EXHIBIT "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF JEFFERSON

———————————————————————X

THOUSAND ISLAND FITNESS CENTER, Individually
And on Behalf of all Others Similarly Situated,

Plaintiffs, Index No.: EF2020-997

Against

ORAL ARGUMENT REQUESTED

ANDREW M. CUOMO, in his Official
Capacity as Governor of the State of New York,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
and **STATE OF NEW YORK,**

Defendants.

———————————————————————X

"A public health emergency does NOT give governors *carte blanche* to disregard the Constitution for as long as the medical problem persists."

Supreme Court Justice Samuel Alito, July 24, 2020.

In a recent United States Senate Health, Education, Labor & Pensions Committee Hearing, Senator Rand Paul, a doctor said the following, **"***It is a fatal conceit to believe that any one person or small group of people have the knowledge necessary to direct an economy, or dictate, public health behavior." "Government health experts need to show caution in their prognostications. It is important to realize that if society meekly submits to an expert and that expert is wrong, a great deal of harm may occur."*[1]

MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY INJUNCTION

Plaintiff, Individually and on behalf of all others similar situated, submits this Memorandum of Law in support of its EMERGENCY Order to Show Cause for a Preliminary Injunction.

[1] U.S. Senate Health, Education, Labor & Pensions Committee Hearing, 6/29/20.

INTRODUCTION

On March 2, 2020, New York State Legislature rushed through in record time with a message of necessity from Governor Cuomo, a bill amending Section 29-a of the Executive Law to increase the Governor Cuomo's powers to deal with a broad array of emergencies. Upon information and belief, there was no debate, prior public notice and no media coverage and bill was passed while everyone in the state was sleeping.

In early March 2020, New York was faced with a threat that caused unease and uncertainty on a scale that has not been witnessed in many years. The COVID-19 pandemic, had arrived in New York. There is no question that New York, like the rest of the country, was ill-prepared to meet the rising demands for hospital supplies and hospital beds for the sick, or that the novel coronavirus was spreading rapidly.

The Governor's initial Executive Order was premised on the perceived need to "flatten the curve" so as to avoid overwhelming the State's hospitals and healthcare centers, not to eradicate the virus. Although the curve has been flattened for almost two months now, the Governor has nonetheless issued stricter and confusing executive orders that unreasonably and unnecessarily interfere with Plaintiff's, and those similarly situated, constitutional rights.

However, after initially ordering fitness centers and a few other industries shuttered on March 16, 2020 pursuant to executive order 202.3, and after shutting down the entire state economy for months (far past when the curve had been flattened) a short time later, the initial response to the pandemic by our state has continued. Now those damaging, unconstitutional actions must finally be addressed, and it is up to the judiciary to act.

THE EXECUTIVE "SHUTDOWN" ORDERS

On March 7, 2020, Governor Cuomo, signed executive order 202, which declared a state of disaster emergency for the State of New York. (See all relevant executive orders attached as Exhibit F.)

On March 16, 2020, Governor Cuomo, signed executive order 202.3, which stated that gyms, fitness centers or classes shall cease operation effective at 8pm on March 16, 2020 until further notice. (See attached as Exhibit F.)

On March 29, 2020, Governor Cuomo, signed executive order 202.13, which extended the shutdown of gyms, fitness centers, etc. until April 15, 2020. (See attached as Exhibit F.)

On April 7, 2020, Governor Cuomo, signed executive order 202.14, which extended the shutdown of gyms, fitness centers, etc. until April 29, 2020. (See attached as Exhibit F.)

On April 16, 2020, Governor Cuomo, signed executive order 202.18, which extended the shutdown of gyms, fitness centers, etc. until May 15, 2020. (See attached as Exhibit F.)

On May 14, 2020, Governor Cuomo, signed executive order 202.31, which extended the shutdown of gyms, fitness centers, etc. until May 28, 2020. (See attached as Exhibit F.)

On May 28, 2020, Governor Cuomo, signed executive order 202.34, which extended the shutdown of gym, fitness centers, etc. until June 27, 2020. (See attached as Exhibit F.)

On June 13, 2020, Governor Cuomo, signed executive order 202.41, which ***allowed all personal care services to open including salons, tattoo parlors, piercing parlors and related personal care services.*** (See attached as Exhibit F.)

