D. Ohio, Mar. 30, 2020) (while asthma “can affect an individual’s major life activity of breathing” because such presents “in varying levels of severity,” a plaintiff must establish that such “substantially limits his ability to breathe”). Second, to the extent Plaintiff seeks to rely on her doctor’s assertion that she was unable to wear a mask, such is dated more than two months after the incident at the YMCA and does not establish that Plaintiff, as of the date in question, was unable to wear a mask.

The undersigned recommends, therefore, that Plaintiff’s ADA claims be dismissed.

II. First Amendment

Plaintiff alleges that Defendants Gordon and Whitmer violated her First Amendment rights as well as her free speech rights under the Michigan

Constitution.⁵ Specifically, Plaintiff alleges that being compelled to wear a mask violates her right to free speech by “muffling [her] voice and making [her] words difficult to understand.” Plaintiff also alleges that a mask mandate constitutes a religion which she cannot be mandated to follow and that she instead “has the right to freely exercise her religion according to the dictates of her own conscious (sic).” Plaintiff’s claims are patently frivolous and diminish the protections the First Amendment and the Michigan Constitution afford to truly fundamental rights.

To the extent Plaintiff’s complaint is interpreted as asserting a claim that her refusal to comply with the Order constitutes symbolic speech, such is likewise rejected. See, e.g., *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65- 66 (2006) (the Court “rejected the view that conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”); *Zinman v. Nova Southeastern University, Inc.*, 2021 WL 4025722 at *12-13 (S.D. Fla., Aug. 30, 2021) (rejecting the argument that wearing or refusing to wear a mask is expressive speech protected by the First Amendment.) Accordingly, the undersigned recommends that Plaintiff’s free speech claims, asserted under the First Amendment and the Michigan Constitution, be dismissed.

III. Fourth Amendment

The Fourth Amendment protects against unreasonable searches and seizures. Plaintiff alleges

⁵ The free speech protections articulated in the Michigan Constitution are identical to those guaranteed by the First Amendment. See *Thomas M. Cooley Law School v. Doe 1*, 833 N.W.2d 331, 338 (Mich. Ct. App. 2013).

that Defendants Gordon and Whitmer violated her Fourth Amendment rights “by mandating searches of everyone not wearing a mask.” Plaintiff does not allege, however, that she suffered any unreasonable search or seizure. Likewise, the Gatherings and Face Mask Order she is challenging does not authorize, or purport to authorize, the unlawful search or seizure of any person not wearing a mask or otherwise not in compliance with the Order. The undersigned recommends, therefore, that Plaintiff’s Fourth Amendment claims be dismissed.

IV. Fifth and Fourteenth Amendment

Plaintiff alleges that Defendants Gordon and Whitmer violated her Fifth Amendment due process rights. Plaintiff further alleges that Defendants violated her right to substantive due process and equal protection under the Fourteenth Amendment.

A. Procedural Due Process

The analysis applicable to procedural due process claims under the Fifth and Fourteenth Amendments is identical. See, e.g., *Parrino v. Sebelius*, 155 F.Supp.3d 714, 718 n.1 (W.D. Ky. 2015); *Mathis v. Franklin County Children Services*, 2008 WL 1775422 at *5 (S.D. Ohio, Apr. 16, 2008). To prevail on a procedural due process claim, Plaintiff must establish: (1) a life, liberty, or property interest requiring constitutional protection; (2) a deprivation of that interest; and (3) that the deprivation occurred without adequate process. *Burton v. Michigan Department of Corrections*, 2020 WL 5677465 at *5 (W.D. Mich., Sept. 24, 2020).

Denying Plaintiff access to a privately-owned recreational facility does not implicate Plaintiff’s due process rights. See, e.g., *Memphis A. Philip Randolph Institute v. Hargett*, 482 F.Supp.3d 673, 684-85 (M.D. Tenn. 2020) (due process is implicated where the

state interferes with a constitutionally protected interest). Plaintiff's claim that Defendants Whitmer and Gordon violated her rights by enacting and/or implementing a mask mandate likewise falls short. While due process generally requires either a pre-deprivation or post-deprivation hearing, no hearing is required "in those circumstances where the State has issued a generally applicable law or order." *Hartman*, 2020 WL 1932896 at *7 "[g]overnmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard").

B. Substantive Due Process

State action involving public health emergencies will be struck down on substantive due process grounds only "if it 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." *TJM 64, Inc. v. Harris*, 475 F.Supp.3d 828, 834-35 (W.D. Tenn. 2020) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)). Plaintiff's allegations do not satisfy this standard. See, e.g., *P.M. by and Through Maras v. Mayfield City School District Board of Education*, 2021 WL 4148719 at *3 (N.D. Ohio, Sept. 13, 2021) (COVID-related mask mandates do not violate substantive due process); *Denis v. Ige*, 538 F.Supp.3d 1063, 1080-81 (D. Hawai'i 2021) (same).

C. Equal Protection

Plaintiff also alleges that Defendants violated her right to equal protection. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To prevail on her equal protection claim, Plaintiff must establish "that the government treated [her] '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.” *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011). The

Supreme Court has also recognized what is referred to as a “class-of-one” equal protection claims in which the plaintiff does not allege membership in a particular class or group, but instead alleges that she “has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Davis v. Prison Health Services*, 679 F.3d 433, 441 (6th Cir. 2012). Plaintiff does not allege that she has been treated differently from similarly situated people.

Accordingly, the undersigned recommends that Plaintiff’s Fifth and Fourteenth Amendment claims be dismissed.

V. Declaratory and Injunctive Relief

The undersigned recommends that Plaintiff’s claims for declaratory judgment be dismissed. Plaintiff has failed to allege any violation of her rights based on Defendants’ prior conduct. Likewise, Plaintiff cannot establish that she is likely to suffer legally cognizable harm in the future as a result of the matters alleged. Finally, the undersigned recommends that Plaintiff’s claims for injunctive relief be dismissed for the reasons articulated herein and in the undersigned’s prior Report and Recommendation.

CONCLUSION

For the reasons articulated herein, the undersigned recommends that Defendant’s Motion to Dismiss (ECF No. 19) and Defendants’ Motion to Dismiss (ECF No. 22) both be granted and this action terminated.

OBJECTIONS to this Report and
Recommendation must be filed with the Clerk of
Court within fourteen days of the date of service of
this notice. 28 U.S.C. 636(b)(1)(C). Failure to file
objections within the specified time waives the right
to appeal the District Court's order. See *Thomas v.*
Arn, 474 U.S. 140 (1985); *United States v. Walters*,
638 F.2d 947 (6th Cir.1981).

Respectfully submitted,
Date: February 3, 2022
/s/ Phillip J. Green
PHILLIP J. GREEN
United States Magistrate Judge

APPENDIX D
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

No. 22-1343
JENNIFER REINOEHL—
PETITIONER/PLAINTIFF-APPELLEE
VS.
GOVERNOR GRETCHEN WHITMER, ET AL.—
RESPONDENTS/DEFENDANT-APPELLANT

May 30, 2023

ORDER

Plaintiff-Appellant filed a petition for rehearing and rehearing en banc on May, 2023. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing en banc is therefore DENIED.

APPENDIX E***STATUTORY PROVISIONS*****Federal Rules of Civil Procedure****Rule 1**

“These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

Rule 8(e)

“(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.”

Statutes**21 U.S.C. § 360bbb(a)**

“The following acts and the causing thereof are prohibited: **(a)** The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded. **(b)** The adulteration or misbranding of food, drug, device, tobacco product, or cosmetic in interstate commerce.

(a) IN GENERAL (1) EMERGENCY USES

Notwithstanding any provision of this chapter and section 351 of the Public Health Service Act [42 U.S.C. 262], and subject to the provisions of this section, the Secretary may authorize the introduction into interstate commerce, during the effective period of a declaration under subsection (b), of a drug,

device, or biological product intended for use in an actual or potential emergency (referred to in this section as an “emergency use”).

(2) APPROVAL STATUS OF PRODUCT An authorization under paragraph (1) may authorize an emergency use of a product that—**(A)**is not approved, licensed, or cleared for commercial distribution under section 355, 360(k), 360b, or 360e of this title or section 351 of the Public Health Service Act [42U.S.C.262] or conditionally approved under section 360ccc of this title (referred to in this section as an “unapproved product”); or **(B)**is approved, conditionally approved under section 360ccc of this title, licensed, or cleared under such a provision, but which use is not under such provision an approved, conditionally approved under section 360ccc of this title, licensed, or cleared use of the product (referred to in this section as an “unapproved use of an approved product”).

(3) RELATION TO OTHER USES An emergency use authorized under paragraph (1) for a product is in addition to any other use that is authorized for the product under a section of this chapter or the Public Health Service Act [42 U.S.C. 201 et seq.] referred to in paragraph (2)(A). **(4) DEFINITIONS** For purposes of this section: **(A)**The term “biological product” has the meaning given such term in section 351 of the Public Health Service Act [42U.S.C.262]. **(B)**The term “emergency use” has the meaning indicated for such term in paragraph (1). **(C)**The term “product” means a drug, device, or biological product. **(D)**The term “unapproved product” has the meaning indicated for such term in paragraph (2)(A). **(E)**The term “unapproved use of an approved product” has the meaning indicated for such term in paragraph (2)(B).

21 U.S.C.§ 360bbb(c)

(c) CRITERIA FOR ISSUANCE OF AUTHORIZATION The Secretary may issue an authorization under this section with respect to the emergency use of a product only if, after consultation with the Assistant Secretary for Preparedness and Response, the Director of the National Institutes of Health, and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the applicable circumstances described in subsection (b)(1)), the Secretary concludes—**(1)**that an agent referred to in a declaration under subsection (b) can cause a serious or life-threatening disease or condition; **(2)**that, based on the totality of scientific evidence available to the Secretary, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that—**(A)**the product may be effective in diagnosing, treating, or preventing—**(i)**such disease or condition; or **(ii)**a serious or life-threatening disease or condition caused by a product authorized under this section, approved or cleared under this chapter, or licensed under section 351 of the Public Health Service Act [42U.S.C.262], for diagnosing, treating, or preventing such a disease or condition caused by such an agent; and **(B)**the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product, taking into consideration the material threat posed by the agent or agents identified in a declaration under subsection (b)(1)(D), if applicable; **(3)**that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition; **(4)**in the case of a determination described in subsection (b)(1)(B)(ii), that the request for emergency use is made by the Secretary of

Defense; and (5)that such other criteria as the Secretary may by regulation prescribe are satisfied.

21 U.S.C. § 360bbb(e)(1)

(1) UNAPPROVED PRODUCT (A) Required conditions With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable circumstances described in subsection (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:

(i) Appropriate conditions designed to ensure that health care professionals administering the product are informed—(I) that the Secretary has authorized the emergency use of the product; (II) of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and (III) of the alternatives to the product that are available, and of their benefits and risks.

(ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed—(I) that the Secretary has authorized the emergency use of the product; (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and (III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks. (iii) Appropriate conditions for the monitoring and reporting of

adverse events associated with the emergency use of the product. (iv) For manufacturers of the product, appropriate conditions concerning recordkeeping and reporting, including records access by the Secretary, with respect to the emergency use of the product."

21 U.S.C. § 360bbb (k)

(k) RELATION TO OTHER PROVISIONS If a product is the subject of an authorization under this section, the use of such product within the scope of the authorization shall not be considered to constitute a clinical investigation for purposes of section 355(i), 360b(j), or 360j(g) of this title or any other provision of this chapter or section 351 of the Public Health Service Act [42 U.S.C. 262].

