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2 NOT FOR PUBLICATION

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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 Xponential Fitness, et al.,

10 Plaintiffs,

11 v.

12 State of Arizona, et al.,

13 Defendants.

No. CV-20-01310-PHX-DJH

**ORDER**

14  
15 Plaintiffs are franchisors of boutique fitness studios that provide physical fitness  
16 services to consumers across North America, including Arizona, that have been  
17 temporarily closed by Defendant Arizona Governor Doug Ducey’s Executive Order 2020-  
18 43, issued and effective on June 29, 2020 (“June 29, 2020 Executive Order”).  
19 Understandably, Plaintiffs seek to reopen. They claim that the June 29, 2020 Executive  
20 Order violates their rights under the United States and Arizona Constitutions, and they seek  
21 a temporary restraining order (“TRO”) and preliminary injunction (“PI”) to prevent  
22 Governor Ducey from enforcing the June 29, 2020 Executive Order.<sup>1</sup> In accordance with  
23 an expedited briefing schedule, Governor Ducey filed a Response (Doc. 39), and Plaintiffs  
24 filed a Reply (Doc. 41). The Court held a telephonic hearing<sup>2</sup> on Plaintiffs’ Motion on July

25  
26 <sup>1</sup> Defendant State of Arizona has filed a Motion to Dismiss (Doc. 34), arguing that it is  
27 immune from this suit. At the Hearing, Plaintiffs conceded that the Motion contained  
28 correct assertions of law, and therefore, they would be withdrawing their claims against  
Arizona. In light of Plaintiffs’ representations, the Court will grant Arizona’s Motion  
(Doc. 34).

<sup>2</sup> Members of the media and public were permitted an opportunity to listen to the hearing.

1 13, 2020, at which argument was presented (the “Hearing”).

2 The Court’s limited role of judicial review is not to assess the wisdom of the June  
3 29, 2020 Executive Order, but rather to determine whether it violates the law. Having  
4 carefully considered the briefing submitted by the parties and the arguments presented by  
5 counsel, the Court finds that Plaintiffs are not entitled to the extraordinary remedy of  
6 injunctive relief and will therefore deny the Motion.

## 7 **I. BACKGROUND**

### 8 **A. The Covid-19 Health Crisis in Arizona**

9 Arizona, the United States, and the entire world are in the middle of an unparalleled  
10 public health emergency. The novel coronavirus, SARS–CoV–2, and the disease it causes,  
11 COVID-19, first appeared in December 2019, and has since spread to most countries in the  
12 world, including the United States. In the short time since, the virus “has thrust humankind  
13 into an unprecedented global public health crisis.” *Gayle v. Meade*, 2020 WL 2086482, at  
14 \*1 (S.D. Fla. Apr. 30, 2020), *order clarified*, 2020 WL 2203576 (S.D. Fla. May 2, 2020).  
15 “Experts consider this outbreak the worst public health epidemic since the influenza  
16 outbreak of 1918.” *Altman v. County of Santa Clara*, 2020 WL 2850291, at \*1 (N.D. Cal.  
17 June 2, 2020).

18 The virus “is extremely easy to transmit, can be transmitted by infected people who  
19 show no symptoms, has no cure, and the population has not developed herd immunity.”  
20 *Id.* According to the Center for Disease Control (“CDC”) the virus that causes COVID-19  
21 is believed to spread mainly through close person-to-person contact via respiratory  
22 droplets. *Ibarra-Perez v. Howard*, 2020 WL 3440298, at \*4 (D. Ariz. June 23, 2020).  
23 Additionally, physical activity results in more exerted breathing, which increases the output  
24 of viral respiratory droplets. (Doc. 40 at 29). Confined spaces within gyms increase the  
25 ability of individuals to breathe in these respiratory droplets, contract COVID-19, and  
26 spread COVID-19 within the community. Indeed, intense physical activity in confined  
27 spaces increases the risk of infections, and those risks increase with higher intensity  
28 exercise. (*Id.* at 30).

1           Additionally, it is possible to contract COVID-19 by touching a surface or object  
2 that has the virus on it. (Doc. 40 at 7). “The CDC recommends that to avoid exposure and  
3 transmission, individuals should maintain a physical distance of at least six feet from  
4 others, wear cloth face covers, frequently wash their hands or use hand sanitizer, and  
5 disinfect frequently touched surfaces.” *Id.*

6           As of the date of this order, COVID-19 has sickened at least 13,177,855 people  
7 worldwide and 3,397,069 in the United States, and has killed 574,793 people globally and  
8 136,117 nationally. Center for Systems Science and Engineering at Johns Hopkins Univ.,  
9 *COVID-19 Dashboard*, [https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.htm](https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6)  
10 [l#/#/bda7594740fd40299423467b48e9ecf6](https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6) (last visited July 14, 2020). In Arizona alone,  
11 128,114 people have been infected and 2,341 people have died. New York Times Staff,  
12 *Arizona Coronavirus Map and Case Count*, NEW YORK TIMES,  
13 <https://www.nytimes.com/interactive/2020/us/arizona-coronavirus-cases.html> (last visited  
14 July 14, 2020). Since May 13, 2020, Arizona has seen a sharp increase in the number of  
15 new COVID-19 cases reported each day, and on July 1, 2020, Arizona set a record for  
16 newly reported cases. (Doc. 40 at 10). As of July 8, 2020, there was no country in the  
17 world where confirmed COVID-19 cases were growing as rapidly as they were in Arizona.  
18 Jen Fifield, *Is COVID-19 spreading more rapidly in Arizona than anywhere else in the*  
19 *world? Here's what data shows*, AZCentral.com (July 9, 2020, 12:22 PM),  
20 [https://www.azcentral.com/story/news/local/arizona-health/2020/07/09/how-arizonas-](https://www.azcentral.com/story/news/local/arizona-health/2020/07/09/how-arizonas-covid-19-cases-compares-rest-world/5399832002/)  
21 [covid-19-cases-compares-rest-world/5399832002/](https://www.azcentral.com/story/news/local/arizona-health/2020/07/09/how-arizonas-covid-19-cases-compares-rest-world/5399832002/). Furthermore, Arizona’s rate of  
22 positive COVID-19 test is 26.8%, which is the highest in country and the third highest in  
23 the world. *Id.*