On June 26, 2020, Governor Cuomo, signed executive order 202.45, which extended the shutdown of gyms, fitness centers, etc. until July 26, 2020. (See attached as Exhibit F.)

On July 6, 2020, Governor Cuomo, signed executive order 202.48, which extended the shutdown of gyms, fitness centers, etc, ***indefinitely***. (see attached as Exhibit F.)

GOVERNOR CUOMO IN THE MEDIA AND RELEVANT STATEMENT OF FACTS

On March 15, 2020, Governor Cuomo states that the State must do everything it can to slow the rate of infection. He also said that means working to "flatten the curve" on the chart showing infections to a level where the health care system stands a chance of not being overwhelmed. In his press conference, he also states that "if you have too high a number of sick at the same time, when they descend on the hospital system you will overwhelm the hospital system. That is the issue here. It has always been the issue here- overwhelming the capacity of the hospital system."(Attached as Exhibit G.)

On March 16, 2020, Governor Cuomo told MSNBC that he will be closing schools, businesses and halt mass gatherings. "We'll be doing more of that because right now, the numbers are continuing to spike. So you have to ratchet down on the density control if you're going to get those numbers anywhere near where you can manage them in the hospital system." (Attached as Exhibit H.)

On March 16, 2020, Governor Cuomo, signed executive order 202.3, which stated that ALL gyms, fitness centers or classes shall cease operations effective at 8pm on March 16, 2020 until further notice.

Defendants' executive order 202.3 and the executive orders that followed do not provide a pre- or post- deprivation remedy to question "essential." There has never been any health inspection of the Plaintiff's, and all others similarly situated, gyms, no analysis of the health status of gyms as essential and no analysis of Plaintiff's, and all others similarly situated, health related protocols to see if they meet the same health standards as allowed for essential businesses.

On March 16, 2020, Plaintiff, and all others similar situated, businesses were declared non-essential without process. Liquor stores and big box stores such as Target, Walmart and Home Depot were allowed to remain open as "Essential." Plaintiff's, and all others similarly situated, health protocols are sufficiently similar to those businesses that were allowed to remain open.

Plaintiff's, and all others similarly situated, businesses are absolutely essential to the health and well being of its members and to the financial viability and health of its owners and employees.

There was a list of businesses that were allowed to remain open and that the classification was not reasonable or rational and was arbitrary and random without any data, and therefore a denial of due process.

On March 18, 2020, Governor Cuomo states, "Where this all comes down to, is when they talk about flattening the curve. They're trying to slow the advance of the enemy until we

can get enough of our defenses in place. What are the defenses? A healthcare system that can handle the injured." (Attached as Exhibit I.)

On March 26, 2020, Governor Cuomo stated in his press conference that "this is all about getting that curve down and not overwhelming the hospital system." The hospitals have 53,000 bed capacity and we're trying to get to 140,000 bed capacity. (Attached as Exhibit J.)

On June 4, 2020, during his press conference, Cuomo said that, "this is a public health issue and you don't want people sick and dead." During the same press briefing, Cuomo stated that he wanted to thank the protesters for protesting in thousands throughout New York.

The only conclusion you draw from that is that thousands of people can march together throughout the State and there is no public health issue for marches, but someone who wants to open their gym with CDC safety guidelines is endangering the public.

The Governor cannot selectively enforce his executive orders. There is either a public health emergency or there's not. It cannot be both.

On June 6, 2020, Governor Cuomo tweeted the following, "We did the impossible. We didn't just flatten the curve- we crushed it." #NYTough (Tweet attached as Exhibit K.)

On June 25, 2020, Governor Cuomo in an interview with CNN stated, "We did the right thing and New Yorkers paid a terrible cost. They have been locked up. They have been closing their businesses. We have the virus under control finally. We had to flatten the curve." (Attached as Exhibit L.)

On June 25, 2020, Governor Andrew Cuomo announced that gyms would NOT open during Phase IV. There is no Phase V. The State continues to govern impartially and arbitrarily

by allowing personal care businesses such as tanning salons, tattoo parlors, salons, and spas to open while gyms are still ordered to remain shut.

