IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

KINGS ISLAND, LLC
6300 Kings Island Drive
Mason, Ohio 45034

KINGS ISLAND COMPANY, Inc.
6300 Kings Island Drive
Mason, Ohio 45034

and

CEDAR FAIR, L.P.
1 Cedar Point Dr.
Sandusky, Ohio 44870

v.

AMY ACTON, ***in her official capacity as Director of the Ohio Department of Health***
246 N High Street
Columbus, Ohio 43215

and

WARREN COUNTY HEALTH DISTRICT
416 S East Street
Lebanon, OH 45036

Defendants.

Case No. 20-CV-93363

Judge Oda

AMENDED VERIFIED COMPLAINT for DECLARATORY JUDGMENT AND IMMEDIATE INJUNCTIVE RELIEF

Exhibit 1: ***Director's May 29, 2020 Order Closing Amusement and Water Parks***

Exhibit 2: ***Entry and Order in Rock House Fitness v. Acton***

Exhibit 3: ***Memorandum in Opposition to Motion for TRO*** **in** ***Hartman v. Acton***

Exhibit 4: ***Defendant Amy Acton's Interrogatory Responses.***

Exhibit 5: ***Generally-Applicable Safety Protocols***

Exhibit 6: ***Affidavit of Mike Koontz***

Exhibit 7: ***City of Mason Resolution 2020-3***

Now comes Plaintiffs, and for their Complaint for Declaratory Judgment and Injunctive Relief, allege as follows:

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INTRODUCTION

1. This is an action for declaratory judgment, and preliminary and permanent injunction, pursuant to Ohio Rev. Code Chapter 2721 and Ohio Rev. Code Chapter 2727, arising from Defendants' unconstitutional official conduct, policies, practices, regulations, restrictions, threats, intimidation, and/or harassment.

2. Defendants continue to obstruct rather than advance Ohioans' physical and mental health, all the while having continuously overinflated the risk of harm to the general public.

3. While the Ohio Department of Health and its Director, AMY ACTON, together with local health departments, including the WARREN COUNTY GENERAL HEALTH DISTRICT, maintain latitude to enforce regulations that ameliorate the effects of a pandemic, that latitude remains subject to limitations imposed by both the Ohio Constitution.

4. The Ohio Department of Health, its Director, and county health departments claim the authority to criminalize and fine operation of <u>safe</u> amusement and water parks.

5. Through various orders and fiat, the Director of the Ohio Department of Health has arbitrarily criminalized all <u>safe</u> amusement and water park operations, without providing any process, venue, or judicial review to determine whether these Ohioans' businesses are in fact safe enough to warrant operation.

6. However, Plaintiffs remain entitled to due process, equal protection, and a government that abides by the doctrine of separation of powers with the attendant checks and balances.

7. The various orders and fiat of the Director of the Ohio Department of Health, together with their enforcement, violate those fundamental rights through the arbitrary imposition of excessive strict liability, together with criminal, civil, and equitable sanctions – unilaterally created by just one unelected individual within the bureaucracy of the State of Ohio – without due process, equal protection, or just compensation and *irrespective of safety*, and in violation of the doctrine of separation of powers.

8. As a direct and proximate result of the unconstitutional conduct, policies, practices, regulations, restrictions, threats, intimidation, and/or harassment of the Director of the Ohio Department of Health, together with enforcement efforts by local health departments Plaintiffs (as well as many others) face an imminent risk of criminal prosecution and extensive daily fines, and/or the decimation of their businesses, livelihoods, and economic security, as well as continued irreparable harm to their rights.

9. Further, the employees that Plaintiffs employ, the taxes that they pay to local governments, and the lives that their businesses otherwise improve all remain impaired.

10. This harm may only be remedied by a ruling from this Court, and Defendants must be immediately and permanently enjoined from imposing criminal, civil, or equitable sanctions on the safe operation of Ohio amusement and water parks including Plaintiffs.

PARTIES

11. KINGS ISLAND, LLC is a Delaware Limited Liability Company that owns the assets of Kings Island Amusement Park in Warren County, Ohio.

12. KINGS ISLAND Company, Inc. is a Delaware corporation that operates Kings Island Amusement Park in Warren County, Ohio.

13. Kings Island is a combination amusement and water park operated on a 330 acres footprint.

14. Kings Island is one of the most attended regional amusement parks in North America. The park features a children's area that has been consistently named one of the "Best Kids' Area in the World" by Amusement Today.

15. The Park's market area includes Cincinnati, Dayton and Columbus, Ohio in addition to markets in adjacent states.

16. Plaintiffs, together with Cedar Point, employs approximately 570 full-time employees.

17. During the operating season, Plaintiffs employ, together with Cedar Point, in aggregate approximately 10,000 seasonal and part-time employees, many of whom are high school and college students.