21 U.S.C. § 360bbb (l)

(l) OPTION TO CARRY OUT AUTHORIZED ACTIVITIES
Nothing in this section provides the Secretary any authority to require any person to carry out any activity that becomes lawful pursuant to an authorization under this section, and no person is required to inform the Secretary that the person will not be carrying out such activity, except that a manufacturer of a sole-source unapproved product authorized for emergency use shall report to the Secretary within a reasonable period of time after the issuance by the Secretary of such authorization if such manufacturer does not intend to carry out any activity under the authorization. This section only has legal effect on a person who carries out an activity for which an authorization under this section is issued. This section does not modify or affect activities carried out pursuant to other provisions of this chapter or section 351 of the Public Health Service Act [42 U.S.C. 262]. Nothing in this

subsection may be construed as restricting the Secretary from imposing conditions on persons who carry out any activity pursuant to an authorization under this section.

28 U.S.C. § 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

29 U.S.C. 794(a) (The Rehabilitation Act of 1973)

“(a) PROMULGATION OF RULES AND REGULATIONS:
No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.”

29 U.S.C. 794(b) (The Rehabilitation Act of 1973)

“(b)’PROGRAM OR ACTIVITY’ DEFINED: For the purposes of this section, the term “program or activity” means all of the operations of—**(1)(A)** a department, agency, special purpose district, or other instrumentality of a State or of a local government; or **(B)** the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or **(B)** a local educational agency (as defined in section 7801 of title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—**(i)** if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or **(ii)** which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or **(B)** the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph **(1)**, **(2)**, or **(3)**; any part of which is extended Federal financial assistance.”

ADA 42 U.S. Code § 12132

“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

ADA 42 US Code § 12182(a)

“(a)GENERAL RULE No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

ADA 42 US Code § 12182(1)(A)

“(1)GENERAL PROHIBITION(A)Activities (i)Denial of participation: It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii)Participation in unequal benefit: It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals. **(iii)Separate benefit:** It shall be discriminatory to provide an individual or class of

individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals: For purposes of clauses (i) through (iii) of this subparagraph, the term “individual or class of individuals” refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.”

ADA 42 US Code § 12182(1)(B)

(B) Integrated settings: Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

ADA 42 US Code § 12182(1)(D)

(D) Administrative methods An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—**(i)**that have the effect of discriminating on the basis of disability; or **(ii)**that perpetuate the discrimination of others who are subject to common administrative control.

ADA 42 US Code § 12182(1)(E)

(E) Association: It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other

opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

ADA 42 US Code § 12182(2)(A)(i)

(2)SPECIFIC PROHIBITIONS (A)Discrimination: For purposes of subsection (a), discrimination includes—
(i)the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

ADA 42 US Code § 12182(1)(A)(ii)

(ii)a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

**Michigan Public Health Code Act 368 of 1978§
333.17011**

(1) An individual shall not engage in the practice of medicine or practice as a physician's assistant unless licensed or otherwise authorized by this article. An individual shall not engage in teaching or research that requires the practice of medicine unless

the individual is licensed or otherwise authorized by this article.

Michigan's Persons with Disabilities Civil Rights Act 220§ 37.1102

(1) The opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a disability is guaranteed by this act and is a civil right.

(2) Except as otherwise provided in article 2, a person shall accommodate a person with a disability for purposes of employment, public accommodation, public service, education, or housing unless the person demonstrates that the accommodation would impose an undue hardship.

Michigan's Persons with Disabilities Civil Rights Act 220§ 37.1302

Except where permitted by law, a person shall not: (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or public service because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations or because of the use by an individual of adaptive devices or aids. (b) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or public service will

be refused, withheld from, or denied an individual because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations or because of the use by an individual of adaptive devices or aids, or that an individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations or because of the use by an individual of adaptive devices or aids.

Michigan State Constitution of 1963 Art. 1§ 4

Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

Michigan State Constitution of 1963 Art. 1§ 5

Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law

shall be enacted to restrain or abridge the liberty of speech or of the press.

Michigan State Constitution of 1963 Art. 17

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Michigan Public Health Code Act 368§ 333.5207

(1) To protect the public health in an emergency, upon the filing of an affidavit by a department representative or a local health officer, the circuit court may order the department representative, local health officer, or a peace officer to take an individual whom the court has reasonable cause to believe is a carrier and is a health threat to others into custody and transport the individual to an appropriate emergency care or treatment facility for observation, examination, testing, diagnosis, or treatment and, if determined necessary by the court, temporary detention. If the individual is already institutionalized in a facility, the court may order the facility to temporarily detain the individual. An order issued under this subsection may be issued in an ex parte proceeding upon an affidavit of a department representative or a local health officer. The court shall issue an order under this subsection upon a determination that reasonable cause exists to believe that there is a substantial likelihood that the individual is a carrier and a health threat to others.

An order under this subsection may be executed on any day and at any time, and shall be served upon the individual who is the subject of the order immediately upon apprehension or detention. (2) An affidavit filed by a department representative or a local health officer under subsection (1) shall set forth the specific facts upon which the order is sought including, but not limited to, the reasons why an emergency order is sought. (3) An individual temporarily detained under subsection (1) shall not be detained longer than 72 hours, excluding Saturdays, Sundays, and legal holidays, without a court hearing to determine if the temporary detention should continue. (4) Notice of a hearing under subsection (3) shall be served upon the individual not less than 24 hours before the hearing is held. The notice shall contain all of the following information: (a) The time, date, and place of the hearing. (b) The grounds and underlying facts upon which continued detention is sought. (c) The individual's right to appear at the hearing. (d) The individual's right to present and cross-examine witnesses. (e) The individual's right to counsel, including the right to counsel designated by the circuit court, as described in section 5205(13). (5) The circuit court may order that the individual continue to be temporarily detained if the court finds, by a preponderance of the evidence, that the individual would pose a health threat to others if released. An order under this subsection to continued temporary detention shall not continue longer than 5 days, unless a petition is filed under section 5205. If a petition is filed under section 5205, the temporary detention shall continue until a hearing on the petition is held under section 5205.

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APPENDIX F
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

No. 1:21-cv-00061-JTN-PJG
JENNIFER REINOEHL—
PETITIONER/PLAINTIFF-APPELLEE
VS.
GOVERNOR GRETCHEN WHITMER, ET AL.—
RESPONDENTS/DEFENDANTS-APPELLANTS

Feb. 23, 2021

**FIRST MOTION FOR LEAVE TO AMEND
COMPLAINT**

COMES NOW Plaintiff and moves the Court pursuant to Rule 15(a)(2) for an Order granting leave to file a First Amended Complaint. In support of this Motion, Plaintiff states as follows:

**INTRODUCTION AND GROUNDS FOR THE
PROPOSED AMENDMENT**

Plaintiff is pro se and attempting to learn the legal process. Plaintiff has no secretarial staff to proofread items as a second set of eyes. Plaintiff made a typo stating 2020 was the year for several dates throughout the Complaint when the events actually took place in 2021.

The Court noticed this in the Report and Recommendation filed January 22, 2021. The Report also reflected that the Complaint was unclear in certain areas.

Therefore, Plaintiff requests to amend the Complaint to fix the year typos from 2020 to the

correct year (2021) in ¶¶ 70, 85, 98, and 132, and to amend other areas for clarity as listed below.

In addition, Plaintiff's agent attempted service on Mark Weber, registered agent for the Young Men's Christian Association of Greater Michiana, Inc. (herein "YMCA"). Mark Weber informed Plaintiff's agent that service should be performed directly on their lawyer: Mowitt S. Drew III and provided the address of 12 Longmeadow Village Dr., Suite 100, Niles, MI, 49120.

In addition to the change of date and clarity issues, Plaintiff would like to add the information about Mowitt S. Drew III to reflect he will be representing the YMCA (¶ 4).

To help with clarity, the Plaintiff requests to amend the Complaint to change the # symbol to the ¶ symbol. Plaintiff requests to fix a typo in ¶ 38. Plaintiff also requests to amend ¶ 97 to better describe her disability. For clarity, Plaintiff also requests to amend ¶ 98 and 99 to more clearly reflect the incident. Plaintiff requests to add a case citation to ¶ 113. Plaintiff also requests to amend ¶ 211 for typos and clarity. Plaintiff requests to amend ¶ 225 to clarify the YMCA also violated the ADA. Plaintiff requests to amend ¶ 247 to reflect the 4th Amendment title instead of its previous 5th Amendment claims. Plaintiff requests to move ¶¶248-258 to the 5th Amendment claim, so they become ¶¶261-271.

LEGAL ARGUMENT

1. Pursuant to Federal Rule of Civil Procedure 15(a)(1), "a party may amend its pleading once as a matter of course within (A) 21 days after serving it..."
2. The policy of the federal rules is to permit liberal amendment to facilitate determination of

claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading. See *Foman v. Davis* :: 371 U.S. 178 (1962), *Conley v. Gibson* :: 355 U.S. 41 (1957).

Plaintiff is acting in good faith in seeking to amend the pleadings in the case. Plaintiff only seeks to clarify the original pleading. She seeks judicial economy and efficiency. Plaintiff is submitting the amendments as soon as she became aware of the need for them and could make them.

CONCLUSION

For the reasons set forth above, the Plaintiff respectfully requests that this Court enter an order granting leave to file the Amended Complaint.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

No. 1:21-cv-00061-JTN-PJG
JENNIFER REINOEHL—
PETITIONER/PLAINTIFF-APPELLEE
VS.
GOVERNOR GRETCHEN WHITMER, ET AL.—
RESPONDENTS/DEFENDANTS-APPELLANTS

Feb. 1, 2021

FIRST MOTION FOR LEAVE TO AMEND
COMPLAINT

COMPLAINT FOR DAMAGES AND
PERMANENT INJUNCTION

Now comes JENNIFER J. REINOEHL (herein referred to as "Plaintiff"), on behalf of herself, pro se, and respectfully brings this Complaint for Damages and Permanent Injunction, against Defendants Governor Gretchen Whitmer, Robert Gordon, and the Young Men's Christian Association of Greater Michiana, Inc. (herein also referred to as "YMCA" or "YMCA of Greater Michiana") collectively referred to herein as "Defendants."

I. PARTIES TO THE COMPLAINT

A. The Plaintiff

1. Jennifer J. Reinoehl resides at 51860 Cheryl Dr., Granger, St. Joseph County, IN, 46530 with phone number: 574-302-6088.

B. The Defendants

2. Governor Gretchen Whitmer is the acting governor of the State of Michigan and resides at 2520

Oxford Rd, Lansing, MI, 48911 and is being sued in her individual capacity.

3. Robert Gordon is the acting Director of the Michigan Department of Health and Human Services (herein referred to as "MDHHS") and resides at 3687 Beech Tree Lane, Okemos, MI, 48864 and is being sued in his individual capacity.

4. The Young Men's Christian Association of Greater Michiana, Inc. is a non-profit health-based organization doing business at 905 North Front Street, Niles, MI, 49120. Mark Weber is its registered agent, according to public record, but Mowitt S. Drew III, at 12 Longmeadow Village Dr., Suite 100, Niles, MI, 49120 is their attorney of record.

II. BASIS FOR JURISDICTION AND VENUE

5. The U.S. District Court for the Western District of Michigan has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, which provides Federal Courts have jurisdiction over cases involving a federal question—U.S. Constitutional Rights granted under the 1st, 4th, 5th, and 14th Amendments and Rights bestowed by the Federal American Disabilities Act are in question.

6. In addition, 28 U.S.C. § 1332 provides Federal Courts have jurisdiction over cases in which a citizen of one State sues a citizen of another State and the amount at stake is more than \$75,000—the Plaintiff is a resident of the State of Indiana and the Defendants reside or primarily operate in Michigan. More than \$75,000 is at stake because the Plaintiff's Rights and the pain and suffering caused when the Plaintiff was given the choice of putting her life at risk or being denied access to the YMCA of Greater Michiana combined with the pain and suffering from

the humiliation she suffered when her Rights were denied and the pain and suffering from the missed developmental moments with her child are worth far more than \$75,000, and in fact are so valuable that no monetary amount would ever fully compensate her loss. These facts also make this a diversity of citizenship case.