On June 26, 2020, Governor Cuomo stated that "gyms, movie theaters and malls will not re-open until the State determines if air-filtrating systems are circulating the coronavirus and whether there are filters available that would remove it from the air." (Attached as Exhibit M.)

On June 26, 2020, eight Members of the New York State Assembly penned the following excerpts from a letter to Governor Andrew Cuomo:

> *"I write to you today to express my deepest concerns about your decision to remove gyms from Phase IV of re-opening. Since your announcement yesterday, I have heard from gym owners who have expressed frustrations and concerns that if they do not open soon, they may never open their doors again."*
>
> *"Over the last few weeks, the Southern Tier and New York State as a whole have made great strides in fighting against the spread of covid-19. While the health and safety of my constituents is my top priority, I cannot see the logic in this announcement of refusing to allow gyms to open in Phase IV."*
>
> *"For weeks and months, we have all stuck to the plan. Gyms have been working around the clock to come up with creative and safe ways to open theirs doors again. Gyms play not only a crucial role in the physical health and fitness of New Yorkers, but also contribute to mental health, which surely has taken toll during the NYS on PAUSE initiative. Studies have shown that regular exercise and fitness, as well as good sleeping and eating habits, play crucial roles in boosting*

one's immune system, which could ultimately play a role in how badly covid-19 affects an individual who contracts the virus."[2]

On July 17, 2020, Governor Cuomo in his daily press conference stated, "We're feeling very good about what we have done and I applaud all New Yorkers, because the New Yorkers did it." (Attached as Exhibit N.)

On July 20, 2020, in a press conference in Savannah, GA, Governor Cuomo stated,"So New York-yes we got the virus under control and we're now down to one of the lowest infection rates on the globe." (Attached as Exhibit O.)

On July 26, 2020, Cuomo stated that only 637 people were hospitalized with covid-19 statewide. "That's a new low for us since March 18, so really great news." Cuomo further said, "*Don't get cocky, don't get arrogant. There are still threats out there. You still have a national threat and a compliance challenge*." (Attached as Exhibit P.)

As we approach August, the SIXTH month since the shutdown, there is still no date in site for the opening of gyms or fitness centers. Tanning salons, tattoo parlors, dentists, indoor gymnastics, malls and all personal care businesses have been allowed to open.

New York gyms continue to be shut down meanwhile two states (CT. and PA.) that border New York have opened their gyms. If you live by the CT or PA. border, you can go to a gym in one of those states but cannot workout in a gym in New York.

The gyms and fitness centers continue to be shuttered despite Cuomo saying:

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[2] Letter to Andrew Cuomo by the following Members of the Assembly: Clifford Crouch, Jake Ashby, Karl Brabenic, Joe DeStefano, Will Barclay, Ken Blackenbush, Marjorie Byrnes and David DiPietro, June 26, 2020.

(a) we didn't flatten the curve, we crushed it; and

(b) we have the virus under control; and

(c) New York has the lowest infection rate on the globe; and

(d) the lowest hospitalization rates since March 18.

Governor Cuomo's comments and data above demonstrate that the curve flattened a long time ago and there is no longer a state of emergency in the State of New York. He was direct on March 15, 2020 when he said that the most important issue here was overwhelming the hospital system. By his own admission, Governor Cuomo stated, "*There are still threats out there and you still have a national threat.*" There is no longer an imminent, urgent or impending threat of overwhelming the hospital system when 637 are hospitalized with covid-19 and there are at a minimum 53,000 beds available for covid-19 patients. Since this threat is no longer imminent, urgent and impending as necessary under Executive Law 29-a, Governor Cuomo must be removed of his executive powers. Governor Cuomo stating that "*there are still threats out there*" does not equate to an imminent, urgent and impending emergency.

Every other state in this country has allowed gyms to re-open along with hair salons, barber shops and spas including California, South Carolina, Texas, Connecticut, Delaware, Florida, Georgia, Indiana, Minnesota, Missouri, New Hampshire, Pennsylvania and Wisconsins. New York gyms continue to be shut down meanwhile two states (CT. and PA.) that border New York have opened their gyms.