24           Recent data shows that the spread of COVID-19 is greatest among the demographic  
25 20-44-year-olds. (Doc. 40 at 29). In the month of June, 53% of all COVID-19 cases  
26 reported in Arizona were in 20-44-year-olds. (*Id.*) Additionally, as of July 3, 2020,  
27 hospitals reported that 90% of intensive care beds and 85% of inpatient beds in Arizona  
28 are now filled. (*Id.*) And these numbers, as shocking as they are, likely actually understate

1 the damage inflicted by the virus, because a lack of testing masks the true number of  
2 infections and underreporting masks the true number of confirmed COVID-19 cases and  
3 fatalities.

4 **B. Governor Ducey's Executive Orders**

5 In response to the extraordinary challenge that containing novel coronavirus poses,  
6 Governor Ducey has issued what are known as "shelter-in-place" orders. Such orders  
7 typically require non-essential businesses to close; limit individuals' ability to travel; and  
8 require individuals to avoid behaviors that make transmission of the virus more likely. The  
9 purpose of such orders is to slow virus transmission as much as possible, to protect the  
10 most vulnerable, and to prevent the health care system from being overwhelmed.

11 On April 29, 2020, Governor Ducey issued Executive Order 2020-33 instituting a  
12 "Stay home, Stay health, Stay connected" policy to promote physical distancing, while also  
13 encouraging social connectedness ("April 29, 2020 Executive Order"). (Doc. 1 ¶ 30).  
14 Under the April 29, 2020 Executive Order, all businesses classified as "Essential  
15 Functions" were to establish and implement social distancing and sanitation measures  
16 established by the United States Department of Labor or Arizona Department of Health  
17 Services ("ADHS"). In addition, effective May 8, 2020, retailers not classified as essential  
18 under the April 29, 2020 Executive Order, and whose business involves the sale of goods,  
19 were allowed to open, operate, and offer goods for sale to customers in their stores provided  
20 they established and implemented protocols and best practices for businesses to address  
21 COVID-19 as outlined in the Order. (*Id.*)

22 On May 4, 2020, Governor Ducey issued Executive Order 2020-34 ("May 4, 2020  
23 Executive Order") providing that barbers and cosmetologists may resume operations  
24 effective May 8, 2020, provided they establish and implement protocols and best practices  
25 for businesses to address COVID-19. (*Id.* ¶ 31). On May 12, 2020, Governor Ducey issued  
26 Executive Order 2020-36 ("May 12, 2020 Executive Order") instituting a "Stay Healthy,  
27 Return Smarter, Return Stronger" policy allowing businesses to gradually and safely open,  
28 effective May 16, 2020, in compliance with federal guidelines to mitigate and prevent the

1 spread of COVID-19. Under the May 12, 2020 Executive Order, any business operating  
2 in Arizona shall develop, establish and implement policies based on guidance from the  
3 CDC, Occupational Safety and Health Administration (“OSHA”), and ADHS to limit and  
4 mitigate the spread of COVID-19. The May 12, 2020 Executive Order also included  
5 specific guidance for gyms and fitness centers. Additionally, ADHS made clear that this  
6 guidance could change if the trajectory of COVID-19 changed. (Doc. 22-1 at 7).

7 On June 17, 2020, Governor Ducey issued Executive Order 2020-40 (“June 17,  
8 2020 Executive Order”) providing that businesses shall assist in efforts to “Contain the  
9 Spread,” by updating and enforcing written policies in accordance with May 12, 2020  
10 Executive Order. Governor Ducey subsequently issued the June 29, 2020 Executive Order  
11 requiring that all “[i]ndoor gyms and fitness clubs or centers,” among other businesses,  
12 “pause operations” effective June 29, 2020, at 8:00 p.m., until at least July 27, 2020, unless  
13 extended. (Doc. 1 ¶ 36). Under this Order, businesses closed may “receive authorization  
14 to reopen” after they “submit a form as prescribed by [ADHS] that attests the entity is in  
15 compliance with guidance issued by ADHS related to COVID-19 business operations.”  
16 (*Id.*)

### 17 C. Governor Ducey’s COVID-19 Medical Experts

18 Dr. Cara Christ, Director of ADHS, provides that on May 12, 2020, she concurred  
19 with Governor Ducey’s decision to issue his May 12, 2020 Executive Order, which detailed  
20 a plan for the safe and progressive reopening of Arizona businesses. (Doc. 40 at 8). Dr.  
21 Christ avers that since gyms and other businesses were allowed to reopen on May 13, 2020,  
22 Arizona has seen a sharp increase in the number of new COVID-19 cases reported. (*Id.*)  
23 Additionally, Dr. Christ notes that Arizona has seen a sharp increase in the number of 20-  
24 44-year-old people testing positive with that age group now representing 50 % of all newly  
25 reported positive tests. (*Id.*) In response to this data, Dr. Christ avers that she advised and  
26 concurred with Governor Ducey’s June 29, 2020 Executive Order, which temporarily  
27 paused Arizona’s reopening by closing some businesses and activities, including indoor  
28 gyms and fitness clubs. (*Id.* at 11). Dr. Christ opines that “[i]ndoor gyms and fitness clubs