18. Plaintiffs' parks operate seasonally.

19. CEDAR FAIR L.P., a Delaware Limited Partnership, is one of the largest regional amusement park operators in the world with 13 properties in consisting of amusement parks, water parks and complementary resort facilities.

20. CEDAR FAIR is a publicly-traded Delaware limited partnership formed in 1987 and managed by Cedar Fair Management, Inc., an Ohio corporation (the “General Partner”), whose shares are held by an Ohio trust, headquartered in Sandusky, Ohio.

21. CEDAR FAIR parks are family-oriented, with recreational facilities for people of all ages, and provide clean and attractive environments with exciting rides and immersive entertainment.

22. CEDAR FAIR employs approximately 2,600 full-time employees.

23. During the operating season, CEDAR FAIR employs in aggregate approximately 48,600 seasonal and part-time employees, many of whom are high school and college students.

24. CEDAR FAIR parks operate seasonally, beginning in April or May, and then daily from Memorial Day until Labor Day. After Labor Day, meaning that a substantial portion of CEDAR FAIR’S revenues from these seasonal parks are generated during an approximate 130- to 140-day operating season.

25. CEDAR FAIR owns and operates Cedar Point and Kings Island.

26. Cedar Point and Cedar Point Shores are located on approximately 365 acres, virtually all of which have been developed, on the Cedar Point peninsula. The park features 18 roller coasters and three children’s areas. Located adjacent to the park is Cedar Point Shores Water Park, a separately gated water park featuring more than 15 water rides and attractions. Cedar Point also features four hotels, three marinas, an upscale campground, and the nearby Cedar Point Sports Center which features both indoor and outdoor sports facilities.

27. Defendant AMY ACTON is, and has been at all times relevant to the facts at issue in this case, the Director of the Ohio Department of Health.

28. Defendant WARREN COUNTY GENERAL HEALTH DISTRICT is a county health district organized under Ohio Rev. Code Chapter 3709, charged with enforcing the Ohio Department of Health’s Orders and empowered to make its own orders.

29. At all times relevant to the allegations in this Complaint, each and all of the acts of AMY ACTON alleged herein were undertaken in conformity with the regulations, customs, usages, policies, and practices of the State of Ohio and the Ohio Department of Health.

30. The actions of AMY ACTON described herein were either outside the scope of her respective office, or, if within the scope, undertaken in an arbitrary manner, grossly abusing the lawful powers of her office.

31. Defendants have personally undertaken and/or threaten to continue to personally undertake specific action so as to deprive and/or violate the constitutional rights of the Plaintiffs.

32. Defendant AMY ACTON is being sued herein in her official capacity.

FACTS

33. Ohio Rev. Code § 3701.13 delegates to the Director of the Ohio Department of Health, amongst other things, "<u>ultimate authority</u> in matters of quarantine and isolation" and authority "to make special orders."

34. Ohio Rev. Code § 3701.352 mandates that "[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event."

35. In turn, Ohio Rev. Code § 3701.99(C) provides that any violation of Ohio Rev. Code § 3701.352 constitutes a second-degree misdemeanor, thus, subjecting any person violating Ohio Rev. Code § 3701.352 to up to 90 days in jail and a $750 fine, or both.

36. On March 22, 2020, AMY ACTON, in her capacity as the Director of the Ohio Department of Health, issued a *Director's Stay at Home Order*, ordering that "non-essential businesses and operations must cease" and "effective at 11:59 pm on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations as set forth in this Order."

37. Rather than defining the category articulated as "Essential Businesses and Operations," the *Director's Stay at Home Order* attempted to name "essential businesses and operations" over the course of three pages and 25 paragraphs.

38. While the standard of "essentiality" may initially appear clear, *i.e.*, "necessary for survival," the *Director's Stay at Home Order* included within the category of "essential", *inter alia*, liquor, marijuana, dry cleaners, and the state lottery.

39. Amusement and Water Parks did not make the list of "essential businesses" within the *Director's Stay at Home Order.*

40. On April 2, 2020, AMY ACTON renewed the *Director's Stay at Home Order*, with the issuance of the *Amended Director's Stay at Home Order*, which continued the closure of Ohio amusement and water parks.

41. On April 30, 2020 AMY ACTON renewed the *Director's Stay at Home Order*, with the issuance of the *Director's Stay Safe Ohio Order*, which continued the closure of Ohio amusement and water parks.

42. At approximately midnight on May 29, 2020 AMY ACTON renewed the closure of Amusement and Water Parks through issuance of *Director's Order.*

43. Specifically, ¶9 of the *Director's Order* indicates "the following businesses and operations are to remain closed until this Order is amended or rescinded: . . . (d) . . . All places of public amusement, whether indoors or outdoors, including, but not limited to, locations with amusement rides, . . . amusement parks, water parks, . . ."