7. Title 42§ 1983, the U.S. Constitution, 14th Amendment §5, and *Ex parte Young*, 209 U.S. 123 (1908), allow lawsuits to be brought against persons in government employ when those officials act under the color of law but act independent of Federal and State Laws. Governor Gretchen Whitmer and Robert Gordon are granted lawful authority to enact orders during public emergencies but have abused Federal and State Laws through the orders they have enacted and the posts they have allowed on State websites.

8. The court has personal jurisdiction over the Defendants because they are all situated in Western Michigan with (2) being situated in Lansing and (1) situated in Berrien County, MI.

9. Venue is proper because the events and omissions giving rise to the allegations in this complaint occurred in Berrien County, MI, where (1) of the Defendants is situated (28 U.S. Code § 1391).

III. STATEMENTS OF FACTS

10. Plaintiff resides in the unincorporated community of Granger, St. Joseph County, IN. The Plaintiff, like the rest of the citizens of the United States, has been adversely affected by COVID-19.

A. Historical Scientific Background

11. Prior to the acceptance of Germ Theory—the modern theory of disease transmission—Miasma

Theory was the accepted theory of disease transmission. (Exhibit 1)

12. Miasma Theory was the belief that “bad air,” specifically bad smelling air, caused disease. Miasma Theory adherents believed that the smell of rotting fish or the smell of an unbathed person would cause smallpox or other diseases. Most of their methods of preventing disease transmission focused on avoiding bad smells. (Exhibit 1)

13. The 1600’s plague mask with its long “beak” was designed with Miasma Theory in mind—the “beak” was actually a potpourri holder to keep bad smells from reaching the nose. At the same time, the overall look of a plague doctor’s outfit resembled that of a raven, a creature which has powerful protective mythological ties for the British. These ties are so strong that today at least seven ravens are permanently kept with clipped wings on the Tower of London grounds allegedly for superstitious reasons.

14. The plague mask’s design bridged the fine line between medieval mysticism and science.

15. By the 19th century, masks for public use that protected against Miasma had been patented, including but not limited to Lewis Haslett’s 1849 “Lung Protector,” which used charcoal to purify bad smells.

16. Germ Theory, first proposed in A.D. 1546, had started to gain scientific momentum against Miasma Theory by the late 19th and early 20th century. (Exhibit 1)

17. So strong was the hold of the Miasma Theory, cloth masks were introduced to surgical attire around the 1880s when the scientific works of Pasteur, Lister, and Koch strengthened Germ Theory and their methods and antiseptic procedures reduced deaths from infection after surgery.

18. If the now disproven Miasma Theory had been correct, face masks would have prevented "bad air" from getting to the patient or the doctor. Once Germ Theory was widely accepted, face masks were justified as being able to block bacteria from the surgeon's mouth.
19. Cloth face masks did not improve surgical outcomes over Lister's.
20. No research was performed in regards to the safety or effectiveness of cloth masks prior to their addition to the surgical attire.
21. In the more than 100 years since the introduction of cloth surgical masks, research has shown the ability of cloth masks and masks used by the general public to control disease transmission is scientifically controversial at best and ineffective at worst.
22. In 1910 and 1911, pneumonic plague swept across Manchuria.
23. Extensive experiments were performed on this droplet spread disease.
24. In the Report of the International Plague Conference held at Mukden, April, 1911, scientists placed agar plates in close proximity to a plague patient's mouth as well as holding guinea pigs there, which are susceptible to the plague and concluded,

"During normal and dyspnoeic respiration of primary pneumonic-plague cases, plague bacilli are not usually expelled by means of the expired air. During coughing of such cases, even when sputum visible to the naked eye is not expelled, plague bacilli in large numbers may become widely disseminated into the air surrounding the patient... The idea that infection of

doctors, nurses, attendants, etc., in plague hospitals, is caused entirely by particles of sputum expectorated by the patient and visible to the naked eye, is erroneous."

The scientists recommended tight fitting cloth masks that were more than $\frac{1}{2}$ " thick to stop particles that could not be seen. (Exhibit 2)

25. Only 1 out of 20 doctors who wore this mask at Fuchiatien died. (Exhibit 3)

26. About 1 out of 5 nursing assistants (referred to as "Coolies" in the Exhibit), who were also responsible for burying the dead, died in Fuchiatien even though they were also wearing masks. (Exhibit 3)

27. More than 1 out of 3 "ambulance parties" (drivers and attendants) died in Fuchiatien. (Exhibit 3)

28. High death rates among some medical staff at Fuchiatien were attributed to wearing the mask improperly or inconsistently. (Exhibit 3)

29. In Vol. VII, Sec. B, No. 3, of the Philippine Journal of Science (June, 1912), Barber and Teague, in a variety of experiments that would be deemed unethical by today's standards, had lab assistants hold a solution containing *Bacillus prodigiosus* (*Serratia marcescens*), a bacteria believed to be harmless to humans prior to the 1950s, in their mouths and then blow it out through cloth masks (identical to the ones used in the Manchurian plague and recommended for use in ¶24) to simulate sneezing and coughing, directing the airflow at Petri dishes. Although the masks effectively stopped visible liquid droplets, *Bacillus prodigiosus* (*Serratia marcescens*) were found on the petri dishes. The

masks stopped visible droplets without stopping the bacteria. (Exhibit 3)

30. *Serratia marcescens* is 500-800 x 900-2000 nanometers (μm) in size. SARS-CoV-2, the virus that causes COVID-19 is 60-140 nanometers(μm) in diameter. 168 of the largest SARS-CoV-2 viruses could fit inside the smallest *Serratia marcescens*.

31. The experiment summarized in ¶29 was one of several experiments performed by Barber and Teague that brought into question the effectiveness of cloth face masks. (Exhibit 3)

32. From 1915 to 1920, G.H. Weaver published a several papers defending the use of cloth masks.

33. Weaver's studies do not involve random controlled trials.

34. In *Value of the Face Mask and Other Measures*, Weaver accredited masks of 2 layers of cloth with reducing infection in Durand Hospital.

35. In the later published, *Droplet Infection and Its Prevention by the Face Mask*, Weaver re-examined his statements, after others had shown them to be wrong, and performed an experiment that showed it took at least 6 layers of tightly woven cloth to stop a sufficient number of bacteria. He then recommended cloth masks be made from 3 layers of the same material. (Exhibit 4)

36. Kellogg questioned Weaver's findings on cloth masks after San Francisco mandated masks during the Spanish Flu without any effect on the disease, so he performed a mechanical experiment where he used a machine to blow bacteria through different layers of cloth. He found it took (10) layers of cloth (noting this would cause breathing difficulties) in order to stop the bacteria. (Exhibit 5)

37. All viruses are much smaller than bacteria.

38. Major Capp, relying on Weaver's data, published Measures for the Prevention and Control of Respiratory Infections in Military Camps, August 10, 1918. In it, the measures he promoted after instituting them at Camp Grant included but were not limited to

"every patient [upon arrival to the infirmary] with a contagious disease is masked immediately after the diagnosis is made."

These measures, he said, were

"efficient in 95 per cent. [sic] of the exposures to scarlet fever and 100 per cent. [sic] of the exposures to the measles. If this experience can be taken as criterion, we soon shall be justified in ignoring the quarantine of the ward in these cross-infections, provided the system of masking and the cubicle is in good working order at the time of their appearance."

(Exhibit 6)

39. The Spanish Flu arrived at Camp Grant September 21, 1918, six weeks after the paper discussing Major Capp's measures was published, and saw 70 hospital admissions that day. (Exhibit 7)

40. Eight days later, September 29, 1918, there were 788 admissions. (Exhibit 7)

41. In the end, Camp Grant had 10,713 cases of Spanish Influenza (about $\frac{1}{4}$ the population) and 1,060 deaths. Colonel Charles B. Hagadorn shot himself because so many of his men died. (Exhibit 7)

42. In 1919, the Navy published the results of the extensive research they conducted during the

Spanish Flu on prevention methods, including some random controlled trials of masks, the Secretary of the Navy stated in pertinent part,

'First and last, all preventative measures which seemed logical, either from *a priori* reasoning or because of seemingly good effects claimed elsewhere during the year or previous epidemics, were tried in the Navy. These included quarantine, daily inspection of personnel and the taking of temperatures, early isolation of the sick, the wearing of face masks and gowns and rigid aseptic technic [sic] by attendants upon the sick...Not infrequently certain specific measures which were credited at one station with having prevented the spread of influenza or with having reduced the complications or with having kept case-fatality rates low failed to prove of any value at another station...In other words, each particular preventative measure failed in some instances to accomplish recognizable results."

"The experience of 1918 would indicate that a very important preventative measure when confronted with an outbreak of influenza consists in rapidly enlarging existing medical and nursing facilities for the proper care and treatment of large numbers of persons who will inevitably be attacked regardless of the measures planned to

prevent the occurrence or spread of the disease."

And

"No evidence was presented which would justify compelling persons at large to wear masks during an epidemic. The mask is designed to only afford protection against a direct spray from the mouth of the carrier of pathogenic microorganisms; and assuming that it affords such protection, the probability that the microorganisms will eventually be carried into the mouth or nose by the fingers is very great if the mask is worn for more than a brief period of time. Masks of improper design, made of wide-mesh gauze, which rest against the mouth and nose, become wet with saliva, soiled with the fingers, and are changed infrequently, may lead to infection rather than prevent it especially when worn by persons who have not even a rudimentary knowledge of the modes of transmission of the causative agents of communicable diseases."

And finally,

"At the United States Naval Training Station, Great Lakes, Ill., of 674 hospital corpsmen and volunteers of other ratings who were on duty caring for the sick during the epidemic, 96 wore gauze masks. The others did not. Of the latter, 7.9 per cent [sic] developed

influenza, while 8.3 per cent [sic] of those who wore masks contracted the disease. It will be noted that the attack rate in both groups was much lower than for the personnel in general at the station."

(Exhibit 8)

43. In regards to real world use in a non-military setting, the city of Edmonton, Alberta, Canada, enacted severe measures as soon as they got their first Spanish Flu case. Masks were mandated 14 days after the first outbreak and initially met with high compliance. After the pandemic passed, Dr. T. H. Whitelaw published a scathing rebuke of the health measures in the Canadian Medical Association Journal specifically stating about masks,

"Had this mask order been instituted a few days before the epidemic reached its peak, it would probably have been acclaimed as the chief factor in bringing about the rapid subsidence of the epidemic, but unfortunately for the extravagant claims made in justification of the mask order as means of prevention, the number of cases of the disease continued to increase rapidly for some time after the order was enforced, and public confidence in it as a prevention soon gave way to ridicule."

(Exhibit 9)

44. The number of newly reported cases of Spanish Flu did not begin to subside in Edmonton until December, more than six weeks after the mask mandate was enacted. (Exhibit 9)

45. It has been observed that the failure of cloth masks to prevent disease transmission during the Spanish Flu of 1918-1919 despite widespread use is proof of the ineffectiveness of cloth masks at preventing disease transmission. (Exhibit 10)

46. In the 1930s, electron microscopes were developed. Scientists could see viruses for the first time.

47. In the same decade, surgical masks with superior filtering abilities were developed and their filtering ability continues to improve today.

48. The debate about the effectiveness of cloth masks at preventing disease continued in the United States, and in the 1960s, several papers were published showing the ineffectiveness of cloth masks, especially after more than 10 minutes of use. A review of these papers, among others, is found in Spooner's 1967 paper, History of Surgical Face Masks. (Exhibit 11)

49. By the end of the 1970's, cloth masks were no longer allowed in any American hospital as personal protective equipment (PPE).

50. In the United States, most research on cloth masks stopped at this time.

51. In 2011, Yang et al published Mask-wearing and Respiratory Infection in Healthcare Workers in Beijing, China in the Brazilian Journal of Infectious Diseases. In it, they found nurses who wore cloth masks had significantly higher incidences of respiratory illness in comparison to nurses who wore surgical masks. (Exhibit 12)

52. In 2015, MacIntyre et al, published A Cluster Randomised Trial of Cloth Masks Compared with Medical Masks in BMJ Open and found nurses who wore cloth masks had significantly higher rates of

respiratory illness than those who wore medical masks. (Exhibit 13)

B. COVID-19

53. A newly recognized disease called COVID-19 was announced by the World Health Organization (herein referred to as WHO) on January 5, 2020.