Plaintiff is a family owned and operated business in Jefferson County for twenty-one years and Plaintiff, ands those similarly situated, can no longer afford to remain closed as we are

almost in August, the six month of the shutdown. Plaintiff provides affordable fitness for hundreds of Jefferson County residents and allowing said residents to maintain their mental and physical health and wellness. If Plaintiff does not open immediately, Plaintiff will permanently shut its doors.

Plaintiff, and all others similarly situated, provide their members an essential service. Plaintiff, and all others similarly situated, can provide this professional service to its members in a spacious, socially distanced, sanitary and covid conscious environment.

Plaintiff, and all others similarly situated, have all conformed their fitness centers to the Center of Disease Control guidelines, just like the fitness centers in at least forty states that have been allowed to open, including Pennsylvania, Connecticut and Massachusetts.

If permitted to reopen, there is no question that Plaintiff will take all necessary precautions to prevent the transmission of COVID-19. Among them were that all workouts will be conducted with stringent social distancing in place, dependent on the square footage of the space; all equipment, flooring and surfaces would be constantly cleaned with a disinfectant cleaner; employees will wear masks and, in some cases, face shields; members will have access to disinfecting materials to wipe down their workout areas before and after exercise; members will complete health assessment checks before working out; classes will be staggered if the facility is a class-based gym so that there would not be overlap between members; and finally, since many gym members check in before working out (unlike in many other industries), the fitness industry would keep records to assist with contact tracing in the event that a member tested positive.

Plaintiff, and all others similarly situated, have been affected terribly by the Governor's executive orders. Under threat of criminal penalties, Plaintiff, and all others similarly situated, have been forced to close their businesses, depriving the Plaintiff, and all others similarly situated, of their liberty and property interests without due process. At the same time, without offering any justification, the Governor has allowed, and is still allowing, other businesses deemed "essential" to stay open and now the Governor has opened almost all businesses including tanning salons, tattoo parlors, indoor gymnastics, and spas even though: (a) "essential" businesses and the non-essential businesses that have been allowed to open must also adhere to guidance from the U.S. Centers for Disease Control and Prevention ("CDC") on "social distancing"; and (b) Plaintiff, and all others similarly situated, are fully capable of adhering to those same guide-lines if allowed to reopen.

At the present time, Plaintiff, and all others similarly situated, have lost hundreds of millions of dollars in revenue and have had to lay off at least 70,000 employees throughout the State.

THE EUROPEAN GYM STUDY

In a research experiment and/or study in Europe, researchers found no coronavirus infections among thousands of people allowed to return to their gyms. (See attached "Randomized Re-Opening of Training Facilities during Covid-19 pandemic" Study as Exhibit Q.)

It was apparently the first and only randomized trial to test whether people who work out at gyms with modest restrictions are at greater risk of infection from the coronavirus than those who do not. The tentative answer was no.

The incidence of the infection in Oslo, where the study was conducted, resembles that in such cities as Boston, Oklahoma City and Trenton, NJ.

The trial began on May 22, 2020 with 3,764 members, ages 18 to 64, who did not have underlying medical conditions. They were required to wash hands and maintain social distancing. The subjects were allowed to use lockers and were not required to wear masks. The researchers found only one covid-19 case of the 3,764 subjects, but in a person who had not used the gym before he was tested and was traced to his workplace.

To date, the State has not provided any studies indicating why gyms and fitness centers should remain shuttered.

ARGUMENT

A preliminary injunction is appropriate where petitioners show "a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor." *Doe v. Axelrod*, 73 N.Y.2d 748 [1988]; *1659 Ralph Ave. Laundromat Corp. v. Ben David Enters.,* LLC., 307 A.D.2d 288 [2d Dept. 2003]; see also CPLR 6301.

"It is not for the Court to determine the merits of an action upon a motion for preliminary injunction; rather the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits." *Tucker v. Toia, 54 A.D.2d 322* (4th Dept 1976).

Notably, the Appellate Division, Second Department granted an appellant's preliminary injunction when disputed issues of fact were present but there was adequate irreparable injury to appellant and no harm to respondent. See *Melvin v. Union Coll.,* 195 A.D.2d 447 (1993). The Appellate Court stated that, "The existence of a factual dispute will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance." Id. at 448 (emphasis added).