44. The May 29, 2020 *Director's Order*, like those Orders before it, was issued by AMY ACTON without enabling legislation or administrative rulemaking.

45. The May 29, 2020 *Director's Order* "shall remain in full force and effect until 11:59pm on July 1, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date." *Director's Order,* at p. 14.

46. To enforce the May 29, 2020 Order, the Ohio Department of Health and its enforcement agents rely upon Ohio Rev. Code § 3701.352 to punish any violation of "any order the director of or department of health issues" with subjection to "a misdemeanor of the second degree, which can include a fine of not more than $750 or not more than 90 days in jail, or both."

47. To enforce the May 29, 2020 Order, the Ohio Department of Health and its enforcement agents rely upon Ohio Rev. Code § 3701.56 for the proposition that "boards of health of a general or city health district . . . shall enforce quarantine and isolation orders."

48. A true and accurate copy of the May 29, 2020 *Director's Order* is attached hereto as Exhibit 1.

49. Pursuant to both past *Orders* and Ohio Rev. Code § 3701.56, Defendant WARREN COUNTY GENERAL HEALTH DISTRICT maintains authority to enforce the criminalization of amusement park and water park operations against Plaintiffs.

50. The *Director's Stay Safe Ohio Order* is unconstitutional as applied to Plaintiffs, who are owners and operators of "amusement parks" and/or "water parks."

51. Paragraph 9(d) of the *Director's Order* is unconstitutional on its face, insofar as it forbids the opening of "amusement parks" and/or "water parks" under safe circumstances.

52. Prior to the expiration of the *Director's Order*, *i.e.*, prior to July 1, 2020, Plaintiffs desire and intend to reopen their businesses thereby subjecting Plaintiffs and their agents to the immediate risk of criminal, civil, and equitable sanctions, pursuant to the penalties articulated in R.C. 3701.352 and R.C. 3701.99.

53. Venue is proper within this County and division because (i) Plaintiffs are situated within this county and the Defendants are regulating water parks and amusement parks, including Plaintiffs, within this county; and (ii) all of the claims asserted by Plaintiffs arose within this county.

First Cause of Action
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF
Vagueness and Separation of Powers
Article I, Sections 1, 2, 16, 19 and 20 and Article II, Section 1 of the Ohio Constitution

54. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

55. Through enactment of Ohio Rev. Code § 3701.13, the Ohio General Assembly delegated to the Ohio Department of Health, *inter alia*, "ultimate authority in matters of quarantine and isolation."

56. In delegating "ultimate authority in matters of quarantine and isolation" to the Ohio Department of Health, the Ohio General Assembly has delegated legislative authority without an intelligible principle.

57. The vagueness concerns raised by the delegation of "ultimate authority" to the Ohio Department of Health is aggravated by the unilateral creation of strict liability crimes by the various orders issued by AMY ACTON.

58. "Without sufficient limitations, the delegation of authority can be deemed void for vagueness as allowing ad hoc decisions or giving unfettered discretion." *Biener v. Calio*, 361 F.3d 206, 215-17 (3d Cir. 2004).

59. "A delegation of legislative authority offends due process when it is made to an unaccountable group of individuals and is unaccompanied by 'discernible standards,' such that the delegatee's action cannot be 'measured for its fidelity to the legislative will.'" *Ctr. for Powell Crossing, LLC v. City of Powell, Ohio*, 173 F. Supp. 3d. 639, 675-79 (S.D. Ohio 2016).

60. "To pass muster under the void-for-vagueness doctrine, Ohio law dictates an ordinance must survive the tripartite analysis set forth in *Grayned*. The three aspects examined under *Grayned* are: (1) the ordinance must provide fair warning to the ordinary citizen of what conduct is proscribed, (2) the ordinance must preclude arbitrary, capricious, and discriminatory enforcement, and (3) the ordinance must not impinge

constitutionally protected rights." *Viviano v. City of Sandusky*, 2013-Ohio-2813, 991 N.E.2d 1263 (6th Dist. 2013).

61. "Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Norwood v. Horney,* 110 Ohio St.3d 353, at 361-62 (2006) (internal citations omitted).

62. And these "venerable rights associated with property" are not confined to the mere ownership of property: "[t]he rights related to property, i.e., to *acquire, use, enjoy,* and dispose of property, are among the most revered in our law and traditions." *Norwood v. Horney,* 110 Ohio St.3d 353, at 361-62 (2006)

63. In sum, "the free use of property is guaranteed by Section 19, Article I of the Ohio Constitution." *State v. Cline,* 125 N.E.2d 222, 69 Ohio Law Abs. 305.