54. On January 30, 2020, the WHO declared the COVID-19 outbreak a “Public Health Emergency of International Concern.”

55. During a public health crisis, including but not limited to pandemics like COVID-19, government agencies and leaders, including but not limited to Governor Gretchen Whitmer and Robert Gordon, are afforded some emergency powers to reasonably address public health and safety issues.

56. In a literature review titled Rapid Expert Consultation on the Effectiveness of Fabric Masks for the COVID-19 Pandemic (April 8, 2020) and the correspondence related to it (herein referred to collectively as “Rapid Response”) issued by the National Academies of Sciences, Engineering, and Medicine (herein referred to as “NAS”), after the Centers for Disease Control (herein referred to as the CDC) stated cloth and non-medical masks and facial coverings (herein referred to as “non-medical masks”) “may prevent asymptomatic spread,” [my emphasis] NAS stated,

“The evidence from these laboratory studies suggests that while fabric masks may reduce the transmission of larger respiratory droplets, there is little evidence regarding transmission of small aerosolized particulates of the size potentially exhaled by asymptomatic or

presymptomatic individuals with COVID-19." (Exhibit 14)

57. The NAS' paper called for more quality research on the safety, effectiveness, and tested design of cloth masks.
58. Since the NAS Rapid Response, most studies published concerning cloth masks are laboratory [theoretical] studies which employ artificially created aerosols with droplets in the visible range. These are the types of studies the NAS relied upon in their Rapid Response and stated were inadequate.
59. Modeling studies, which are not easily replicable and for which modelers can easily adjust the input numbers or parameters to achieve the desired results, are also in great supply. These have little scientific value, especially when they are used to predict future events based on past unknowns.
60. Theoretical, laboratory studies and modeling studies conducted prior to their destruction determined the Twin Towers in New York (which were destroyed when airplanes flew into them on September 11, 2000) could withstand the impact of a 747.
61. Strikingly absent from post-COVID-19 published non-medical mask research are large, significant, peer-reviewed, random-controlled-trials—the gold standard of medical research that the NAS requested.
62. As Feder stated in Why Truth Matters: Research versus Propaganda in the Policy Debate, "...In "truthful" research, the answers are what they are, regardless of the researcher's point of view. By contrast, "propaganda" starts with an answer and relies on research not to find out how things work but to prove a predetermined conclusion." (Exhibit 15)

63. It is easy to manipulate laboratory studies, modeling studies and to a lesser extent observational studies into propaganda.

64. It requires much greater direct deviousness to manipulate data from large, random controlled trials that achieve significant results.

65. The State of Michigan has not conducted any large, significant, peer-reviewed random controlled trials on cloth and non-medical masks nor does it seem to be funding them. (Exhibit 16)

66. The NAS neglected to comment on the research done prior to the 1980s, which is referenced in the Historical Scientific Background section of this Complaint. It can only be assumed this research was unknown to them due to the rapid nature of their response and their inability to do an in-depth analysis.

67. On May 2, 2020, Plaintiff's husband, Jason Reinoehl, was notified someone with whom he had close contact (within 3 feet of distance) at work had tested positive for COVID-19.

68. Due to work mandates, both Jason Reinoehl and the COVID-19 positive individual were both wearing cloth masks given to them by their employer.

69. On May 3, 2020, Jason Reinoehl began to feel unwell. On May 4, 2020, Jason Reinoehl was administered a COVID-19 test at a testing site after being referred there by a doctor. The test results came back positive for COVID-19 on May 7, 2020.

70. On January 5, 2021, Plaintiff's father (unnamed for HIPPA reasons), was admitted to the hospital with COVID-19. Plaintiff's father faithfully wears non-medical masks and avoids public areas as much as possible.

71. It is illogical to think that a mask which cannot prevent viruses from getting into your mouth

and nose can prevent viruses from leaving your mouth and nose. Cloth is not a one-way filter.

C. Mandating Non-Medical Devices

72. The U.S. Food and Drug Administration (herein referred to as "FDA") Emergency Use Authorization (herein referred to as "EUA") dated April 18, 2020 and updated May 2020, allowed non-medical masks to be sold in the United States with strict restrictions. (Exhibit 17)

73. On April 24, 2020, the FDA issued a letter restating what they said in the EUA—that

"the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or related uses or is for use such as infection prevention or reduction;" [my emphasis]. (Exhibit 18)

74. Police powers allowed a State during medical emergencies are limited by the U.S. Constitution and Federal Law to medical treatments and medical devices of proven ability to treat disease or prevent disease transmission, all of which should be regulated by the FDA under the Food, Drug, and Cosmetic Act under Chapter IV even in emergency situations.

75. Experimental medical devices and treatments cannot be forced upon the humans for research purposes without informed consent Title 45 §46.116.

76. Under the Equal Protection Clause of the 14th Amendment, human research volunteers do not have more rights than a citizen who is not the subject of official research.

77. All non-medical masks can only be sold in the United States under the FDA EUA referenced in ¶72

and ¶73 above as “non-medical” devices and must be clearly labeled as such.

78. Non-medical masks are being classified as “apparel,” and therefore are considered exempt from FDA regulation.

79. No State can compel individuals to wear specific apparel simply because there is an emergency medical situation.

80. The State’s rights to regulate the apparel of its citizens are limited to morality purposes.

81. To regulate apparel on the basis of health would be akin to mandating citizens wear coats in the winter and shorts in the summer. Coats and shorts, at the appropriate times, may also provide a health benefit.

82. As “apparel,” all non-medical masks are only minimally regulated by the Federal Trade Commission and the U.S. Consumer Product Safety Commission. These products must only meet minimal safety standards: (a) they must not contain lead if they are targeted at children and (b) they must be fire resistant if they are targeted at children.

83. Adult cloth and non-medical masks and face coverings are not being regulated for lead content even though they are worn across the mouth and nose in some cases for hours at a time.

84. No cloth or non-medical masks or face coverings are being regulated for hazardous materials, including but not limited to asbestos or chromium.

85. The State of Michigan has more than 558,000 confirmed cases of COVID-19 as reported by Google January 10, 2021. Michigan mask regulations have been in effect since Governor Gretchen Whitmer issued Executive Order 2020-147 (July 13, 2020).

86. An effective health measure, such as hand washing or covering coughs, works even when there is not 100% compliance.

87. An effective method of reducing disease transmission works with even 1% compliance because it reduces the amount of transmission by at least 1%.

88. Cloth and non-medical masks and face coverings have failed to prevent the spread of COVID-19 just as they failed to prevent the spread of Spanish Flu.

D. Mask Dangers

89. Wearing masks improperly can spread disease as noted by the Secretary of the Navy in 1919 and the U.S. Surgeon General on March 27, 2020. (Exhibit 19)

90. Jason Reinoehl, a normally healthy individual, caught COVID-19 from a person who was wearing a mask after only brief close contact with that person throughout the day.

91. Plaintiff's father caught COVID-19 while primarily avoiding most public contact with individuals in closed spaces and while always wearing a mask in accordance with published guidelines.

92. Disposing of masks improperly also spreads disease. Masks are littering the world. (Exhibit 20)

93. Masks of any kind, including but not limited to N-95s, surgical masks, and cloth masks, can cause negative health changes even in healthy individuals, including but not limited to reduced blood oxygen levels (SpO2%), lightheadedness, increased heart rate, increased exposure to all infectious diseases, and long term use of cloth masks (niqab) can reduce lung capacity and lead to increased respiratory infections and asthma. (Exhibits 21-29)

94. Jennifer Reinoehl has breathing and heart issues, including but not limited to asthma and tachycardia that severely limit her daily activities. For example, sometimes she has to stop shopping for weekly groceries early because she is too tired to finish.

95. Wearing a cloth or non-medical mask for (15) minutes or longer increases Jennifer Reinoehl's heart rate, increases her oral body temperature by (1) degree Fahrenheit, and decreases her blood oxygen levels, starting at 20 minutes after first donning the mask and continuing for up to two hours after taking it off.

96. This does not happen if Plaintiff performs the same activities without a mask. Without a mask, her heart rate elevates during the activity, but returns to normal within (15) minutes of stopping activity. Without a mask, her oxygen levels remain stable even when active.

E. Discrimination

97. Mask mandates harm disabled people in two ways: (a) by forcing or encouraging a person with a breathing disability to wear a mask, which puts his or her health at risk, or (b) by not wearing a mask, the disabled person is marked as being disabled, or worse marked as being a protester, or a selfish person who doesn't care about whether or not they get others sick. With only these two options available to him or her, a disabled person has no recourse for avoiding harm.

98. On January 4, 2021, Plaintiff, Jennifer Reinoehl, was forbidden from entering the YMCA. She approached the desk and was asked about having a mask. She stated she had breathing problems and could not wear a mask. She was told even people with breathing problems had to wear a

mask to enter and walk through the YMCA. She asked to record this information, and after obtaining permission to do so from the other participant, who appeared to first obtain permission from her supervisor, she recorded that the YMCA would follow Robert Gordon's mask regulations and not follow the Federal Americans with Disabilities Act of 1990 (herein referred to as "ADA"). Her inhaler was shown as proof of her breathing disability, but that was also not accepted.

99. Prior to this date, Plaintiff had not been barred from entering the YMCA without a mask once she had informed them of her breathing problems.

100. The Gatherings and Face Mask Order issued by Robert Gordon December 18, 2020 states in pertinent part,

"8. Exceptions to face mask requirements...the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:...

(b) Cannot medically tolerate a face mask;" and

"10. Implementation (a) Nothing in this order modifies, limits, or abridges protections provided by state or federal law for a person with a disability" and

"7. Face mask requirement at gatherings...

(d)...An individual's verbal representation that they are not wearing a face mask because they fall within a specified exception, however, may be accepted."

101. At the same time, Robert Gordon allowed the MDHHS to post advice on its website directed at those with asthma which states, among other things, “If the doctor does give you a pass not to wear a mask, you may not be able to go to places that require them.” [my emphasis] This explains the mandate in terms that go against ADA regulations, supports businesses and schools who deny disabled people entry when not wearing a mask even with a doctor’s pass, and pressures individuals with disabilities to avoid seeking ADA accommodation requirements by informing them they can still be denied entrance to businesses. (Exhibit 30)

102. Businesses, such as the YMCA, within the State could use the statements made on the website (and quoted in ¶100) to deny anyone services for not wearing a mask regardless of statements in Robert Gordon’s official Order.

103. This same flyer quoted in ¶101 also states people with asthma “can wear a face mask.” (Exhibit 30)

104. Whether or not a person “can” wear a face mask is advice that only a doctor familiar with the patient’s individual case should give.

105. The MDHHS has also issued advice directed at medical providers, which states, among other things, “The decision to give face mask exemptions should not be taken lightly and should be considered only in extreme circumstances,” and “During the pandemic, people who are having active breathing problems should stay home except to seek medical care.”

(Exhibit 31) This advice encourages inhibiting the movement and public access of the disabled, makes it more difficult for disabled children to obtain waivers required for school entrance, and avoids ADA accommodation requirements.

106. The advice Robert Gordon allowed to be posted on the MDHHS is in contradiction to the order and infringes upon rights given to the disabled in both the ADA, Federal Law, and Michigan Law.

107. The advice allowed to be posted on the MDHHS by Robert Gordon wrongly pushes culpability on doctors and others following the advice and circumvents due process, allowing Robert Gordon to act under the color of law.

108. Plaintiff, Jennifer Reinoehl, was barred from fully entering the Niles branch of the YMCA on the basis of Robert Gordon's order.