The Appellate Division in *Tucker v. Toia* granted the Plaintiff a preliminary injunction stating that "the argument may not prove to be ultimately successful, but it is based on substantial principles of constitutional law and involves novel issues of first impression. Plaintiff's argument and state's counterarguments in favor of upholding the statute's validity involved aspects of constitutional law too weighty to have been briefed adequately in the short time available to the parties before the motion was heard and too complex to resolve in a short time." The Court went on to conclude that, "this is precisely the situation in which a preliminary injunction should be granted to hold the parties in status quo while the legal issues are determined in deliberate and judicious manner." Tucker at 326 (emphasis added).

This preliminary injunction and civil action is based on substantial principles of constitutional law and involves novel issues of first impression. Plaintiff amply satisfies all of these factors.

I. Plaintiffs Have Made a Showing They Are Likely To Succeed On The Merits.

A. Defendants' Orders violate Due Process Clause of the 14th Amendment.

Plaintiff has a fundamental property interest in conducting lawful business activities that are protected by the Due Process Clause of the Fourteenth Amendment.

The Orders and Defendants' enforcement thereof, violate Plaintiff's substantive due process rights secured by the Fourteenth Amendment to the U.S. Constitution. Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana,* 391 U.S. 145, 147–149 (1968). In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972); *Griswold v. Connecticut,* 381 U.S. 479, 484–486 (1965).

Defendants' Orders, which expressly deprive Plaintiff, and all others similarly situated, of their rights and liberties in lawfully operating their businesses by ordering the closure of "Non-Essential" businesses, did not afford Plaintiff, and all others similarly situated, with a constitutionally adequate hearing to present their case for their businesses to not be shut down. At a minimum, now that we are in the FIFTH 30 day extension of the Executive Order, Plaintiff , and all others similarly situated, aver that they should have been able to decide for themselves whether to "shut down" if their businesses / business models were not equipped to properly deal with health and safety guidelines issues by the federal and New York state governments in connection with the Covid 19 crisis.

Defendants failed to comply with the procedural and substantive requirements of the U.S. Constitution in connection with Plaintiff, and all others similarly situated, rights and liberties as they relate to their respective properties / businesses, which would have given Plaintiff, and all others similarly situated, a meaningful opportunity to respond to the proposed Orders and explain how and why they were so deeply flawed and unconstitutional as applied to Plaintiff, and all others similarly situated.

Because Defendants' decisions in issuing their Orders were made in reliance on procedurally deficient and substantively unlawful processes, Plaintiff, and all others similarly situated, were directly and proximately deprived of their property, and consequently, their ability to lawfully operate their businesses without unconstitutional government overreach.

Because Defendants' decisions were made in reliance upon an arbitrary and capricious interpretation of the United States Constitution and related laws and statutes with respect to their ability to order the State-wide "closure" of all "Non-Essential" businesses, Plaintiff, and all others similarly situated, were directly and proximately deprived of their property rights absent substantive due process of law, in violation of the Fourteenth Amendment to the U.S. Constitution.

B. Defendants' Orders violate the Equal Protection Clause of the Fourteenth Amendment.

At its core, the Equal Protection Clause of the 14th Amendment to the U.S. Constitution functions as a constitutional guarantee that no person or group will be denied the protection under the law that is enjoyed by similar persons or groups. In other words, persons similarly situated must be similarly treated. Equal protection is extended when the rules of law are applied equally in all like cases and when persons are exempt from obligations greater than those imposed upon others in like circumstances.

The Orders and Defendants' enforcement thereof violate the Fourteenth Amendment, both facially and as-applied to Plaintiff, and all others similarly situated. The Fourteenth Amendment of the Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Equal protection requires the state to govern impartially—not draw arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objection. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Defendants have intentionally and arbitrarily categorized New York businesses and conduct as either "Essential" or "Non-Essential." Those businesses classified as "Essential," or as participating in "essential services", are permitted to go about their business and activities provided certain social distancing practices are employed. *Id.* Those classified as "Non-essential," or as engaging in Non-essential activities, are required to shut down and have their workers stay in their residences, unless it becomes necessary for them to leave for one of the enumerated "Essential" activities. *Id.*

Strict scrutiny under the Equal Protection Clause applies where, as here, the classification impinges on a fundamental right, the right to due process.