64. More specifically, Ohio businesses "have a constitutionally protected property interest" in freedom "from unreasonable and arbitrary interference from the government." *Mariemont Apartment Association v. Village of Mariemont,* 2007-Ohio-173, at ¶40-42.

65. In *Norwood v. Horney,* 2006-Ohio-3799, at ¶ 83, the Ohio Supreme Court explained that "[i]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application").

66. "Though the degree of review for vagueness is not described with specificity, if the enactment 'threatens to inhibit the exercise of constitutionally protected rights,' (such as property rights in Ohio), a more stringent vagueness test is to be applied." *Yoder v. City of Bowling Green, Ohio,* No. 3:17 CV 2321, 2019 WL 415254, at 4-5 (N.D. Ohio Feb. 1, 2019), citing *Norwood,* 110 Ohio St.3d at 379.

67. Because there is no means of exercising judicial review over any order issued by AMY ACTON purportedly under the authority of Ohio Rev. Code § 3701.13, that delegation is impermissibly vague.

68. The vague delegation, both on its own and in combination with the various orders issued by AMY ACTON, has violated, continues to violate, and will further violate Plaintiffs' rights.

69. AMY ACTON has already conceded, and in fact repeatedly claimed that "Dr. Acton's generally-applicable orders are legislative acts," and "general policy decisions." See *Hartman v. Acton*, Case No. 2:20-cv-1952 (S.D. Ohio 2020), *Memorandum in Opposition to Motion for TRO* (Doc. 4, PageID#71, 79, 80 & 81 ("the Amended Order is a legislative act of general application.... A State can make general policy decisions…").

70. A true and accurate copy of the *Memorandum in Opposition to Motion for TRO* is attached hereto as Exhibit 2.

71. AMY ACTON and her attorneys have framed her as a policymaker, explaining that "Dr. Acton weighed the danger from the spread of Covid-19 with the need of Ohioans to obtain necessary goods and services." *Memorandum in Opposition to Motion for TRO,* at PageID#80.

72. AMY ACTON and her attorneys have claimed that all Ohio businesses "take their business-operation rights subject to those restrictions" that may be imposed by Acton, no matter what those restrictions may be. *Memorandum in Opposition to Motion for TRO*, at PageID#83.

73. AMY ACTON and her attorneys have claimed that the Ohio Department of Health may usurp the function of the Ohio General Assembly by creating strict liability criminal penalties, *i.e.*, disobedience with any order issued by AMY ACTON, including, without limitation, the *Director's Stay at Home Order*, the *Amended Director's Stay at Home Order*, and the *Director's Stay Safe Ohio Order*, and the May 29, 2020 *Director's Order.*

74. One of two conclusions is necessarily true: either (i) the General Assembly's delegation of authority to the Ohio Department of Health in Ohio Rev. Code § 3701.13 is too broad or vague; or (ii) the

Ohio Department of Health's exercise of the delegated authority is too broad. Under either conclusion, the *Director's Order*, in criminalizing the operation of amusement parks and water parks, violates the separation of powers guarantees to which Plaintiffs are entitled.

75. At the time of this filing, just one Ohio Court has adjudicated the merits of the Orders criminalizing businesses issued by Director of the Ohio Department of Health.

76. The aforesaid Court determined the criminal penalties flowing from such orders to be impermissibly unconstitutional and otherwise unlawful. See *Rock House Fitness, Inc. v. Acton*, Case No. 20CV000631 (Lake Cty. C.P. 5-20-2020)(Decision attached).

77. In *Rock House Fitness,* the Court explained that "[t]he director has quarantined the entire people of the state of Ohio, for much more than 14 days. <u>The director has no statutory authority to close all businesses</u> . . . She has acted in an impermissibly arbitrary, unreasonable, and oppressive manner and without any procedural safeguards . . . Fundamental liberties to own and use property and earn a living are at stake and are violated [Acton's] actions . . . and there is no administrative appeal process within the department of health regulation for this taking." *Id.*, at ¶26, 31, 34.

78. Further, the *Rock House Fitness* court rejected the notion that "one unelected individual could exercise such <u>unfettered power</u> to force everyone to obey impermissibly, vague, arbitrary, and unreasonable rules that the Director devised and revised, modified and reversed, whenever and as she pleases, without any legislative guidance." *Id.*, at ¶37. The Court then enjoined Director Acton and the local health department "from <u>imposing or enforcing penalties solely for noncompliance</u> with the director's order." *Id.,* at ¶37.

79. In order to prevent the continued violation of Plaintiffs' constitutional rights by Defendants, it is appropriate and proper that a declaratory judgment be issued, declaring unconstitutional the *Director's Stay at Home Order*, the *Amended Director's Stay at Home Order*, the *Director's Stay Safe Ohio Order,* and/or the May 29, 2020 *Director's Order,* as such orders are imposed pursuant to vague and unfettered

enforcement authority that creates the crime of operating an amusement park or water park and violates the doctrine of separation of powers.