109. Plaintiff suffered emotional pain and suffering when she was not allowed to fully enter the YMCA and view her daughter swimming.

110. Plaintiff lost hours of work doing research that Governor Gretchen Whitmer and Robert Gordon should have done themselves prior to issuing public health orders.

111. In *In Re Certified Question* (Midwest Inst of Health V, 161492 (Mich. 2020), the Court determined Governor Gretchen Whitmer cannot exercise emergency powers indefinitely.

112. Robert Gordon is continuing to exercise emergency powers for Governor Gretchen Whitmer despite the ruling in *In Re Certified Question* (Midwest Inst of Health V, 161492 (Mich. 2020).

IV. ARGUMENT

113. The police power afforded to governments to reasonably address public health and safety issues is not limitless. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ____ (2020).

114. The rights secured by the United States Constitution and the Constitution and Laws of the

State of Michigan do not disappear during a public health crisis.

E. Jacobson v. Massachusetts

115. Jacobson v. Massachusetts, 197 U.S. 11 (1905), in which the Supreme Court ruled that it was acceptable for Massachusetts to mandate all healthy citizens take a smallpox vaccination or be fined a one-time fee of \$5 (about \$150 adjusted for today), is frequently used to support State police power in the face of public health emergencies, among other things.

116. Jacobson v. Massachusetts, 197 U.S. 11 (1905), does not apply here because Robert Gordon through the MDHHS is allowing places of business to discriminate and suppress rights of a citizen or visitor to the State who has a medical exemption.

117. The Court held in Jacobson v. Massachusetts, 197 U.S. 11 (1905) that Jacobson had the appearance of a healthy man and had not provided admissible evidence to the contrary. It also noted adults could obtain exemption from vaccination and fine if they presented a doctor's exemption.

118. Jacobson v. Massachusetts, 197 U.S. 11 (1905) does not apply here because the Court noted that Jacobson offered no material evidence into the case, including but not limited to scientific evidence in opposition to vaccination or medical evidence of his health problems.

119. Plaintiff in this case historical, scientific, and medical evidence. (Exhibits 1-33)

120. Plaintiff is willing to submit her medical records supporting her breathing impairments to the court during discovery.

121. Jacobson v. Massachusetts, 197 U.S. 11 (1905) does not apply here because it was predicated on the

centuries of scientific evidence showing the safety and effectiveness of the vaccine.

122. The evidence specifically included, but is not limited to: (a) The first statistics on case-fatality rates between the smallpox disease and variolation (the precursor to vaccination) were collected during the Boston smallpox plague in 1721 and showed a reduction in death for those variolated; (b) When Jenner discovered the safer cowpox virus also provided protection in 1796, vaccination became widespread; (c) The smallpox vaccine had the support of President Madison, who signed "An Act to Encourage Vaccination" in 1813. (d) There were more than 200 years of scientific evidence supporting the scientific safety and effectiveness of smallpox's variolation and vaccination methods prior 1905, and (e) In 1905, smallpox vaccination was a scientifically and medically accepted method of preventing smallpox and had been for almost a century.

123. In contrast, scientists today are still divided in peer-reviewed literature on the safety and effectiveness of cloth masks and any mask used by the general public, despite their hundreds of years of use.

124. Cloth masks and facial coverings failed to prevent the spread of Spanish Flu. (Exhibit 8, 9)

125. Wearing any mask comes with health risks to all the people who wear them. (Exhibit 21-29)

126. The ineffectiveness of cloth masks and facial coverings to prevent disease transmission has kept them out of U.S. hospitals since the 1970s.

127. The FDA required that manufacturers do not place anything on their labels that would mislead consumers into believing they can prevent disease transmission. (Exhibit 17, 18)

128. “Non-medical” masks, confusingly designed to look identical to surgical masks, have never been tested for safety and effectiveness and are experimental in nature.

129. The evidence against non-medical mask effectiveness is stronger than the evidence for it.

130. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) does not apply here because smallpox is a much deadlier disease than COVID-19.

131. Smallpox is a disease with an average 30% case-fatality rate across all age groups. Among those vaccinated who then acquired the disease, case-fatality rates ranged from 1.3%-11%. The vaccine itself had a case-fatality of 0.0002%. Smallpox affects young and old alike.

132. Without vaccination, COVID-19 is a disease with a case-fatality rate of 1.7% in the United States (2.6% in Michigan) calculated based on statistics reported to Google January 9, 2021, making it more than 11 times less deadly than smallpox in unvaccinated individuals and much less deadly than smallpox was in most vaccinated individuals. In addition, COVID-19 primarily kills people over the age of 65 who have multiple comorbidities.

133. In 1905, when there was no other method of treating smallpox or preventing its spread and when vaccination was shown by more than 200 years of research to be safe and effective at preventing its transmission, and when the majority of the members of the medical and scientific community supported vaccination, freely vaccinating healthy people by mandate or requiring them to pay a fine that would be the equivalent of about \$150 today was reasonable, and the Court did not err in its opinion under those conditions in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

134. In 2021, when there are many methods of treatment for COVID-19, when there are many methods of preventing its transmission that are supported by the majority of the scientific community (some of which have not been executed or have been poorly executed in their entirety by the State of Michigan under the direction of Governor Gretchen Whitmer and Robert Gordon), when other methods do not infringe Constitutional Rights, when COVID-19 is not a deadly disease in comparison to many other diseases, when the safety and effectiveness of non-medical masks has not yet been determined in the scientific community, and when the FDA is refusing to regulate non-medical masks for safety and effectiveness, a mask mandate is unreasonable, arbitrary and unwarranted.

135. Jacobson v. Massachusetts, 197 U.S. 11 (1905) does not apply here because in it, the Court stated, "Although this court has refrained frained [sic] from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states," [my emphasis]. Mandating masks in order to enter any business or public space within the state of Michigan affects the people of other states, including visitors coming from other states.

136. In the case of mandated masks, references more appropriate than Jacobson v. Massachusetts, 197 U.S. 11 (1905) would include but not be limited to the cited Gibbons v. Ogden, 22 U.S. 9 Wheat. 1 1 (1824).

137. The ruling in Gibbons v. Ogden, 22 U.S. 9 Wheat. 1 1 (1824) (the state sought to preserve its

waterways solely for its residents) supports Plaintiff's claims—a state cannot regulate public waterways (or in this case public areas) in a way that prevents or inhibits citizens of other states from using them or prevents citizens from other states from conducting commerce in that state. Mandated masks interfere with the rights of citizens of other states.

138. Jacobson v. Massachusetts, 197 U.S. 11 (1905) does not apply here because in 1905, the U.S. military, including the now Federally funded

National Guard, could not have been called in to quickly build field hospitals that could care for the sick, as they were called in to do at the beginning of the COVID-19 pandemic in New York. (Exhibit 34)

139. State leaders have used the excuse they would "run out of hospital beds" as a justification for ignoring Constitutional Rights and exercising unlimited police power since March 17, 2020, when Ferguson, et al's now discarded model was first introduced with that claim.

140. President Trump quickly authorized additional Military hospitals in response to the claim we would "run out of hospital beds," including a fully operational and almost instantly available 1000 bed Navy medical ship in New York. (Exhibit 34)

141. These military hospitals in New York were used by only a few people and in some cases were not used at all before being taken down because they were deemed not necessary and because they were costing taxpayers money without being used.

(Exhibits 34-35)

142. Since the Navy's well-researched report on Spanish Flu in 1919 stated the only thing a government could do to stem deaths during a pandemic was "build more hospitals," this should be

an important medical recourse for any government during a pandemic, especially since it does not interfere with Constitutional Rights.

143. Quickly erected military field hospitals provide ideal containment facilities for sick who test positive for COVID-19. These would keep COVID-19 positive people away from other sick people who do not have the disease, supporting isolation efforts.

144. Military field hospitals could specialize in COVID-19 treatment to improve the quality of care for these patients, reducing case-fatality rates and potentially reducing personal protective equipment demands.

145. Field hospitals could treat on an in-patient basis both the seriously ill and the mildly ill, which would help isolate COVID-19 patients with active symptoms and prevent them from spreading the disease in the community.

146. The FMLA gives sick workers the ability to stay home (or in a field hospital) without fear of being fired, making containment and isolation easier and less restrictive on Constitutional Rights.

147. Finally, contained COVID-19 treatment facilities allow hospitals and other medical services to continue operating as normal and reduce fatalities caused when “unnecessary” medical services are randomly prohibited or delayed by State leaders’ unscientific methods of controlling the pandemic.

148. During the COVID-19 pandemic, the ability of States, including but not limited to the State of Michigan, to build field hospitals has gone virtually unused, while State leaders, including but not limited to Governor Gretchen Whitmer and Robert Gordon, continue to claim they will “run out of hospital beds” if their emergency mandates are not

followed and Constitutional Rights of healthy individuals are not set aside.

149. Failing to use options that would not violate Constitutional Rights in favor of ones that trample them is an abuse of power that must not go unchecked.

150. Jacobson v. Massachusetts, 197 U.S. 11 (1905) does not apply here because most people at the time, including medical workers, were not aware of the importance of hand washing and covering coughs to prevent disease transmission. The existence of viruses was debated as were most methods of disease control. There were at least (7) vaccines available at the time. Vaccines were the only known preventative that worked in all cities.

151. Scientists and doctors now know how small the smallpox virus is and how it spreads from active sneezing, coughing, and close contact, including but not limited to hugging (droplet), or spread from aerosol (air contamination by viral particles from the infected), or spread from articles touched by the victim including but not limited to clothing (fomite) through viruses. Other now known methods of disease transmission include but are not limited to fecal-oral, animal vectors, and sexual transmission.

152. We now know, among other things, that hospitals are a major source of disease transmission as are germy hands and coughs and sneezes that people do not cover with a hand or elbow.

153. Plaintiff hopes a detailed list of all the modern disease prevention methods is unnecessary, but offers as an example some that were incorporated in plans to eradicate smallpox (when vaccination alone did not work) and guinea worm (for which there is no vaccination).

154. In 1966, the WHO began a smallpox eradication plan. It relied on community education, early identification of cases, early isolation of the sick, and targeted vaccination. The last known worldwide case of smallpox occurred 10 years later, in 1976. (Exhibit 42)

155. Mass masking of healthy individuals was not a part of the smallpox eradication plan—nor was any other forced mass compliance with health orders.

156. The Guinea worm eradication program consists primarily of educating locals, finding and isolating case outbreaks rapidly, early treatment, and water purification. (Exhibit 42)

157. Governor Gretchen Whitmer and Robert Gordon are relying on methods that take away Constitutional Rights and “may” work instead of relying on time-proven methods of disease control that do work without infringing on those Rights.

158. Faith in non-medical masks’ abilities to stop droplets as preached by Governor Gretchen Whitmer and Robert Gordon, has led many to stop covering their coughs when masked—thus exchanging a known disease preventative (covering coughs) for an unknown one that has not been effective in previous pandemics.

159. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) does not apply here because in 1905 powerful disinfectants, including but not limited to quaternary ammonium compounds, had not yet been discovered. Hand sanitizer and disposable tissues were non-existent.

160. Although cloth masks were available (and notably not mandated by Cambridge or even considered as a method of disease prevention), their effectiveness is and was at the time debated.

161. Jacobson v. Massachusetts, 197 U.S. 11 (1905) does not apply here because in addition to knowledge and powerful disinfectants, we have antiviral medications to treat diseases caused by viruses and antibiotics to treat secondary infections caused by bacteria. We have diagnostic machines, and the ability to quickly create tests, perform them, and obtain results, including but not limited to nasal swab tests, which help us pin-point who has the disease and who does not.

162. There were no known, effective treatments for smallpox in 1905, and vaccination was the only known, effective method of prevention.