Defendants cannot satisfy strict scrutiny, because their arbitrary classifications are not narrowly tailored measures that further compelling government interests, for the reasons stated above.

Defendants cannot satisfy any level of scrutiny because the classification is manifestly irrational and arbitrary. It is arbitrary and irrational for indoor gymnastics centers, malls, tattoo parlors and tanning salons to open while gyms remain shuttered.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no State can "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. Accordingly, State action that regulates economic activity in a discriminatory manner violates the Equal Protection Clause unless the State can show a "rational relationship between the disparity of treatment," along with some "legitimate governmental purpose." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67; (2001). Under no circumstances can a State "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446; 105 S. Ct. 3249; 87 L. Ed. 2d 313, 324 (1985) (citation omitted); see also *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535-38 (1973) (holding that the classification at issue was not only 'imprecise,' but was utterly want of any rational basis).

The Supreme Court's decision in *City of Cleburne* exemplifies how such arbitrariness or irrationality may be identified. In *Cleburne*, the Supreme Court struck down a zoning ordinance that required a special use permit for a home for individuals with disabilities ("Featherstone Home"), but did not require the same special use permit "for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged . . ., private clubs or fraternal orders and other specified uses." *City of Cleburne*, 473 U.S. at 447.

The Court acknowledged that, while individuals with intellectual disabilities may have unique needs, such difference is patently irrelevant unless the Featherstone Home and its

occupants would threaten legitimate city interests in a way that other permitted uses such as boarding houses, fraternity or sorority houses, etc. would not. Id. at 448. In conclusion, the Court found that the record did not reveal "any rational basis for believing that the Featherstone Home would pose any special threat to the city's legitimate interests." Id.

Plaintiff, and those similarly situated, have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing the Orders.

C. Orders violate the Takings Clause of the Fifth and Fourteenth Amendment.

The Supreme Court has long held that "the Fifth Amendment...was designed to bar Government from forcing people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." See *Armstrong v. United States* (1960) 364 U.S. 40, 49.

Defendants' Orders mandated that because Plaintiff was a "Non-Essential" business, Plaintiff was required to "shut down" and cease all operations as a means to help curb the spread of Covid 19. Such a mandate completely and unconstitutionally deprived Plaintiff of all economically beneficial use of its business without just compensation.

The Defendants have executed a "Taking" by ordering that gyms and fitness centers be shuttered since March 16, 2020. If the Defendants do not lift the executive order, they must pay Plaintiff, and those similarly situated, just compensation for this compensatory taking.

While the "police power" is inherent in a sovereign government and is reserved for the States in the 10th Amendment to the U.S. Constitution, it is not without constitutional limits. See *Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926) (holding that local governments may protect the general welfare through the enactment of residential zoning ordinances). However, a government's "police power" in this area is restricted by Constitutional considerations, including the 5th Amendment's "Takings Clause", as well as Due Process and Equal Protection. Plaintiff,

and those similarly situated, assert that the "police power" is not a defense because the taking has gone too far.

The Supreme Court has long recognized that a Taking may be effected not only by government's physical occupation of private property but also by regulations that "go too far." See *Tahoe-Sierra Presidential Council v. Tahoe Regional Planning Agency* 535 U.S. 302 (2002).

As of July 29, 2020, Plaintiff and members of the putative Class have been ordered to shutdown for 135 days even though Governor Cuomo boasted on CNN on June 25, 2020 that "*the virus is under control*" and tweeted on June 6 that "*we crushed it.*"

Defendant Cuomo's executive shutdown orders and the enforcement thereof has caused both a complete and total regulatory and physical taking of Plaintiff and members of the putative Class' property without just compensation in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution. As a result, Defendants' blatant violation of the Takings Clause of the 5th Amendment has caused proximate and legal harm to Plaintiff and members of the putative Class.

Plaintiff and members of the putative Class are entitled to just compensation in the form of lost income and revenue from the use of its property.

Plaintiff and members of the putative Class have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing the executive shutdown orders.

Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiff and members of the putative Class are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief invalidating and restraining enforcement of the orders, as well as compensatory damages.

D. **The Executive Orders are Unconstitutional**

The concurrence of individual constitutional rights amid the declared COVID-19 pandemic.