1 pose a uniquely dangerous environment for the spread of COVID-19. Because individuals  
2 breathe harder during exercise, droplets are able to spread at an increased rate and distance,  
3 putting others at distances in excess of the recommended six feet at risk for inhaling  
4 infected droplets and making it more likely that distance objects become contaminated by  
5 the virus.” (*Id.* at 11-12). Additionally, Dr. Christ states that even if masks are worn, they  
6 “can rapidly dampen when exercising, reducing their prevention benefits.” (*Id.* at 12).  
7 According to Dr. Christ, “[t]he nature of indoor gyms makes [management of COVID-19  
8 difficult given the tendency to regularly go to different areas of the gym, use multiple  
9 machines, enter and exit locker rooms/restrooms, and travel to and from water fountains  
10 throughout a visit.” (*Id.*) Dr. Christ opines that “without the Governor’s [June 29, 2020  
11 Executive Order] scaling back the reopening of certain business and activities that pose a  
12 higher risk of infection, such as gyms, Arizona will face an even larger increase in COVID-  
13 19 related illnesses which will put more strain on our healthcare system.” (*Id.* at 12-13).  
14 Dr. Christ further avers that “the measures contained in [the June 29, 2020 Executive  
15 Order] are necessary to address the spread of COVID-19 and limit the public health crisis  
16 caused by COVID-19[.]” and are “reasonable and narrow directives directed at those  
17 businesses which [Dr. Christ] believe[s] are critical to contain the spread and impact of  
18 COVID-19[.]” (*Id.* at 14).

19 Dr. Marjorie Bessel, Chief Clinical Officer at Banner Health, opines that “COVID-  
20 19 is readily transmitted from person to person in settings where social distancing cannot  
21 be maintained . . . and in indoor locations, like gyms, where ventilation may be less than  
22 ideal.” (*Id.* at 19). According to Dr. Bessel, there are some industries, including gyms and  
23 fitness facilities, where social distancing is difficult and contact with the respiratory  
24 droplets of others is much more likely. (*Id.* at 24). Dr. Bessel avers that some gyms and  
25 fitness centers have taken measures to mitigate the spread of COVID-19; however, as  
26 anyone can unknowingly spread COVID-19, limiting in-person social contact, especially  
27 in those activities that are more prone to sharing bodily fluid and droplets, is currently the  
28 most effective tool for containing this virus. Furthermore, Dr. Bessel states that “[w]hile

1 mandating masks, even while exercising, will help reduce the spread of the virus, this alone  
2 is not enough.” (*Id.*) Additionally, Dr. Bessel provides that even if gyms meet the ADHS  
3 standards, it does not negate the fact that gyms and fitness centers are high-risk  
4 environments. Dr. Bessel opines that in her professional opinion, “temporarily closing  
5 gyms is a prudent way to help mitigate the risk of furthering the spread of COVID-19 . . .  
6 .” (*Id.* at 25).

7 Ms. Jessica Rigler, the Assistant Director of the Division of Public Health  
8 Preparedness (the “Division”) at ADHS, avers that “[g]yms and fitness clubs or centers--  
9 because of the nature of their function and the demographics who patronize those  
10 establishments (20-44 year olds)--pose a particular threat to Arizona’s ability to combat  
11 and minimize the spread of COVID-19.” (*Id.* at 31).

#### 12 **D. Plaintiffs**

13 Plaintiffs are franchisors of boutique fitness studios. Plaintiff Xponential Fitness  
14 LLC (“Xponential”), is the curator of boutique fitness brands that operate small exercise  
15 studios that provide classes such as Pilates, cycle, dance, rowing, and yoga. (Doc. 21-2 at  
16 4). Xponential’s brands include fifty studios located in Arizona.

17 Plaintiffs AKT Franchising, LLC (“AKT”), Club Pilates Franchise, LLC (“Club  
18 Pilates”), CycleBar Franchising, LLC (“CycleBar”), PB Franchising, LLC (“Pure Barre”),  
19 Row House Franchise, LLC (“Row House”), Stretch Lab Franchising, LLC (“Stretch  
20 Lab”), and Yoga Six Franchise, LLC (“Yoga Six”) are all owned by Xponential and have  
21 at last one franchisee operating in Arizona. Plaintiffs provide that they have all expended  
22 significant resources<sup>3</sup> to develop, establish, and implement detailed and comprehensive  
23 written policies and procedures based on the guidance provided by the CDC, OSHA, and  
24 ADHS for reopening gyms. Additionally, Plaintiffs all provide that they were operating in  
25 compliance with Governor Ducey’s May 12, 2020 Executive Order and have all  
26 subsequently closed pursuant to the June 29, 2020 Executive Order.

27  
28 <sup>3</sup> It is unclear whether Plaintiffs as the franchisor expended these resources or if it was the  
non-party franchisee that expended these resources.

## 1       **II.     LEGAL STANDARD**

2           The standards governing temporary restraining orders and preliminary injunctions  
3 are “substantially identical.” *Washington v. Trump*, 847 F.3d 1151, 1159 n.3 (9th Cir.  
4 2017) (citation omitted). Thus, to obtain preliminary injunctive relief, the moving party  
5 must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm  
6 to the moving party in the absence of preliminary relief; (3) that the balance of equities tips  
7 in favor of the moving party; and (4) that an injunction is in the public interest. *See Winter*  
8 *v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). Where, as here,  
9 the government is a party, the last two factors merge. *See Drakes Bay Oyster Co. v. Jewell*,  
10 747 F.3d 1073, 1092 (9th Cir. 2014).

11           The Ninth Circuit also employs a “sliding scale” approach to preliminary  
12 injunctions, under which “the elements of the preliminary injunction test are balanced, so  
13 that a stronger showing of one element may offset a weaker showing of another.” *All. for*  
14 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The issuance of a  
15 preliminary injunction may be appropriate when there are “‘serious questions going to the  
16 merits’ and a balance of hardships that tips sharply towards the plaintiff . . . so long as the  
17 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is  
18 in the public interest.” *Id.* at 1135. “[C]ourts ‘must balance the competing claims of injury  
19 and must consider the effect on each party of the granting or withholding of the requested  
20 relief,’” and should be particularly mindful, in exercising their sound discretion, of the  
21 “public consequences in employing the extraordinary remedy of injunction.” *Id.* at 24  
22 (citations omitted).

## 23       **III.     DISCUSSION**

24           Plaintiffs argue that the June 29, 2020 Executive Order violates the United States  
25 Constitution’s due process, equal protection, takings, and contracts clauses. Additionally,  
26 Plaintiffs contend that Order violates the Arizona Constitution’s due process and equal  
27 protection clauses. (Doc. 1).