163. Another reason Jacobson v. Massachusetts, 197 U.S. 11 (1905) does not apply here is because some of the arguments of the Court were founded upon precepts that no longer apply since many Federal laws have been passed in the past 115 years, which further secure the rights of citizens. For example, the statement by the Court that

"The liberty secured by the 14th Amendment, this court has said, consists, in part, in the right of a person 'to live and work where he will' (Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427); and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense"

no longer applies since 50 U.S. Code § 456 passed June 24, 1948 allows people to avoid military service or active duty if they are a conscientious objector (a person who, for reasons of conscience, objects to military service).

164. If in 1905 a man could be forced to take a vaccination on the basis that he could also be compelled to be shot at in the army of his country, then in 2021, since he can no longer be compelled to be shot at in the army of his country by simply declaring reasons of conscience, he also can no longer be compelled to take a vaccination or follow mask mandates as a manner of conscience.

165. U.S. Const., 14th Amendment § 5 gives Congress the right to legislate States.

166. Congress in the past 115 years has used that right to strengthen the rights of the people through Acts including but not limited to 50 U.S. Code § 456, the Civil Rights Act of 1964, and the ADA.

167. Another important difference is that in Jacobson v. Massachusetts 197 U.S. 11 (1905), the Court believed those making public health decisions “presumably” had the knowledge to do so.

168. Michigan Public Health Code Act 368 of 1978 § 333.17011 prohibits individuals from practicing medicine in the State of Michigan unless the individual is licensed or otherwise authorized by said article.

169. Neither Governor Gretchen Whitmer nor Robert Gordon have a license to practice medicine in the State of Michigan nor do they meet other requirements of licensure stated in the Michigan Public Health Code Act.

170. Similarly, Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993) requires standards before expert testimony is admitted to the

Court—neither Governor Gretchen Whitmer nor Robert Gordon meet these standards in the subject of medicine but are dictating medical advice to the citizens of the State of Michigan and its visitors.

171. That neither Governor Gretchen Whitmer nor Robert Gordon are qualified to make health decisions is evident in their actions.

172. Robert Gordon erred when he allowed the MDHHS to post information that failed to recognize that lung diseases, including but not limited to asthma and COPD, are not the only medical issues that cause breathing problems. Other diseases that can cause breathing problems include but are not limited to heart disease, obesity, and anxiety.

(Exhibit 30)

173. Robert Gordon allowed the MDHHS to post information in err stating, “If your asthma symptoms keep you from wearing a mask, call your doctor right away for help getting your asthma under control.”

(Exhibit 30) This statement mistakenly assumes all asthma patients can afford to see a doctor whenever they want and mistakenly assumes all asthma can be treated.

174. It would be extremely offensive to tell an obese person to “call a doctor right away for help getting your” weight “under control.”

175. It is no less offensive to tell this to the estimated 4% of people who have severe asthma.

176. Robert Gordon erred and failed the Daubert test when he allowed the MDHHS to post information about asthma stating, “N95 masks should be saved for healthcare workers” but on the same page stating “wearing a mask can also help block asthma triggers like common cold viruses, cold air, pollen, and animal dander.” (Exhibit 30)

177. N95 masks are the only masks scientifically capable of blocking viruses, pollen, and animal dander.

178. Robert Gordon erred, practiced medicine without a license, failed the Daubert test, and breached the patient-physician relationship when he allowed the MDHHS to post information stating everyone with asthma “can wear a mask,” instead of telling everyone to seek the advice of his or her doctor on the matter. (Exhibit 30)

179. Robert Gordon did not respect the standards of scientific and medical research when allowed the MDHHS to post they “worked with experts” without naming them, and when he allowed MDHHS to post a “provider version” of Exhibit 30 which lacks references and the professionalism required of research presented to medical providers. (Exhibit 31)

180. Robert Gordon erred, practiced medicine without a license, failed the Daubert test, misconstrued important medical information and when he allowed the MDHHS to post information to providers that states,

“The decision to give a face mask exemption should not be taken lightly and should be considered only in extreme circumstances. A joint statement recommending that people with asthma and other severe lung diseases wear masks to help prevent the spread of COVID-19 was recently issued by the American College of Chest Physicians, American Lung Association, American Thoracic Society, and COPD Foundation...” (Exhibit 31)

The actual statement from the American College of Chest Physicians, et al, (a) mentions that the authors of the statement only considered studies done on healthy individuals using N-95s, which are regulated by the FDA and *must meet breathability and filtration standards*, and (b) states in regards to face mask exemptions, "The decision to give this exemption should be at the discretion of the treating physician." (Exhibit 36)

181. Robert Gordon allowed public posts on the MDHHS that misconstrued statements made by medical authorities in order to support his mask mandate.

182. Jacobson v. Massachusetts, 197 U.S. 11 (1905) acknowledges,

"We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."

183. Jacobson v. Massachusetts, 197 U.S. 11 (1905) was never meant to be definitive.

184. Jacobson v. Massachusetts 197 U.S. 11 (1905) needs to be revisited on its own merits well as on the merits of the laws enacted since it was decided and the merits of the improvements made to healthcare.

B. Emergency Powers Are Limited

185. Emergencies and the powers granted to leaders during them, do not last indefinitely and have both a beginning and an end. The COVID-19 “state of emergency” was declared over 10 months ago.

186. The WHO defines “state of emergency” as

“A ‘state of emergency’ demands to ‘be declared’ or imposed by somebody in authority, who, at a certain moment, will also lift it. Thus, it is usually defined in time and space, it requires threshold values to be recognized, and it implies rules of engagement and an exit strategy”

187. In *In Re Certified Question (Midwest Inst of Health V. 161492 (Mich. 2020)*, the Supreme Court of Michigan stated

“We conclude that the Governor lacked the authority to declare a 'state of emergency' or a 'state of disaster' under the EMA after April 30, 2020, on the basis of the COVID-19 pandemic. Furthermore, we conclude that the EPGA is in violation of the Constitution of our state because it purports to delegate to the executive branch the legislative powers of state government-- including its plenary police powers-- and to allow the exercise of such powers indefinitely.”

188. In a gross obstruction of justice, Robert Gordon, who was appointed to his position by Governor Gretchen Whitmer despite a lack of medical training or license, using the color of law

granted to him as Director of the MDHHS, immediately re-enacted all the restrictions Governor Gretchen Whitmer had enacted after the Michigan Supreme Court ruled she had abused her power.

189. Governor Gretchen Whitmer and Robert Gordon colluded to maintain emergency police state prohibitions on citizens of the State of Michigan and its visitors with blatant disregard for the Michigan Supreme Court.

190. There has been adequate time for government officials to stabilize health systems, to implement testing, research and education, and to create contact tracing procedures.

191. It is no longer the appropriate role of governors and unelected health officials to dictate policy and mandate health measures.

192. It has never been the role of persons not licensed in medicine to dictate medical treatments or policies for preventing disease transmission.

193. Non-medical masks are not approved by the FDA for preventing the spread of any disease.

194. Any and all statements about the effectiveness of non-medical masks in preventing disease transmission that were made by Governor Gretchen Whitmer and Robert Gordon are in opposition to the FDA's EUA issued April 9, 2020.

195. Using non-medical devices for medical purposes when they are not regulated by the FDA is experimental and dangerous, and should never be compelled upon a person Title 45 §46.116. (Exhibits 32, 33)

196. Currently, in United States v. Grenon (1:20-mj-03050) the United States is suing individuals who sold a product as a cure for COVID-19 that was not approved by the FDA for the treatment of COVID-19. This is not the first case the United States

government has brought against individuals for selling “treatments” and “preventatives” that are not approved by the FDA for treating or preventing disease.

197. Governor Gretchen Whitmer and Robert Gordon are pivotal in encouraging masks that are not being regulated by the FDA to be worn by consumers, including those with breathing disabilities.

198. Governor Gretchen Whitmer and Robert Gordon are pivotal in encouraging consumers to wear these non-medical masks for extended periods of time despite the known medical risks to healthy people that all masks cause when worn for extended periods of time.

199. Although Governor Gretchen Whitmer and Robert Gordon did not manufacture non-medical masks or distribute them, in *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 447–62, 267 Cal. Rptr. 3d 601, 612–25 (2020), the Court ruled against Amazon stating that “Whatever term we use to describe Amazon’s role, be it ‘retailer,’ ‘distributor,’ or merely ‘facilitator,’ it was pivotal in bringing the product here to the consumer.”

200. Governor Gretchen Whitmer and Robert Gordon have had 10 months to commission or cause to be commissioned significantly large random controlled trials of a variety of masks, including but not limited to several designs of cloth masks, in order to determine their safety and effectiveness in hospital and community settings but have not done so.

201. Early identification and contact tracing, isolating the sick, and increasing the numbers of hospital beds are all scientifically and medically accepted methods of controlling disease that do not massively infringe on Constitutional Rights.

202. Michigan's contact tracing was not started until more than 30,000 cases COVID-19 had been detected in the state. Fewer than 4,000 volunteers were dedicated to this task.

203. Policies preventing "unnecessary" medical care did not increase hospital beds and medical workers, but instead decreased them.

204. Instead of policies that encouraged the sick to seek treatment, persons who tested positive for COVID-19 were treated as if they were zombies from a Hollywood movie. Unscientific, draconian methods and statements made contradicting scientific facts made people fearful of seeking treatment and distrustful of the government. Putting millions of healthy people out of work for no reason did not improve the situation.

205. Ending non-medical mask and lock down mandates, allowing people to return to their work without fear that it will be soon shut down again, explaining medical policies, treatment options, vaccination options, and best practices for prevention to the public in a non-threatening, consistent way and increasing medical treatment facilities and personnel if needed through the National Guard, will help citizens feel reassured and less fearful, reduce riots (based on more than 1000 years of police power and pandemic history), and encourage people to seek medical treatment and submit to isolation.

206. Governor Gretchen Whitmer and Robert Gordon are not pursuing the above methods of disease control but are continuing to practice medicine without a license and continuing to ignore the State Court and continuing to rule Michigan with the same policies that have failed to slow the spread of COVID-19 and have kept Michigan case-fatality rates high for 10 months.

C. Discrimination

207. The United States Constitution and the Constitution and Laws of Michigan give citizens equal treatment and equal protection under the law.

208. The ADA requires people with disabilities of all kinds to have public access.

209. Actively trying to prevent citizens of the United States from obtaining disability accommodations through intimidation techniques directed at both them and their doctors is not providing them with equal protection.

210. Governor Gretchen Whitmer and Robert Gordon have infringed upon the ADA by not considering the accommodations needed by its disabled citizens and disabled visitors to the State.

211. Health authorities headed by officials licensed to practice medicine have repeatedly stated it is more important to remain 6' apart—a safer, easy accommodation for disabled people than forcing them to wear a mask, as well as one that allows those wishing to exercise their freedom of speech, those wishing to exercise their right to protest, and those wishing to freely practice their religion to do so. Robert Gordon's order exempts people giving a speech from wearing a mask if they are (6) feet away from the audience.

212. This lawsuit challenges the mask mandate Governor Gretchen Whitmer and Robert Gordon have enacted under the color of law through the MDHHS.

213. Governor Gretchen Whitmer and Robert Gordon exercised police power under the color of law which illegally infringed upon the fundamental rights of the Plaintiff.

214. Governor Gretchen Whitmer and Robert Gordon have invested state and federal funds in

scientifically debated methods of disease control including but not limited to quarantining healthy individuals and mandating masks instead of using funds on other more scientifically accepted methods of disease control.

215. This non-medical mandate is in violation of the United States Constitution and Federal Law, and Michigan Law.

216. Without injunctive relief, Plaintiff and those similarly situated, will suffer irreparable harm, which includes, but is not limited to, the following: loss of her State and Constitutional rights and freedoms and other losses which will continue to cause her pain and suffering and which may cost her life, as she is forced to make the choice between such things as risking her life and filing this lawsuit or between risking her life or losing her chance to watch her child swim until whenever it so pleases Robert Gordon to lift the mask mandate.

217. Plaintiff bring this lawsuit under the Federal Constitution, the ADA, and corresponding Federal law. She seeks declaratory relief, injunctive relief, and damages from the unconstitutional deprivation of rights and the disregard for the ADA.