80. It is further appropriate and hereby requested that preliminary and permanent injunctions issue prohibiting the Defendants from enforcing the *Director's Stay at Home Order*, the *Amended Director's Stay at Home Order*, the *Director's Stay Safe Ohio Order* and/or the May 29, 2020 *Director's Order* against Plaintiffs.

81. It is further appropriate and hereby requested that preliminary and permanent injunctions issue enjoining Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from engaging in any further official conduct that threatens, attempts to threaten, and/or actually interferes with Plaintiffs' occupation and operation of their private property despite their disfavored identity.

Second Cause of Action

DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Deprivation of Property Rights without Equal Protection and Due Process / Takings
Article I, Sections 1, 2, 16, 19 and 20 of the Ohio Constitution

82. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

83. "[T]he Ohio Constitution is more protective of private property rights than its federal counterpart [and] the Ohio Supreme Court insists upon a more stringent Equal Protection analysis." *Yoder v. City of Bowling Green*, Ohio, No. 3:17 CV 2321, 2019 WL 415254, at p. 4-5 (N.D. Ohio Feb. 1, 2019), citing *Norwood* and Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law 198* (2018), at 16 ("Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees in the U.S. Constitution when it comes to the rights guarantees in their own constitutions").

84. On Equal Protection and Due Process, Article I, Section 2 of the Ohio Constitution provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit…"

85. In *State v. Mole*, the Ohio Supreme Court indicated that the Ohio Constitution's equal protection guarantees can be applied to provide greater protection than their federal counterparts: "Although this court previously recognized that the Equal Protection Clauses of the United States Constitution and the Ohio Constitution are substantively equivalent and that the same review is required, we also have made clear that the Ohio Constitution is a document of independent force." *State v. Mole*, 2016-Ohio-5124, ¶¶ 14, citing *Arnold v. Cleveland,* 67 Ohio St.3d 35, 42 (1993).

Equal Protection and Substantive Due Process

86. Nowhere is this "independent force" of Ohio's equal protection clause more relevant than with *protection of private property rights*, since those rights are "fundamental rights" in Ohio but not so pursuant to federal constitutional precedent.

87. A regulation of property violates the Ohio Constitution's guarantees of Due Process and Equal Protection when it is "arbitrary," "unduly oppressive upon individuals," not "necessary for the public welfare," or fails to *substantially* advance a legitimate interest *through a substantial relationship to it*. See *Direct Plumbing Supply v. City of Dayton*, 138 Ohio St. 540 (1941); *Olds v. Klotz*, 131 Ohio St. 447, 451 (1936); *City of Cincinnati v. Correll*, 141 Ohio St. 535, 539 (1943).

88. Pursuant to the foregoing standards, the Ohio Supreme Court recently applied exacting scrutiny to invalidate an Ottawa Hills zoning restriction, due to its "disparate treatment" of homeowners. *Boice v. Village of Ottawa Hills,* 137 Ohio St.3d 412, 999 N.E.2d 649, 2013-Ohio-4769 ¶¶17-19 (observing that "there was disparate treatment of the residents in the village when it came to permitting houses to be built on lots smaller than 35,000 square feet," that the land use at issue involved a *de minimus* difference, and that other similarly situated houses were "grandfathered in.").

89. In *State ex rel. Pizza v. Rezcallah*, 84 Ohio St.3d 116, 702 N.E.2d 81, 1998-Ohio-313, the Ohio Supreme Court explained that "the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only when the restriction thereof bears a *substantial relationship* to the public health, morals and safety."

90. "Ohio courts, interpreting the Ohio Constitution, apply something higher than rational basis review, but less than strict scrutiny to cases involving property rights." *Yoder v. City of Bowling Green, Ohio*, No. 3:17 CV 2321, 2019 WL 415254, at 3–6 (N.D. Ohio Feb. 1, 2019)("[t]he dwelling limit is impermissibly arbitrary, oppressive, and untailored . . .Within the regulations, the City claims to be effectuating a governmental interest in limiting population density. * * * But the City's dwelling limit only focuses on the type of relationship between those living together in a home, and as such, is both over- and under-inclusive with respect to either of these interests. The Court thus concludes the dwelling limit is an 'unreasonable and arbitrary' restriction on the issue of property, and does not bear a "substantial relationship" to its avowed goals"), citing *Norwood v. Horney,* 110 Ohio St.3d 353, 361-62 (2006); *Mariemont Apartment Ass'n v. Village of Mariemont,* 2007 WL 120727, at 7 (Ohio Ct. App.) (homeowners "have a constitutionally protected property interest in running their residential leasing businesses free from unreasonable and arbitrary interference from the government" under the Due Process Clause); *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 128 (1998); *Boice v. Ottawa Hills,* 137 Ohio St. 3d 412, 416-17 (2013) (invalidating zoning regulation requiring lots of a certain size because of "disparate treatment of the residents in the village when it came to permitting houses to be built on lots smaller than 35,000 square feet," a *de minimis* difference between prohibited and permitted, and other similarly situated houses were "grandfathered in" . . . "It was clearly arbitrary for the village to single this lot out for a denial of the grandfathering-in treatment enjoyed by similar lots in the same neighborhood!").