28           The Court does not doubt the earnestness of Plaintiffs’ desire to open their



1 businesses, generate revenue, earn a living, and employ—and as importantly, pay—others.  
 2 The Court further recognizes the economic and emotional hardships Governor Ducey’s  
 3 executive orders related to COVID-19 can impose on people and businesses. The Court is  
 4 not unsympathetic to Plaintiffs’ plight, but, as explained below, in our constitutional  
 5 republic, the decisions of whether, when, and how to exercise emergency powers amidst a  
 6 global pandemic belong not to the unelected members of the federal judicial branch, but to  
 7 the elected officials of the executive branch.

8 **A. Plaintiffs Likelihood of Succeeding on the Merits**

9 **1. *Procedural Due Process Claims***

10 The Fourteenth Amendment guarantees equal protection under the law and protects  
 11 individuals from government deprivation of life, liberty, and property without due process  
 12 of law. U.S. Const. amend. XIV. Similar language appears in the Arizona Constitution  
 13 which provides that “[n]o person shall be deprived of life, liberty, or property without due  
 14 process of law.” Ariz. Const. art. 2, § 4; *see Vong v. Aune*, 328 P.3d 1057, 1061 (Ariz. Ct.  
 15 App. 2014) (holding that it is proper to consider state and federal due process claims  
 16 together because the respective due process clauses “contain nearly identical language and  
 17 protect the same interests.”). Thus, “[a] procedural due process claim has two distinct  
 18 elements: (1) a deprivation of a constitutionally protected liberty or property interest, and  
 19 (2) a denial of adequate procedural protections.” *Brewster v. Bd. of Educ. of Lynwood*  
 20 *Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999).

21 In their Complaint and Motion, Plaintiffs argue that Governor Ducey’s June 29,  
 22 2020 Executive Order deprived them of their fundamental property interest in conducting  
 23 lawful business activities. (Doc. 1 ¶¶ 44-45, 47, 69; Doc. 21 at 11). However, the general  
 24 right to do business has not been recognized as a constitutionally protected property right.<sup>4</sup>

25 <sup>4</sup> At the Hearing, Plaintiffs for the first time argued that the right to operate a business was  
 26 a protected liberty interest. The Court will not consider arguments raised for the first time  
 27 during oral argument. However, even if the Court were to consider this new argument, the  
 28 Court is unpersuaded that the right to operate a business is a protected liberty interest. The  
 cases relied on by Plaintiffs, concern an *individual’s* right to work, not a franchisor’s right  
 to have its franchisee operate its business. (Doc. 41 at 7); *see also Ry. Emp. Dept. v.*  
*Hanson*, 351 U.S. 225, 234 (1956) (“[T]he right to *work*, which the Court has frequently  
 included in the concept of ‘liberty’ within the meaning of the Due Process Clauses . . .”)

1 *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675  
2 (1999); *see also Mountainside Fitness Acquisitions, LLC v. Douglas A. Ducey*, CV2020-  
3 093916 at 6 (Ariz. Sup. Ct. July 6, 2020) (“The activity of running a business may not be  
4 a constitutionally protected property interest, at least if the government interference with  
5 the business is only temporary.”). Moreover, courts have held that in the current COVID-  
6 19 crisis, temporary closures of a business do not implicate procedure due process rights.  
7 *Talleywhacker, Inc. v. Cooper*, 2020 WL 3051207, at \*12 (E.D.N.C. June 8, 2020). The  
8 Court is skeptical that federally protected property rights are at issue in this action;  
9 however, even assuming that a property interest is implicated here, Plaintiffs were not  
10 denied adequate procedural protections.

11 Plaintiffs argue that Governor Ducey’s June 29, 2020 Executive Order violated their  
12 procedural due process because they were not provided with notice and a hearing before  
13 their franchisees’ businesses were closed “indefinitely.” (Doc. 21 at 11). However, courts  
14 have routinely held that a pre-deprivation process is not required when addressing the  
15 current COVID-19 crisis. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 897 (Pa. 2020)  
16 (“Under the circumstances presented here, namely the onset of the rapid spread of COVID-  
17 19 and the urgent need to act quickly to protect the citizens of the Commonwealth from  
18 sickness and death, the Governor was not in a position to provide for pre-deprivation notice  
19 and an opportunity to be heard by Petitioners . . .”); *see also Mountainside Fitness*,  
20 CV2020-093916 at 6 (“[E]ven if a temporary shut-down of a business does implicate a  
21 constitutionally protected property interest, it is clear that no pre-deprivation process is  
22 required.”). This Court agrees with these holdings and finds that Plaintiffs were not entitled  
23 to pre-deprivation process under these circumstances.

24 Plaintiffs further argue that they were entitled to a post-deprivation procedure.  
25 (Doc. 21 at 12-13). Relying on *Benner v. Wolf*, 2020 WL 2564920, at \*5 (M.D. Pa. May

26 \_\_\_\_\_  
27 (emphasis added)); *Sagana v. Tenorio*, 384 F.3d 731, 742 (9th Cir. 2004), as amended (Oct.  
28 18, 2004) (“Restrictions on *selecting and pursuing work* are recognized by the Fourteenth  
Amendment’s Due Process Clause.”) (emphasis added). Plaintiffs cite no authority that  
supports the argument that a general right for a business to operate is a protected liberty  
interest.

1 21, 2020), Governor Ducey argues that a waiver process, or post-deprivation process, is  
2 not required because the June 29, 2020 Executive Order was a “*blanket* pause on all [g]ym  
3 operations . . . .” (Doc. 39 at 9) (emphasis in original). However, the executive order in  
4 *Benner* explicitly included a waiver process for the affected business to contest their  
5 closure. 2020 WL 2564920, at \*5. This Court need not decide whether a post-deprivation  
6 process is required, because the June 29, 2020 Executive Order includes such a process, at  
7 least on its face.