V. CAUSES OF ACTION

COUNT I: VIOLATION OF AMERICAN DISABILITIES ACT

218. All paragraphs of the Complaint are incorporated herein.

219. The ADA 42 U.S. Code § 12182 states in pertinent part,

“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges,

advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

220. Michigan’s Persons with Disabilities Civil Rights Act 220 § 37.1102 states,

“(1) The opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a disability is guaranteed by this act and is a civil right.

221. Michigan’s Persons with Disabilities Civil Rights Act 220 § 37.1302 states,

“Except where permitted by law, a person shall not: ... (b) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or public service will be refused, withheld from, or denied an individual because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations or because of the use by an individual of adaptive devices or aids, or that an

individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations or because of the use by an individual of adaptive devices or aids."

222. Governor Gretchen Whitmer's and Robert Gordon's decision to mandate non-medical masks mark the Plaintiff for ridicule and harassment when she is not wearing a mask in a similar way Jewish people were marked by Hitler with a star.
223. Posting information that encourages physicians to limit the movement of the disabled (by telling them to stay home) restricts the rights of the disabled to equal, full public access.
224. Posting information that encourages physicians to not provide mask waivers except under "extreme" circumstances is discriminatory and dangerous in that it pressures physicians to ignore the needs of their patients.
225. The YMCA forbid entry to Jennifer Reinoehl because her disability does not allow her to safely wear a mask. The actions of Defendants abrogate federal and state law.
226. The Defendants, through their actions, have exceeded their emergency authority and deprived Plaintiff of her fundamental rights, privileges and immunities afforded under the law and seek damages, declaratory relief, and injunctive relief to prevent such further deprivation.

**COUNT II: VIOLATION OF FIRST
AMENDMENT AND MICHIGAN
CONSTITUTION ART. 1 § 5**

227. All preceding paragraphs are incorporated herein.

228. The U.S. Const., 1st Amendment states in pertinent part,

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech...”

229. The Michigan State Constitution of 1963 states in Art. 1 § 5,

“Every person may freely speak, write, express and publish his views on all subjects, being responsible for abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.”

230. Sticking a mask of any kind over your mouth while in public mechanically abridges your freedom of speech by muffling your voice and making your words difficult to understand.

231. Further, while some people cannot wear non-medical masks because of disabilities, other people may choose to not wear non-medical masks out of protest against the discrimination suffered by disabled people during mask mandates.

232. In *Tinker v. Des Moines Independent Community School District* (1969) (which addressed whether students could wear symbols of their support to end the Vietnam War) the Supreme Court stated in pertinent part

"our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputations, society. In order for the State...to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

233. The Defendants cannot show how forcing the public to wear a "non-medical" mask which the FDA is refusing to regulate and which the FDA clearly warns their manufacturers about making claims they can prevent disease transmission is an action they ordered based on anything but "a desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

234. The Michigan State Constitution of 1963 states in Art. 1 § 4, in pertinent part,

"Every person shall be at liberty to worship God according to the dictates of his own conscious...The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief."

235. Non-medical masks have been used since ancient times in pagan religious ceremonies to ward off evil spirits and prevent illness.

236. During the 1910-1911 Manchurian pneumonic plague, masks were stamped with the Imperial Seal and worn by citizens as amulets to prevent infection—sometimes worn around necks or weapons instead of covering the nose and mouth. (Exhibit 37)

237. Wearing a non-medical mask as a preventative when it failed to prevent disease transmission during the Spanish Flu of 1918-1919 and failed to stop bacteria in multiple experiments is equivalent to wearing a pagan religious talisman on one's face for the same purpose.

238. Wearing talismans and other pagan, non-medical masks is against Plaintiff's religion.

239. Mandating everyone wear non-medical masks to prevent disease when the mask manufacturers cannot make claims they prevent disease transmission is the same as the State establishing a religion in which the Mask Deity prevents its wearers from becoming infected with disease.

240. Plaintiff has the right to speak freely in the State without being mechanically barred from doing so.

241. Plaintiff has the right to protest non-medical mask mandates by refusing to wear a non-regulated, non-medical mask, whose manufacturers cannot make claims about its ability to prevent disease transmission.

242. The State cannot mandate Plaintiff follows its religion. Plaintiff has the right to freely exercise her religion according to the dictates of her own conscious.

243. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered damages.

244. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered a deprivation of her fundamental rights, privileges, and immunities afforded under the law and seeks damages, reparations, declaratory relief, and injunctive relief to prevent such further deprivation.

COUNT III: VIOLATION OF FOURTH AMENDMENT

245. All preceding paragraphs are incorporated herein.

246. The U.S. Const., 4th Amendment states in pertinent part,

“The right of the people to be secure in their persons...and effects, against unreasonable searches and seizures, shall not be violated...”

247. The mask mandates in combination with other materials Governor Gretchen Whitmer and Robert Gordon allow to be posted on state websites circumvent U.S. Const., 4th Amendment rights by mandating searches of everyone not wearing a mask.

248. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered damages.

249. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered a deprivation of her fundamental rights, privileges, and immunities afforded under the law and seeks damages, reparations, declaratory relief, and injunctive relief to prevent such further deprivation.

**COUNT IV: VIOLATION OF FIFTH
AMENDMENT**

250. All preceding paragraphs are incorporated herein.

251. The U.S. Const., 5th Amendment states in pertinent part, "No person shall be...deprived of life, liberty, or property, without due process of law..."

252. The Michigan State Constitution of 1963 states in Art. 1 § 17,

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

253. Under Michigan Public Health Code, the Director of the Health Department is specifically given the ability to prevent public gatherings and to quarantine suspected carriers ex parte for 72 hours without trial (Michigan Public Health Code Act 368 § 333.5253 and §333.5207). He is not specifically given the ex parte abilities Director Robert Gordon has taken including but not limited to closing businesses en masse and mandating masks.

254. Michigan Public Health Code Act 368 § 333.5207 requires notice of a hearing for forced quarantine to be served upon an individual held ex parte. This code provides a method of due process even for contagious individuals and preserves due process during outbreaks of infectious diseases.

255. Citizens of the State of Michigan and visitors to the State are not provided with any method of due process for fighting mandated non-medical masks.

256. Mandated non-medical devices are not specified within the realm of medical emergency powers nor should any non-medical device be considered a necessary part of an “emergency medical procedure.”

257. Although the Michigan Public Health Code repeatedly states “Emergency procedures shall not be limited to this code,” this cannot be construed to mean the MDHHS leaders have unlimited power to deprive its citizens and visitors to the state of any and all their Federal Constitutional Rights and the Rights provided to them by Michigan State Law and enact whatever orders they choose, lest the Director of the MDHHS, and specifically Robert Gordon, be given the power, among others, to kill all citizens testing positive for COVID-19 by injecting them with bleach or spray Lysol in the nose and mouths of everyone entering Michigan buildings.

258. These suggested methods would stop the spread of COVID-19, but they would also cause serious harm, death, and rights violations to the citizens and visiting non-citizens of the state.

259. Although the Michigan Public Health Code repeatedly states “Emergency procedures shall not be limited to this code,” this also cannot be construed to mean the MDHHS has unlimited power to deprive its citizens and visitors to the state of any and all their Federal Constitutional Rights and the Rights provided to them by Michigan State Law without due process since due process is preserved in the ex parte isolation acts specifically mentioned.

260. Although the Michigan Public Health Code repeatedly states “Emergency procedures shall not be

limited to this code," this cannot be construed to mean the MDHHS has unlimited power to force all its citizens and visitors to wear non-medical devices without regard to the dangers these devices present to the health of its citizens and visitors especially in light of the amount of scientific evidence that shows non-medical masks to be ineffective at controlling disease.

261. In Mrs. Terrie Curran, Plaintiff, v. City of Youngstown et al., Defendants, No. 186118 In the Court of Common Pleas, Mahoning County, Ohio (April 21, 1969), the City of Youngstown attempted to enact a law requiring people wear shoes downtown, but the law was stricken with the Court stating

“...that a state's police power can be properly exercised only where there is a reasonable [sic] relationship to the public health, safety, morals, or welfare...”

262. In Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969) the court ruled that public schools could not limit the length of students' hair, stating,

“For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human "being".

263. There must be compelling evidence of a serious health need and a known, scientifically and medically supported health benefit that will meet that need

before state can mandate a health treatment or disease preventative.

264. Health measures enacted by Governor Gretchen Whitmer and Robert Gordon were enacted prior to a health need being established. They were instead acted in order to prevent a predicted health need.

265. The United States Courts do not recognize injuries that "might" have occurred in personal injury cases. Similarly, public health disasters that "might" occur should not be grounds for the removal of Constitutional Rights.

266. Even with the knowledge that another one of the now known 4000 variations (mutations) of COVID-19 has been found in Michigan, is not cause for an extension of emergency powers, since predictions and "might"s are all we know about this "newly discovered" variant.

267. The FDA is not regulating non-medical masks nor can manufacturers make claims non-medical masks prevent the spread of any disease.

268. Like homeopathic remedies, non-medical masks should be used by the public "at its own risk." (Exhibit 32, 33)

269. If the Federal agencies tasked by law with regulating "apparel" and "medical devices" consider non-medical masks to be "apparel," the court should treat them as "apparel," like shoes and socks and hair bows, and the Court should not treat them as if they were "medical devices" like N-95 masks, which are being regulated by the FDA.

270. Plaintiff has the right to be secure in her person unless there is compelling evidence of a health need. She should not be forced to wear items that are classified as "apparel," must be labeled "non-medical" devices, cannot make claims of preventing

disease, and that are not being regulated for safety and effectiveness by the FDA.

271. Compelling evidence in the medical community for public health interventions involves random controlled trials—not scarce circumstantial evidence built upon hearsay and opinions (including but not limited to after-the-fact observational studies, laboratory studies, and non-replicable modeling papers), that are easily used for propaganda instead of scientific truth.

272. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered damages.

273. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered a deprivation of her fundamental rights, privileges, and immunities afforded under the law and seeks damages, reparations, declaratory relief, and injunctive relief to prevent such further deprivation.

COUNT V: VIOLATION OF FOURTEENTH AMENDMENT

274. All preceding paragraphs are incorporated herein.

275. The U.S. Const., 14th Amendment § 1 expands what was written in the U.S. Const., 5th Amendment,

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

276. The U.S. Const., 14th Amendment § 5 states,

“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

(A): 42 U.S.C. § 1983, VIOLATIONS OF SUBSTANTIVE DUE PROCESS

277. All paragraphs of the Complaint are incorporated herein.

278. Government actions that burden the exercise of fundamental rights are subject to strict scrutiny and will be upheld only when they are narrowly tailored to a compelling government interest.

279. Mask mandates have not been enacted upon the general public in the United States since the 1918 Spanish Flu pandemic, wherein they failed to stop both the spread and fatality rate of the pandemic, even in controlled military situations (Exhibit 8).

280. Michigan is a state with almost 9.987 million residents. January 10, 2021, Michigan had reported 2,745 new cases that day according to Google or about 0.03% of its population. Google also showed that from March 19-March 27, 2020, (eight days), new, daily COVID-19 cases in the entire state of Michigan went from 254 to 778 (0.000025% to 0.000078%).

281. For reference, Camp Grant was a military installation with about 40,000 total residents. At the height of the Spanish Flu, Camp Grant had 788 cases in one day or about 2% of its total population. It jumped from 70 cases to 788 cases in the first eight days of the outbreak (0.175% of its total population to 2% of its total population).

282. The current (January 2021) case-fatality rate (or number of deaths per 100 cases) for COVID-19 in

the U.S. is about 1.7% and falling each month as cases-per-day rise and deaths-per-day remain relatively even. This is much lower than the 9.6% case-fatality rate COVID-19 was predicted to have in April 2020.