91. No classification may be arbitrary: "the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is

proposed, and can never be made arbitrarily and without any such basis.' *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124 ¶¶12-29.

92. "Discrimination of an unusual character especially suggest[s] careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.*

93. Otherwise put, "classifications must have a reasonable basis and may not 'subject individuals to an arbitrary exercise of power." *Id*., citing *Conley v. Shearer,* 64 Ohio St.3d 284, 288 (1992).

94. "A statutory classification violates equal protection if it treats similarly situated individuals differently based upon an illogical and arbitrary basis." *Mariemont Apartment Association v. Village of Mariemont,* 2007-Ohio-173, at ¶28, citing *Adamsky v. Buckeye Local School Dist.,* 73 Ohio St.3d 360, at 362, 1995-Ohio-298.

95. The face of the May 29, 2020 *Director's Order* articulates no clear governmental interest, other than the intimation that the Order is for the purpose of safety. See p. 1.

96. The *Director's Stay Safe Ohio Order* is overbroad, underinclusive, and untailored with respect to the foregoing governmental interest.

97. In selectively singling out and disfavoring several industries, including Ohio amusement parks and water parks, on the basis of their *identity*, rather than their *safety*, the *Director's Stay Safe Ohio Order* fails to provide any basis whatsoever for its disparate treatment.

98. There is no basis in law or fact for the disparate treatment of amusement parks or water parks.

99. The *Director's Order* fails to articulate any basis for disparate treatment of amusement parks or water parks, with reference to the foregoing governmental interest or any governmental interest at all.

100. Disparate prohibition of the operation of amusement parks and water parks is arbitrary.

101. Plaintiffs are willing and able to abide by the safety regulations mandated by the *Director's Stay Safe Ohio Order*, including but not limited to ¶8 (requiring facial masks), ¶16 (requiring "Social Distancing Requirements"); ¶21(a) (requiring certain safety protocols of "manufacturing, distribution, & construction"

employers); ¶21(b) (requiring certain safety protocols of "consumer, retail & services" employers); ¶21(c) (requiring certain safety protocols of "general office environments" employers).

102. Plaintiffs are willing and able to abide by the safety regulations mandated by the May 29, 2020 *Director's Order*, including but not limited to ¶2 ("Social Distancing Requirements"), ¶7 (requiring facial coverings/masks), ¶11 (requiring "Social Distancing Requirements"), ¶12 (identifying "general" safety regulations for "businesses/employers"), ¶13 (requiring certain safety protocols of "manufacturing, distribution, & construction" employers); ¶14 (requiring certain safety protocols of "consumer, retail & services" employers); ¶15 (requiring certain safety protocols of "general office environments" employers).

103. In addition, Plaintiffs are able to abide by all applicable mandatory "Responsible RestartOhio" regulations regarding "Local and Public Pools and Aquatic Centers," "Canoe Liveries and Recreational Paddling," "Restaurants and Bars," and "Day Spas." See *Exhibit 5.*

104. In addition, Plaintiffs are able to abide by all applicable mandatory "Responsible RestartOhio" regulations proposed by the Travel and Tourism Committee.

105. Unlike many retail establishments and other workplaces permitted to open, Plaintiffs' water parks and amusement parks are accessible only to those who have previously purchased tickets.

106. Unlike many retail establishments and other workplaces permitted to open, Plaintiffs' water parks and amusement parks are able to carefully control access to their facilities through admissions policies.

107. Unlike many retail establishments and other workplaces permitted to open, Plaintiffs' water parks and amusement parks include exceptionally large multi-acre outdoor spaces capable of effectuating social distancing.

108. Plaintiffs' facilities exceed 300 acres.

109. Plaintiff are able to operate on a "timed ticketing" reservations-only basis.

110. There is no factor inherent in the operation of an amusement or water park that provides a unique threat of spreading any particular pandemic above and beyond factors inherent in the operation of any other permitted business.

111. For the purposes of safety, Plaintiffs are similarly-situated to, if not far better equipped than, the businesses permitted by Governor DeWine to open on June 10, 2020, including aquariums, indoors sports, country clubs, indoor movie theatres, recreation centers, playgrounds, trampoline parks, and zoos.