8 The June 29, 2020 Executive Order provides that affected businesses may submit a  
9 form to ADHS attesting that it is in compliance with guidance issued by ADHS related to  
10 COVID-19 business operations. To date, Governor Ducey has failed to provide the  
11 affected businesses with such a form. At the Hearing, Governor Ducey’s counsel stated  
12 that the form was “almost finished” and could be expected “quite soon.” As Judge  
13 Thomason noted in *Mountainside Fitness*, the lack of timeline to make the waiver process  
14 available to affected business is suspect. Nonetheless, the failure to make the attestation  
15 form available, at this time, does not render the post-deprivation process insufficient,  
16 particularly in light of the Governor’s representations that one would be forthcoming soon.  
17 See *Mountainside Fitness*, CV2020-093916 at 6. Accordingly, Plaintiffs have not shown  
18 that they will be likely to succeed on the merits of their procedural due process claims.

## 19 2. *Substantive Due Process Claims*

20 There is no dispute that the rational basis test applies for Plaintiffs’ substantive due  
21 process claims.<sup>5</sup> Utilizing that legal framework, the Court presumes that the June 29, 2020  
22 Executive Order is constitutional, making it incumbent upon Plaintiffs to negate “every  
23 conceivable basis which might support” it. *Armour v. City of Indianapolis*, 566 U.S. 673,  
24 681 (2012). This is an uphill battle for Plaintiffs. They must disprove all possible  
25 justifications for the June 29, 2020 Executive Order regardless of whether those  
26 justifications actually motivated Governor Ducey’s decision-making. *FCC v. Beach*  
27 *Comm’ns, Inc.*, 508 U.S. 307, 313–15 (1993) (“[B]ecause we never require a legislature

28 <sup>5</sup> Plaintiffs’ counsel agreed that rational basis is the appropriate standard during oral argument.

1 to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional  
2 purposes whether the conceived reason for the challenged distinction actually motivated  
3 the legislature. Thus, the absence of ‘legislative facts’ explaining the distinction ‘on the  
4 record’ has no significance in rational-basis analysis.” (citations omitted)). Under this test,  
5 Governor Ducey’s action “is not subject to courtroom fact-finding and may be based on  
6 rational speculation unsupported by evidence or empirical data.” *Id.* at 315. This is  
7 especially so in the case of a public health crisis like the one presented by COVID-19,  
8 where a governor’s “latitude ‘must be especially broad.’” *S. Bay United Pentecostal*  
9 *Church v Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) (quoting *Marshall*  
10 *v. United States*, 414 U.S. 417, 427 (1974)).

11 Governor Ducey’s June 29, 2020 Executive Order was issued after Arizona’s top  
12 medical professionals familiar with the COVID-19 crisis in Arizona advised that closing  
13 gyms, and several other industries, was prudent given the sharp increase in cases. These  
14 medical opinions satisfy the rational basis review. *See League of Indep. Fitness Facilities*  
15 *& Trainers, Inc. v. Whitmer*, 2020 WL 3468281, at \*3 (6th Cir. June 24, 2020) (“The idea  
16 that heavy breathing and sweating in an enclosed space containing many shared surfaces  
17 creates conditions likely to spread the virus is a paradigmatic example of ‘rational  
18 speculation’ that fairly supports the Governor’s treatment of indoor fitness facilities.”); *see*  
19 *also Mountainside Fitness*, CV2020-093916 at 9 (holding that June 29, 2020 Executive  
20 Order satisfies the rational basis test because it was issued in consultation with medical  
21 professional that opined that fitness centers, even those currently in compliance with  
22 the guidelines, pose undue risks at this time). Dr. Christ opined that “[b]ecause individuals  
23 breathe harder during exercise, droplets are able to spread at an increased rate and  
24 distance,” thus making “[i]ndoor gyms and fitness clubs . . . a uniquely dangerous  
25 environment for the spread of COVID-19.” (*Id.* at 11-12). Moreover, Dr. Christ stated  
26 that even if masks are worn, they “can rapidly dampen when exercising, reducing their  
27 prevention benefits.” (*Id.* at 12). Plaintiffs may disagree with Dr. Christ, and the other  
28 medical professionals; however, their disagreement has no place in the rational basis

1 framework.

2 Plaintiffs also argue that the closure of gyms and fitness centers that were operating  
3 in compliance with the guidance outlined in the May 12, 2020 Executive Order is  
4 inconsistent with Governor Ducey's previous position that gyms could safely operate if  
5 they met the specified guidance. While the Court understands and sympathizes with  
6 Plaintiffs, and to some extent agrees that Governor Ducey's position regarding COVID-19  
7 protocols for gyms appears to be inconsistent, "[c]onsistency . . . is not required to pass the  
8 rational basis test, particularly during times when the available information is constantly  
9 changing." *Mountainside Fitness*, CV2020-093916 at 9. It is undisputed that the COVID-  
10 19 crisis in Arizona has dramatically changed since mid-May. It is therefore unsurprising  
11 that Governor Ducey would reevaluate the businesses that were operating and the standards  
12 by which they were operating. Dr. Christ stated that it was her opinion on May 12, 2020,  
13 that gyms could operate safely if they complied with certain policies and procedures;  
14 however, she recommended the closure of gyms in late-June because of the increase in  
15 confirmed COVID-19 cases in Arizona since mid-May, and in evaluating the types of  
16 conditions likely to spread the virus. (Doc. 40 at 9-11). A change in Governor Ducey's  
17 position or COVID-19 strategy is not inherently irrational; rather, it is indicative of the  
18 complex and rapidly changing pandemic that Governor Ducey, and governors<sup>6</sup> across the  
19 United States, are combating.