Constitutional rights do not wholly evaporate in times of emergency. See *Jacobson v. Massachusetts,* 197 U.S. 11, 29; 25 S. Ct. 358; 49 L. Ed. 643 (1905). Indeed, the law has long been settled that all essential liberties remain protected at all times, even during the gravest of emergencies. *Bell v. Burson*, 402 U.S. 535, 542; 91 S. Ct. 1586; 29 L. Ed. 2d 90 (1971); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65; 83 S. Ct. 554; 9 L. Ed. 2d 644 (1963). While States may implicate police powers to take swift action necessary to protect public health and safety, those powers are not limitless, and are subject to judicial review. See *Jacobson,* 197 U.S. at 31, 38-39; *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1179 (11th Cir. 2020) ('while constitutional rights have limits, so does a state's power to issue executive orders limiting such rights in times of emergency').

Generally, courts apply a deferential standard of review when reviewing a State's implication of its police powers to preserve public health during a declared state of emergency. See, e.g., *Jacobson*, 197 U.S. at 28. "[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution." Id. at 31. In *Jacobson*, the Court explained that State action may improperly deviate from having a "real or substantial relation" to the public health if it is "exercised in particular circumstances and in references to particular persons . . . in an arbitrary, unreasonable manner." Id. at 28. For example (and as more thoroughly explored in Plaintiffs' Equal Protection argument), rules that now allow outdoor social gatherings, malls, indoor gymnastics, mass protests, while maintaining a 6-foot distance, but not indoor fitness classes of any size under any

circumstances, is a red flag that the Governor's Executive Orders are improperly arbitrary and bears "no real or substantial relation" to its proffered public health end.

A public health crisis state of emergency does not entitle the Governor to cast away constitutional rights and protections full throttle with arbitrary and discriminatory Executive Orders. As outlined above, the Governor's issuance of such patently arbitrary orders under the contrived guise of "mitigating the spread of COVID-19, protecting the public health, and providing essential protections to vulnerable New Yorkers" is undoubtedly an improper constraint on Plaintiffs' (and countless others) protected Constitutional rights. (See *Meyer v. Nebraska*, 262 U.S. 390, 399-400; 43 S. Ct. 625; 67 L. Ed. 1042 (1923)

E. Governor Cuomo's Emergency Powers should be lifted

Section 1. Paragraph a of subdivision 2 of section 20 of the executive law, as amended by section 1 of part B of chapter 56 of the laws of 2010 was amended to read as follows : "disaster means occurrence or imminent, impending or urgent threat of wide spread damage, injury, or loss of life or property resulting from any natural or man made causes. Section 29-a of the executive law states that Governor Cuomo may by executive order temporarily suspend any statute, local law, ordinance or orders, rules, regulations or parts thereof, of any agency during a state disaster emergency.

There is no longer an imminent, impending or urgent threat of wide spread damage or injury. Governor Cuomo has stated vociferously that:

(a) we didn't flatten the curve, we crushed it; and

(b) we have the virus under control; and

(c) New York has the lowest infection rate on the globe; and

(d) the lowest hospitalization rates since March 18.

Governor Cuomo's comments and data above demonstrate that the curve flattened a long time ago and there is no longer a state of emergency in the State of New York. He was direct on March 15, 2020 when he said that the most important issue here was overwhelming the hospital system. By his own admission, Governor Cuomo stated, "*There are still threats out there and you still have a national threat.*" There is no longer an imminent, urgent or impending threat of overwhelming the hospital system when 637 are hospitalized with covid-19 and there are at a minimum 53,000 beds available for covid-19 patients. Since this threat is no longer imminent, urgent and impending as necessary under Executive Law 29-a, Governor Cuomo must be removed of his executive powers. Governor Cuomo stating that "*there are still threats out there*" does not equate to an imminent, urgent and impending emergency.

II. Plaintiff, and those similarly situated, Will Suffer Irreparable Harm If a Preliminary Injunction is not issued.

The Plaintiff, and those similarly situated, have been shutdown since March 16, 2020 or for 135 days. The Plaintiff, and those similarly situated, can no longer support their families and keep their gyms afloat unless their gyms open immediately. Plaintiff and those similarly situated have utilized their entire savings and used their credit cards to conform their gyms into a safe havens for their members. They cannot wait any longer as Governor Cuomo excluded them from phase four. There is no phase five.