Equal Protection and Procedural Due Process

112. While the State has afforded a hearing on safety to some, it has afforded no such hearings to Plaintiffs.

113. A procedural due process limitation, unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person's life, liberty, or property interest. It simply requires that the government provide 'due process' before or after making such a decision.

114. The goal is to minimize the risk of substantive error, to assure fairness in the decision-making process, and to assure that the individual affected has a participatory role in the process. The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard 'in a meaningful manner.'" *Howard v. Grinage,* 82 F.3d 1343, 1349 (6th Cir. 1996), citing *Loudermill v. Cleveland Bd. of Educ.,* 721 F.2d 550, 563 (6th Cir.1983), *aff'd,* 470 U.S. 532 (1985).

115. Interests in operating a business or earning a living are more than sufficient to invoke procedural due process guarantees. *Johnson v. Morales*, 946 F.3d 911, 935–37 (6th Cir. 2020)("Johnson's interest in her business license is enough to invoke due process protection").

116. "There is no dispute that *never* providing an opportunity to challenge a permit revocation violates due process. Thus, the revocation of [the right to remain in business] without a pre-deprivation hearing or a post-deprivation hearing violated due process." *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 488 (6th Cir. 2014).

117. Even when such property interests are deprived in an "emergency situation," government must provide an "adequate post-deprivation process." *United Pet Supply*, 768 F.3d at 486.

118. These safeguards for liberty are so beyond objection that "[n]o reasonable officer could believe that revoking a permit to do business without providing any pre-deprivation or post-deprivation remedy [is] constitutional." *Id.,* at 488.

119. Putting an Ohioan out of business without any opportunity for a hearing "is one of the rare situations where the unconstitutionality of the application of a statute to a situation is plainly obvious" such that "a clearly established right" is violated, and even qualified immunity is to be denied. *Id.,* at 489.

120. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

121. *Further*, even when the "the government has a substantial interest in ensuring the safety of its citizens," a postdeprivation hearing is still required. See *Johnson v. Morales,* 946 F.3d 911, at 923 (6th Cir. 2020).

122. *Finally*, in requiring a postdeprivation hearing, at least with respect to the decimation of one's business and livelihood, it matters not that the deprivation may be only "temporary" in nature. *Fuentes v. Shevin,* 407 U.S. 67, at 84–85 ("[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.").

123. "Due process of law requires that plaintiffs be afforded a *prompt* hearing before a neutral judicial or administrative officer." *Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006)(25 day delay for post-deprivation hearing unconstitutional); see also *United States v. James Daniel Good Real Prop.,* 510 U.S. 43, 56 (1993)("the Due Process Clause requires ... an opportunity for some kind of predeprivation or *prompt* post-deprivation hearing at which some showing of the probable validity of the deprivation must be made").

124. Because "burden-shifting can be a problem of constitutional dimension in the civil context," *Johnson v. Morales*, 946 F.3d 911, 916–40 (6th Cir. 2020), the Ohio Constitution requires, in this context, that the State carry the burden of proving why any appealing water or amusement park must remain closed.

125. The Ohio Department of Health is required to supply Ohioans who own businesses it has closed with a prompt hearing where the burden is on the Department to justify its decision mandated full closure of those Ohioans' businesses, particularly when the May 29, 2020 *Director's Order* closes just a handful of businesses, i.e. those identified in Paragraph 9 on Page 4 of the Order.

126. The Ohio Department of Health is required to supply Ohioans who own businesses it has closed with hardship relief, such as narrowing it closure order so as to permit limited safe operations.

127. The Ohio Department of Health has entirely ignored these clear and important safeguards in imposing its "Orders" indefinitely closing Plaintiffs' businesses, even though the Orders have been renewed and carried on for over two months at the time of this filing, and even though county health departments alone have been privileged to receive hearings.

128. In an unknown and unknowable but not insignificant number of cases, such as Plaintiffs' case, the Ohio Department of Health would be unable to justify forbidding Plaintiffs from reopening on, at minimum, a limited basis on the same safety terms as other open businesses.

129. With each passing day and week that Plaintiffs' businesses remain closed, additional irreparable harm is inflicted on the Plaintiffs' many employees and affiliates, surrounding businesses, and local governments.

130. Neither the May 29, 2020 *Director's Order* nor any other law or rule entitles Plaintiffs or others to any hearing where they can explain these factors to a neutral decisionmaker with the power to lift or amend the closure of their business.

131. The Ohio Supreme Court has expressed that due process requires all inferences to be drawn in favor of *the Ohio property owner rather than against them.*

132. Plaintiffs face irreparable harm in the form of permanent closure and failure of their business and/or criminal, civil, and equitable penalties.

133. Plaintiffs have suffered and continues to suffer actual and nominal damages due to the State's failure to supply a hearing, including but not limited to the total deprivation of all or nearly all gross business revenue and personal financial harm.