20 Plaintiffs' frustrations that the June 29, 2020 Executive Order does not close every  
21 business in which the virus might easily spread is also understandable; however, the Order  
22 need not be the most effective or least restrictive measure possible to attempt to stem the  
23 spread of COVID-19 to be rational. *League of Indep. Fitness Facilities & Trainers*, 2020  
24 WL 3468281, at \*3. It is not this Court's role to "usurp the functions of another branch of  
25 government," *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905), by second-guessing  
26 Governor' Ducey's strategy for combating this unprecedented public health crisis. It is "the  
27 duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety

28 \_\_\_\_\_  
<sup>6</sup> Arizona is not the only state that has had to pause or rollback reopening plans.

1 of the many, and not permit the interests of the many to be subordinated to the wishes or  
2 convenience of the few.” *Id.* at 29. Thus, “[e]ven if imperfect, the Governor’s [June 29,  
3 2020 Executive] Order passes muster under the rational basis test.” *League of Indep.*  
4 *Fitness Facilities & Trainers*, 2020 WL 3468281, at \*3. Accordingly, Plaintiffs are  
5 unlikely to prevail on their substantive due process claims.

### 6 **3. Equal Protection Claims**

7 As with Plaintiffs’ substantive due process claim, the parties agree that Plaintiffs’  
8 equal protection claim is governed by the rational basis standard of review, because no  
9 suspect classification or fundamental right is at stake. Under the rational basis standard,  
10 the Court must first ask “whether the challenged legislation has a legitimate purpose.”  
11 *Jackson Water Works, Inc. v. Pub. Utilities Comm’n of State of Cal.*, 793 F.2d 1090, 1094  
12 (9th Cir. 1986). “Second, assuming a legitimate purpose, [the Court] must decide whether  
13 the challenged classification promotes that purpose.” *Id.* “There need not be a tight fitting  
14 relationship between the legislative goal and the result.” *Id.* (internal quotation marks  
15 omitted). “All that is needed . . . is to find that there are plausible, arguable, or conceivable  
16 reasons which may have been the basis for the distinction.” *Id.* (internal quotation marks  
17 omitted).

18 As previously discussed, Governor Ducey’s June 29, 2020 Executive Order was  
19 implemented to prevent the spread of COVID-19 and to protect the health and safety of  
20 individuals living in Arizona. This interest is legitimate. *S. Bay United Pentecostal*  
21 *Church*, 140 S. Ct. at 1613 (“Our Constitution principally entrusts ‘[t]he safety and the  
22 health of the people’ to the politically accountable officials of the States ‘to guard and  
23 protect.’”) (quoting *Jacobson*, 197 U.S. at 38); *In re Abbott*, 954 F.3d 772, 795 (5th Cir.  
24 2020) (“[The governor’s] interest in protecting public health during such a time is at its  
25 zenith.”).

26 Having found Governor Ducey’s interest to be legitimate, the Court will turn to the  
27 classification at issue. The June 29, 2020 Executive Order requires gyms, among several  
28 other industries, to pause or close until at July 27, 2020. Governor Ducey issued this Order

1 upon the advice of medical professionals familiar the COVID-19 crisis in Arizona,  
2 including Dr. Christ and Dr. Bessel. Both Dr. Christ and Dr. Bessel concluded that gyms  
3 create a uniquely dangerous environment for the spread of COVID19 because exercise  
4 makes mask-wearing more difficult and less effective,<sup>7</sup> and individuals emit more virus-  
5 spreading respiratory droplets during exercise. In light of these plausible reasons, the  
6 temporary closure of gyms by the June 29, 2020 Executive Order is rationally related to  
7 the legitimate interest of curbing the spread of the virus and preserving health resources.

8 Plaintiffs argue the classification lacks a rational basis because individuals at tattoo  
9 parlors are “screaming in pain” while receiving a tattoo and therefore, similar to exercising,  
10 likely emitting a significant amount virus-spreading respiratory droplets; nevertheless,  
11 tattoo parlors are open. Likewise, Plaintiffs’ expert, Dr. Kevin Winthrop, opined that  
12 gyms operating in compliance with the guidance included in the May 12, 2020 Executive  
13 Order “do not present a higher risk of COVID-19 transmission than many other types of  
14 non-essential businesses (e.g. casinos, tanning salons, ‘big box’ stores, and tattoo parlors)  
15 that currently are free to continue operating in the state of Arizona.” (Doc. 21-5 at 9).  
16 However, Governor Ducey’s June 29, 2020 Executive Order does not violate the Equal  
17 Protection Clause simply because it does not close every business where transmission is  
18 possible. *Talleywhacker*, 2020 WL 3051207, at \*10 (holding the decision close certain  
19 industries and not others does not violate the Equal Protection Clause because the governor  
20 “need[s] to consider a myriad of factors, sometimes in tension with each other, in balancing  
21 multiple public needs across the spectrum of the state economy and social fabric.”); *see*  
22 *also S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (“The precise question of when  
23 restrictions on particular social activities should be lifted during the pandemic is a dynamic  
24 and fact-intensive matter subject to reasonable disagreement,” not suitable for judicial  
25 second guessing).

26 <sup>7</sup> Plaintiffs contend that “it is well established that wearing a mask effectively blocks  
27 respiratory droplets, and there is no evidence that breathing harder reduces a mask’s  
28 effectiveness.” (Doc. 41 at 12). Plaintiffs further state that Dr. Christ’s opinion that masks  
can dampen when exercising, reducing their prevention benefits, has “no support.” (*Id.*)  
The Court will, however, decline Plaintiffs’ “invitation to weigh medical and scientific  
evidence in usurpation of the executive’s role.” *Talleywhacker*, 2020 WL 3051207, at \*11.

1 Plaintiffs may disagree with the rationale supporting Governor Ducey’s June 29,  
2 2020 Executive Order; however, Governor Ducey’s medical advisors have opined that  
3 given the current COVID-19 crisis in Arizona, gyms, even those currently in compliance  
4 with the guidelines, pose undue risk. Accordingly, the temporary closure of gyms is  
5 reasonable and rational. Accordingly, there is rational support for treating gyms different  
6 than other businesses, and therefore, Plaintiffs are unlikely to prevail on their equal  
7 protection claim.