There is no question that Plaintiffs suffer irreparable harm every day that the shutdown of gyms remain in force. Deprivation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also *Awad*, 670 F.3d at 1131 ("Furthermore, when an alleged constitutional right is involved, most

courts hold that no further showing of irreparable injury is necessary.") (citation omitted); *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."); *Quinly v. City of Prairie Village*, 446 F.Supp.2d 1233, 1237-38 (D. Kan. 2006) (same).

The Plaintiff, and those similarly situated, will suffer irreparable injury from loss of customers, goodwill, and future business. Further, the harm today to the Plaintiff, and those similarly situated, grows daily for two reasons. First, Governor has had this specific industry shut down longer than nearly any industry in the State when there has not been one single reported outbreak in the United States at a fitness center either before the "Stay Home" orders began or after over 40 states have allowed the reopening of gyms or during the European Study where thousands of members were tested. Second, our Governor's refusal to reengage the fitness industry into the state economy, when nearly all other businesses are open, sends the false message that the fitness industry is unsafe to reopen, which will certainly further damage the industry as a whole.

III. The Harm To Plaintiffs Substantially Outweighs Any Harm To The Defendants.

The balance of harms tips decidedly in favor of Plaintiffs. The Defendants have recently allowed protests to occur in the State of New York with thousands of people marching hand in hand. The continued protests have exposed the absurdity of the continued lockdowns. It is either a public health emergency and crowds must be stopped or its not. It cannot be both. Plaintiff, and those similarly situated, have formulated a responsible plan for re-opening their gyms as discussed above. In addition, if the gym does not open immediately, Plaintiff, and those similarly situated, will suffer the greatest harm by permanently closing their doors.

First, the balance of harms favors the Plaintiff, and those similarly situated. The fitness center Plaintiffs have been unable to see their members for over several months, causing unprecedented disruptions to their members' physical and mental health. Many of the fitness studio Plaintiffs have had to lay off all or some of their staff, have little to no income, and yet

still need to keep paying rent and utilities on their facilities. These layoffs and enormous financial losses are impacting the fitness industry's ability to effectively respond to the very co-morbidities that have caused complications with COVID-19 itself. Permitting the fitness industry to reengage with its members does not pose a significant risk of exacerbating the transmission of COVID-19, as there have been no known outbreaks at fitness facilities across the United States. Further, the fitness industry is well-qualified to take steps to ensure sanitation and appropriate protocol with respect to member interaction and safety. Second, The gyms and fitness centers continue to be shuttered despite Cuomo saying:

(a) we didn't flatten the curve, we crushed it; and

(b) we have the virus under control; and

(c) New York has the lowest infection rate on the globe; and

(d) the lowest hospitalization rates since March 18.

Governor Cuomo's comments and data above demonstrate that the curve flattened a long time ago and there is no longer a state of emergency in the State of New York. He was direct on March 15, 2020 when he said that the most important issue here was overwhelming the hospital system. By his own admission, Governor Cuomo stated, "*There are still threats out there and you still have a national threat.*" There is no longer an imminent, urgent or impending threat of overwhelming the hospital system when 637 are hospitalized with covid-19 and there are at a minimum 53,000 beds available for covid-19 patients. As a result, the opening of gyms and fitness centers are not a threat to the public.

There are currently over forty million unemployed people in the United States. If you add the closure of small businesses to that number, the country is looking at an economic catastrophe.

It is also well established that "when a law is likely unconstitutional, the interests of those the government represents, such as voters do not outweigh a plaintiff's interest in having its constitutional rights protected." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (quoting *Awad*, 670 F.3d at 1131), aff'd, 134 S. Ct. 2751 (2014). Thus, "if the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589–90 (7th Cir. 2012). See also Quinly, 446 F.Supp.2d at 1237 (quoting Alvarez).

IV . CONCLUSION

A preliminary injunction should be entered, enjoining the Defendants from the continued shutdown of Plaintiff's, and those similarly situated, operation of their businesses.

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Respectfully submitted,

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