283. That Michigan's case-fatality rate is at 2.6% and higher than the national average should shock its leaders into focusing more on preventing deaths through better treatment methods and research instead of attempting to prevent disease transmission through scientifically questionable means.

284. Thankfully, COVID-19 is not a deadly disease nor is it as contagious as other diseases.

285. For reference, in 2009, the U.S. case-fatality rate for tuberculosis was about 4.6%, and tuberculosis transmission rates have been reduced without the use of mandated non-medical masks.

286. The case-fatality rate for the 2017-2018 flu grew up to 10.8% according to CDC records, but non-medical masks were not mandated during that pandemic. The case-fatality rate for the 2008-2009 swine flu pandemic ranged from 1-10%—again non-medical masks were not mandated to reduce transmission. By doing the math based on the numbers given on the WHO website, seasonal flu has a worldwide case-fatality rate of 5.8%-21.7% even with a vaccine. Non-medical masks have never been mandated for seasonal flu and have not been mandated for pandemic flu in over 100 years.

(Exhibit 38, 39)

287. The case fatality rate for Ebola disease is about 50% and ranges from 25% to 90%, but when Ebola disease cases appeared in the United States, non-medical masks were not mandated—even for doctors returning home from Africa after being

exposed to Ebola disease firsthand. Prior to COVID-19, Dr. Fauci was adamant that droplet spread respiratory diseases were difficult to spread asymptotically.

288. The case-fatality rate for HIV in person-years (which are adjusted for time since HIV kills slowly) is currently 2% in the USA. (It technically has an 80-90% case-fatality rate, but most people die from complications of the disease.) HIV medications can cost up to \$20,000 per month and HIV positive patients must be on them for decades. People with HIV are not mandated to wear condoms when having sex by any government agency worldwide. (Exhibits 40, 41)

289. This disparate treatment lacks a real or substantial scientific relation to a need for a mask mandate intervention to control the spread of COVID-19, and the mandate is arbitrary in nature.

290. The Plaintiff has a right to protection from arbitrary action of the government, Administrative Procedure Act § 706(2)(A).

291. Substantive Due Process prevents the government from engaging in conduct that "shocks the conscious" or that interferes with the concept of ordered liberty. *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952)

292. Mandates issued by the Michigan State Department of Health and Human Services, to wear items regulated as apparel constitutes arbitrary, capricious, irrational and abusive conduct that interferes with Plaintiff's liberties protected by the due process clause of the U.S. Const., 14th Amendment.

293. The actions of Governor Gretchen Whitmer and Robert Gordon use the authority of the State of Michigan to comply its citizens and visitors to the

State to give up the freedoms afforded them by Federal law and the U.S. Constitution on little more than superstitious grounds.

294. The actions of Governor Gretchen Whitmer, and Robert Gordon's actions shock the conscience of the citizens of the United States by mandating apparel upon all citizens and visitors to the State as if it were a regulated medical device with a proven track record for stopping disease.

295. The actions of Governor Gretchen Whitmer and Robert Gordon do not comport with the traditional ideas of fair play and decency.

296. Although Plaintiff is not a resident of Michigan, she has the right as a citizen of the United States to pursue public activities in the State of Michigan and be free of governmental interference.

297. Randomly mandating apparel to be worn is causing citizens of Michigan and its visitors to give up their freedoms and put their lives at risk—entrusting them to non-medical devices.

298. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered damages.

299. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered a deprivation of her fundamental rights, privileges, and immunities afforded under the law and seeks damages, reparations, declaratory relief, and injunctive relief to prevent such further deprivation.

**(B): 42 U.S.C. § 1983- VIOLATIONS OF
PROCEDURAL DUE PROCESS**

300. All previous paragraphs are incorporated herein.

301. The U.S. Const., 14th Amendment forbids a state from depriving anyone of life, liberty, or property without due process of law.

302. None of the following due process protections have been afforded to Plaintiff as required by the United States Constitution: a) No processes that permit evaluation by a neutral arbitrator; b) No processes that provide for an opportunity to be heard; c) No processes that offer an opportunity to present witnesses; d) No processes that permit an opportunity to cross examine witnesses; e) No processes that allow for a reasoned decision; and, f) No processes that provide for an opportunity for an appeal.

303. Mask mandates by Governor Gretchen Whitmer and Robert Gordon do not provide due process protections set forth herein. The Defendants' mask mandate policy on grounds of preventing disease transmission is contrary to the April 18, 2020 FDA EUA without any reasonable explanation or solid scientific evidence, constitutes an unexplained inconsistency and is arbitrary and capricious.

304. Mask mandates by Governor Gretchen Whitmer and Robert Gordon deprive Plaintiff of fundamental rights without due process of law, based solely upon the discretion of Defendants, which discretion is not subject to appeal rights.

305. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered damages.

306. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered a deprivation of her fundamental rights, privileges, and immunities afforded under the law and seeks damages, reparations, declaratory relief,

and injunctive relief to prevent such further deprivation.

(C) 42 U.S.C. § 1983, VIOLATIONS OF EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

307. Plaintiff incorporates all foregoing paragraphs, as if alleged herein in full.

308. The Equal Protection Clause requires governments to act in a rational and non-arbitrary fashion.

309. The Equal Protection Clause of the U.S. Const., 14th Amendment protects every citizen against intentional, arbitrary government discrimination, whether based on a policy's express terms or improper implementation by government agents.

310. The Equal Protection Clause of the U.S. Const., 14th Amendment prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference.

311. Defendants deprived Plaintiff of her fundamental rights guaranteed under the United States Constitution and the ADA.

312. Defendants' actions and/or omissions, as stated herein, constitute a violation of the Equal Protection as Plaintiff cannot access Michigan public or private businesses without putting her life at risk or being subject to harassment sanction by Robert Gordon through the MDHHS.

313. Governor Gretchen Whitmer and Robert Gordon's actions in deciding to mandate non-medical masks, and then Robert Gordon's conflicting actions claiming to support the ADA in his Order while allowing posts on the Michigan Department that

support businesses banning the disabled, like the YMCA did, in opposition to the ADA are arbitrary and irrational.

314. Robert Gordon's actions mandating non-medical masks when many peer-reviewed scientific studies show non-medical masks do not reduce disease transmission and when a Rapid Review by the NAS published on April 9, 2020, concluded there is no evidence they would stop asymptomatic transmission, is not rational and is an arbitrary exercise of his power.

315. Governor Gretchen Whitmer's and Robert Gordon's non-medical mask mandate is nothing more than arbitrary decision-making that relies on the speculations of Governor Gretchen Whitmer and Robert Gordon.

316. Governor Gretchen Whitmer's and Robert Gordon's decision to mandate non-medical masks impedes Plaintiff's fundamental right to receive services and access public spaces equally with other non-disabled citizens without the government imposing arbitrary or irrational restrictions on that access.

317. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered injuries and damages.

318. As a direct and proximate cause of Defendants' actions and/or omissions stated herein, Plaintiff has suffered a deprivation of her fundamental rights, privileges and immunities afforded under the law and seek damages, reparations, declaratory relief, and injunctive relief to prevent such further deprivation.

COUNT VI: DECLARATORY JUDGEMENT

319. Plaintiff incorporates all foregoing paragraphs, as if alleged herein in full.

320. Plaintiff is an interested party seeking declaration of her rights under the United States Constitution and the ADA as the non-medical mask mandates of Governor Gretchen Whitmer, Robert Gordon, and the actions of the YMCA in following these mandates instead of Federal Law have functioned to deprive Plaintiff of her fundamental rights and caused injuries and damages.

321. Plaintiff seeks a declaratory judgment that Governor Gretchen Whitmer and Robert Gordon's non-medical mask mandates are in violation of the United States Constitution under: ARTICLE IV: §2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several State"), AMENDMENT 1, AMENDMENT 4, AMENDMENT 5, and AMENDMENT 14.

322. Plaintiff seeks a declaratory judgment that Governor Gretchen Whitmer and Robert Gordon's non-medical mask mandates are in violation of Plaintiff's right to equal protection of the law as guaranteed by the United States Constitution.

323. Plaintiff seeks a declaratory judgment that Governor Gretchen Whitmer and Robert Gordon's non-medical mask mandates are in violation of Plaintiff's right to equal access as guaranteed by the ADA and 42 U.S.C. § 12101.

324. In addition to the declaratory judgments sought herein, Plaintiff seeks further necessary or proper prospective relief as justice may require.

**COUNT VII: REQUEST FOR INJUNCTIVE
RELIEF**

325. Plaintiff incorporates all foregoing paragraphs, as if alleged herein in full.

326. Plaintiff seeks a permanent injunction preventing the Governor Gretchen Whitmer and Robert Gordon and other health officers from

mandating non-medical masks or facial coverings which violate Plaintiff's rights under the United States Constitution and Federal Laws as well as under the laws of the State of Michigan until such time as the FDA recognizes these items as medical devices, begins regulating them according to Federal Law, and large, significant, peer-reviewed, random-controlled-trials show these masks are effective at stopping disease transmission in comparison to wearing no mask.

327. Plaintiff seeks a permanent injunction preventing Governor Gretchen Whitmer and Robert Gordon and other health officers from recommending non-medical masks for the prevention of disease unless a disclaimer is included as follows "These masks are not being evaluated by the FDA for effectiveness or safety and may cause serious health problems for some individuals" until such time as the FDA recognizes these items as medical devices and begins regulating them according to Federal Law.

328. Plaintiff seeks a permanent injunction preventing the YMCA and other public and private businesses from preventing citizens who are not wearing non-medical masks from entering and using their facilities until such time as FDA recognizes these items as medical devices, begins regulating them according to Federal Law, and large, significant, peer-reviewed, random-controlled-trials show these masks are effective at stopping disease transmission in comparison to wearing no mask.

329. Plaintiff seeks a permanent injunction preventing the YMCA and other private and public businesses from harassing citizens, including but not limited to arguing with them about whether or not they have a disability and or telling them in spite of that disability they should wear one, who are not

wearing non-medical masks and who wish to use their facilities until such time as the FDA recognizes these items as medical devices, begins regulating them according to Federal Law, and large, significant, peer-reviewed, random-controlled-trials show these masks are effective at stopping disease transmission in comparison to wearing no mask..

330. In the absence of the issuance of injunctive relief, Defendants will cause, and continue to cause, immediate and irreparable harm to Plaintiff including, but not limited to, loss of her First, Fourth, Fifth, and Fourteenth Amendment freedoms granted by the United States Constitution and losses to health due to the added stress put upon her from public ostracism and denial of business services.

331. Public policy favors the entry of a permanent injunction because such relief will prevent unlawful conduct and will preserve and protect Plaintiff's health interests as well as the health interests of the citizens and visitors to the State of Michigan.

332. The harm to the Plaintiff and similarly situated people who are subjected to Defendants' discriminatory and unconstitutional recommendations and mandates herein substantially outweighs any harm to the Defendants.

333. Plaintiff will also seek temporary restraining orders and preliminary injunctions premised on the basis asserted herein.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against Defendants jointly and severally as follows:

A. Declare that Defendants' actions as set forth herein were in violation of Federal Law deprived

Plaintiff of her rights, immunities, and privileges afforded thereunder;

B. Declare that Defendants' actions as set forth herein were in violation of the United States Constitution and deprived Plaintiff of her rights, immunities, and privileges afforded thereunder;

C. Order this cause set for immediate hearing on Plaintiff's request for preliminary injunction, and permanent injunction restraining and prohibiting Defendants from mandating people wear non-medical masks which violates Plaintiff's rights under the United States Constitution and Michigan Law;

D. Award Plaintiff her actual costs, damages, expenses, and reparations in the amount of \$100,000 split evenly between Governor Gretchen Whitmer and Robert Gordon and a free unlimited lifetime family membership for Plaintiff and her family from the YMCA of Greater Michiana.

E. Any and all other relief just and proper in the premises.

Verification

I, the undersigned, hereby swear or affirm, under penalties of perjury that the foregoing statements are true.

Respectfully submitted,



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