#### 8 **4. Takings Clause Claim**

9 Plaintiffs’ Fifth Amendment takings claim cannot support their request for  
10 injunction relief. *See Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2176 (2019)  
11 (“As long as an adequate provision for obtaining just compensation exists, there is no basis  
12 to enjoin the government’s action effecting a taking.”). “The Fifth Amendment does not  
13 proscribe the taking of property; it proscribes taking without just compensation.”  
14 *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172,  
15 194 (1985), *overruled on other grounds by Knick*, 139 S. Ct. 2162. Thus, even if the June  
16 29, 2020 Executive Order did violate Plaintiffs’ Fifth Amendment rights, Plaintiffs would  
17 not be entitled to injunctive relief because damages are the proper remedy for a taking. *See*  
18 *Bridge Aina Le’a, LLC v. State of Hawaii Land Use Comm’n*, 125 F. Supp. 3d 1051, 1066  
19 (D. Haw. 2015), *aff’d sub nom. Bridge Aina Le’a, LLC v. Land Use Comm’n*, 950 F.3d 610  
20 (9th Cir. 2020).

#### 21 **5. Contracts Clause Claim**

22 The Contracts Clause restricts the power of States to disrupt contractual  
23 arrangements. It provides that “[n]o state shall . . . pass any . . . Law impairing the  
24 Obligation of Contracts.” U.S. Const., Art. I, § 10, cl. 1. “Despite the sweeping terms of  
25 its literal test, the Supreme Court has construed this prohibition narrowly in order to ensure  
26 that local governments retain the flexibility to exercise their police powers effectively.”  
27 *Matsuda v. City of Honolulu*, 512 F.3d 1148, 1152 (9th Cir. 2008) (citations omitted). To  
28 determine whether a law crosses the constitutional line, courts apply a two-step test. *Sveen*



1 *v. Melin*, 138 S. Ct. 1815, 1821 (2018). The threshold issue is whether the state law has  
2 “operated as a substantial impairment of a contractual relationship.” *Allied Structural Steel*  
3 *Co. v. Spannaus*, 438 U.S. 234, 244 (1978). If a substantial impairment exists, the inquiry  
4 turns to the means and ends of the legislation. In particular, the Court has asked whether  
5 the state law is drawn in an “appropriate” and “reasonable” way to advance “a significant  
6 and legitimate public purpose.” *Energy Reserves Group, Inc. v. Kansas Power & Light*  
7 *Co.*, 459 U.S. 400, 411–412 (1983).

8 A substantial impairment is more than a temporary alteration of a contractual  
9 relationship; rather “it is a severe, permanent, and immediate change in” a contractual  
10 relationship. *Schmid v. Sonoma Clean Power*, 2014 WL 12689941, at \*5 (N.D. Cal. Nov.  
11 14, 2014) (holding that there was not a substantial impairment because the contractual  
12 relationship could be restored to its original state), *aff’d*, 673 Fed. Appx. 785 (9th Cir.  
13 2017). As the closure of gyms pursuant to the June 29, 2020 Executive Order is temporary,  
14 the Court is skeptical that it meets the threshold requirement of substantial impairment.  
15 Nonetheless, even assuming it is a substantial impairment, as previously discussed, the  
16 June 29, 2020 Executive Order was a reasonable way to advance a legitimate public  
17 purpose—namely, slowing the spread of COVID-19 in Arizona. Accordingly, Plaintiffs  
18 are unlikely to prevail on their Contracts Clause claim.

#### 19 **6. Void-for-Vagueness Claim**

20 “It is a basic principle of due process that an enactment is void for vagueness if its  
21 prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108  
22 (1972); *see also F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“A  
23 fundamental principle in our legal system is that laws which regulate persons or entities  
24 must give fair notice of conduct that is forbidden or required.”). The vagueness doctrine  
25 incorporates two related requirements—fair notice and fair enforcement. The relevant  
26 inquiry is whether the law is “‘so vague and indefinite as really to be no rule or standard at  
27 all,’ or whether a person of ordinary intelligence could understand” what the law requires.  
28 *Fang Lin Ai v. United States*, 809 F.3d 503, 514 (9th Cir. 2015) (quoting *Boutilier v.*

1 *Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967)). If a law “imposes neither  
2 regulation of nor sanction for conduct,” then “no necessity exists for guidance so that one  
3 may avoid the applicability of the law.” *Boutilier*, 387 U.S. at 123. “Courts ‘apply the  
4 void-for-vagueness doctrine outside of the First Amendment context only rarely.’” *Prime  
5 Healthcare Services, Inc. v. Harris*, 216 F. Supp. 3d 1096, 1124 (S.D. Cal. 2016) (quoting  
6 *American Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1277 (11th Cir. 1999)).

7 Plaintiffs allege the June 29, 2020 Executive Order is impermissibly vague because  
8 it fails to give adequate guidance regarding its scope or duration and fails to define  
9 “[i]ndoor gyms and fitness clubs or centers.” (Doc. 21 at 15) (alteration in original). The  
10 Court disagrees. Having examined the text of the June 29, 2020 Executive Order, this  
11 Court is not persuaded that the public will be left to guess at the meaning of “indoor gyms  
12 and fitness clubs or centers,” particularly because the meanings of “indoor,” “gym,”  
13 fitness,” “clubs,” and “centers” are easily discerned through recourse to a common  
14 dictionary. *Edge v. City of Everett*, 929 F.3d 657, 665 (9th Cir. 2019), *cert. denied sub  
15 nom. Edge v. City of Everett, Washington*, 140 S. Ct. 1297 (2020). In other words,  
16 individuals of ordinary intelligence are capable of identifying what constitutes an “indoor  
17 gym or a fitness club and center,” as these are ordinary terms with a common sense  
18 meaning. *See United States v. Osinger*, 753 F.3d 939, 945 (9th Cir. 2014).