Takings

134. Plaintiffs hereby incorporates by reference the allegations in the foregoing paragraphs as if set forth fully herein.

135. The ongoing closure of Plaintiffs' operations, through unequal, unilateral, and unexplained administrative action with no end date, has taken Plaintiffs' property without due process or just compensation.

136. The threatened imposition of fines on Plaintiffs or physical closure of Plaintiffs' property threatens both impermissible takings and impermissible monetary exactions.

137. The State has forced Plaintiffs to bear a burden that should be borne by the public at large, rather than by the few who businesses who remain subject to Defendants' forced closure.

Conclusion

138. Because Defendants claim in paragraph 1 of the *Director's Order* issued on May 29, 2020, that "if the situation deteriorates additional targeted restrictions will need to be made," any permission to operate issued to Plaintiffs by Defendants fails to moot Plaintiffs' claims.

139. The *Director's Order* is entitled to no deference and no presumption of constitutionality, because it is neither a statute duly enacted by the Ohio General Assembly nor an administrative rule enacted through the Notice and Comment rulemaking procedures required by R.C. 119.

140. Nearly every prediction made by Defendants and their attorneys to justify their arbitrary policymaking during the pandemic has been proven false.

141. Defendants' safety concerns regarding Plaintiffs' businesses are speculative; however, the harm to Plaintiffs and their surrounding community is tangible, concrete, and ongoing.

142. In addressing the closure of Plaintiffs' businesses, "every day counts," said Melinda Huntley, executive director of the Ohio Travel Association, in an interview last week. "Every day we're losing more jobs, some permanently." She said many attractions depend on a short summer tourist season to make up the bulk of their revenue. See Cleveland.com, at *https://www.cleveland.com/business/2020/06/gov-mike-dewine-says-hell-reveal-thursday-when-zoos-museums-and-amusement-parks-can-reopen.html*.

143. Plaintiffs respectfully incorporate by reference all Exhibits submitted to the original complaint in this case.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and that this Court:

(1) Declare that R.C. 3701.352 and R.C. 3701.99, when enforcing R.C. 3701.13 and 3701.56, and the closure and criminalization of operations within the *Director's Order* pursuant thereto are unconstitutional on their faces and as applied to Plaintiffs due to the statutes and the *Director's Order*: (i) failing to provide meaningful procedural due process (ii) failing to afford equal protection of the law; (iii) violating the doctrine of separation of powers; and (iv) delegated unfettered and unbridled vague power to unelected officials.

(2) Declare that the closure and criminalization of "amusement parks' and "water parks," within the *Director's Order,* is unconstitutional as applied to Plaintiffs' businesses, so long as those businesses operate safely.

(3) Declare that the Director of the Ohio Department of Health has exceeded the statutory limits of her authority in closing water parks and amusement parks.

(4) Declare that Defendants' fines, threatened fines, and equitable action such as physical closure taken against Plaintiffs effectuates impermissible takings.

(5) Issue a temporary restraining order, and a preliminary and permanent injunction, prohibiting Defendants and Defendants' agents from enforcing the mandate within the *Director's Order* that <u>safe</u> amusement parks and water parks remain closed.

(6) Issue a preliminary and permanent injunction prohibiting Defendants from enforcing or relying on the mandate closing amusement parks and water parks so as to prosecute, fine, imprison, or otherwise punish or sanction Plaintiffs or others who operate safely.

(7) Enjoin Defendants from enforcing penalties for non-compliance with the Order closing the following businesses listed in Paragraph 9(d) of the *Director's Order*: "amusement parks," and "water parks," so long as they operate in compliance with all applicable safety regulations, whether those in the *Director's Order* or the state's supplemental guidelines governing businesses like those of the Plaintiffs in this case (because disparate treatment of these operations is arbitrary, so long as those operations are safely conducted).

(8) Enjoin Defendants from imposing penalties predicated solely on non-compliance with the Order (because R.C. 3701.352 is impermissibly vague and violates separation of powers, insofar as it authorized criminal penalties and the other severe sanctions articulated in R.C. 3701.99 for disobedience of "any order" of the Ohio Department of Health with the sole unconfined limit that the order be one "to prevent a threat to the public caused by a pandemic").

(9) Pursuant to Ohio Rev. Code § 2335.39 ("the Equal Access to Justice Act"), and other applicable law, award Plaintiff its costs, actual damages, nominal damages and expenses incurred in bringing this action, including reasonable attorneys' fees;

and

(10) Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

/s/ Maurice A. Thompson
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on Defendants, through email to Defendants' Counsel, on **June 5, 2020.**

Respectfully submitted,
/s/ _Maurice A. Thompson
Maurice A. Thompson (0078548)