19 Additionally, while Plaintiffs contend that the directive to “pause operations,” is  
20 unclear, the Court finds that “pause operations” used in near proximity to “reopen” is  
21 sufficient for a person of ordinary intelligence reading the June 29, 2020 Executive Order  
22 in its entirety to be adequately informed that “pause operations” means temporary closure.  
23 *Edge*, 929 F.3d at 665. The June 29, 2020 Executive Order’s temporary closure of gyms,  
24 including Plaintiffs’ franchisees’ boutique fitness studios, is not impermissibly vague.  
25 Accordingly, Plaintiffs are unlikely to prevail on this claim.

26 **B. Other Factors**

27 “When, as here, a party has not shown any chance of success on the merits, no  
28 further determination of irreparable harm or balancing of hardships is necessary.” *Global*

1 *Horizons, Inc. v. United States Dep't of Labor*, 510 F.3d 1054, 1058 (9th Cir. 2007).  
2 Nonetheless, the Court will briefly address the remaining factors. Had Plaintiffs been able  
3 to establish a likelihood of success on the merits, they would also have established  
4 irreparable harm. See *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“It is well  
5 established that the deprivation of constitutional rights ‘unquestionably constitutes  
6 irreparable injury.’”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

7 However, Plaintiffs still bear the burden of demonstrating that an injunction would  
8 be in the public interest and that the balance of equities tips in their favor. See *Drakes Bay*  
9 *Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (“When the government is a  
10 party, [the public interest and equities] factors merge.”); *Stormans, Inc. v. Selecky*, 586  
11 F.3d 1109, 1138-39 (9th Cir. 2009). This Court must balance the public’s interest in  
12 preventing constitutional harm against the government’s—and the public’s—interest in  
13 controlling the spread of a dangerous virus. See *Stormans*, 586 F.3d at 1138 (“In assessing  
14 whether the plaintiffs have met [their burden to show that the balance of equities tips in  
15 their favor], the district court has a ‘duty . . . to balance the interests of all parties and weigh  
16 the damage to each.’”) (quoting *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*,  
17 634 F.2d 1197, 1203 (9th Cir. 1980)).

18 Plaintiffs argue that “the public interest weighs heavily in favor of granting the  
19 injunction so that Arizonans may enjoy the mental and physical health benefits resulting  
20 from the panoply of fitness services provided by Plaintiffs’ businesses.” (Doc. 21 at 20).  
21 Plaintiffs further contend that “no harm will result to the public interest in allowing  
22 Plaintiffs’ businesses to operate because they are in compliance with the protocols  
23 mandated to protect the public health from COVID-19.” *Id.* The Court is not persuaded.

24 COVID-19 is highly contagious and continues to spread at alarming rates, requiring  
25 public officials to constantly evaluate the best method by which to protect residents’ safety  
26 against the economy and a myriad of other concerns. Governor Ducey has provided  
27 evidence that gyms create a uniquely dangerous environment for the spread of COVID19  
28 because exercise makes mask-wearing more difficult and *less effective*, and individuals

1 emit more virus-spreading respiratory droplets during exercise. Allowing gyms and fitness  
2 facilities to operate in Arizona, at this time, could increase the risk of transmission of  
3 COVID-19—not just for those who visit Plaintiffs’ particular facilities, but for everyone in  
4 the community—therefore, the Court concludes that this case presents a situation in which  
5 “otherwise avoidable human suffering” would result from the issuance of the requested  
6 injunction. *Stormans*, 586 F.3d at 1140.; *see also City and County of San Francisco v. U.S.*  
7 *Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057, 1127 (N.D. Cal. 2019) (finding  
8 that public interest “in decreasing the risk of preventable contagion” weighed in favor of  
9 enjoining rule that would lead to Medicaid disenrollment and thus decreased vaccination  
10 rates). Granting Plaintiffs the relief they seek would pose serious risks to public health.  
11 Plaintiffs argue that their gyms should be allowed to open, despite Arizona’s top medical  
12 professionals’ opinion that even if gyms follow all protocol, there is still an unacceptable  
13 risk of COVID-19 infections. The risks in doing so are too great. The Court therefore  
14 finds that the public’s interest in controlling the spread of COVID-19 outweighs its interest  
15 in preventing the constitutional violations alleged here, especially given that Plaintiffs have  
16 failed to establish a likelihood of success on the merits. For these reasons, the balance of  
17 equities and public interest weigh against a preliminary injunction.

#### 18 **IV. CONCLUSION**

19 In sum, Plaintiffs are not likely to succeed on the merits of their claims and the  
20 balance of the equities and public interest weigh against entry of a temporary restraining  
21 order or preliminary injunction, and therefore, Plaintiffs’ Motion will be denied. The Court  
22 deeply sympathizes with Plaintiffs, and other similar business owners, and their patrons  
23 affected by Governor Ducey’s June 29, 2020 Executive Order. “Sympathy, however, is  
24 not a relevant consideration for [this] Court.” *Mountainside Fitness Acquisitions, LLC v.*  
25 *Douglas A. Ducey*, CV2020-093916 (Ariz. Sup. Ct. July 6, 2020). “Crises like COVID-  
26 19 can call for quick, decisive measures to save lives. Yet those measures can have extreme  
27 costs—costs that often are not borne evenly. The decision to impose those costs rests with  
28 the political branches of government, in this case,” Governor Ducey. *League of Indep.*


1 *Fitness Facilities & Trainers, Inc. v. Whitmer*, 2020 WL 3468281, at \*3 (6th Cir. June 24,  
2 2020). For the foregoing reasons, Plaintiffs are not entitled to the “extraordinary remedy”  
3 of a temporary restraining order. *See Winter*, 555 U.S. at 22. Accordingly,

4 **IT IS ORDERED** that Plaintiffs’ Motion for a Temporary Restraining Order and  
5 Preliminary Injunction (Doc. 21) is **DENIED**.

6 **IT IS FURTHER ORDERED** that Defendant State of Arizona’s Motion to  
7 Dismiss (Doc. 34) is **GRANTED**. Arizona shall be dismissed as a party from this suit.

8 Dated this 14th day of July, 2020.

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Honorable Diane J. Humetewa  
United States District Judge