

STATE OF VERMONT

SUPERIOR COURT
RUTLAND UNIT

CIVIL DIVISION
DOCKET NO.

STATE OF VERMONT,)
Plaintiff,)
)
v.)
)
CLUB FITNESS OF VERMONT, INC. and)
SEAN MANOVILL,)
Defendants.)
)

**MOTION FOR *EX PARTE* TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION
WITH INCORPORATED MEMORANDUM OF LAW**

The State of Vermont, by and through Vermont Attorney General Thomas J. Donovan, Jr., and pursuant to 20 V.S.A. § 40 and V.R.C.P. 65(a), hereby moves the Court for an immediate, *ex parte* temporary restraining order and preliminary injunction to cease in-person operations of both locations of Club Fitness of Vermont located at 275 North Main Street, Rutland, Vermont, and at 912 Route 4A West, Castleton, Vermont, and to otherwise enjoin Defendants from opening any facility for indoor, in-person fitness operations while the Governor’s order prohibiting such operations is in effect.

This Court should issue an *ex parte* temporary restraining order because Defendants have clearly violated the Governor’s properly issued COVID-19 Executive Order that requires Defendant Club Fitness’s closure. Moreover, the continued operations of an indoor, in-person fitness center will cause imminent and irreparable harm by jeopardizing the health and safety of Vermonters. This motion

and all associated papers have been sent via email to Defendant Manovill and will be served on him by sheriff this afternoon, as described in the accompanying Certificate of Service.

In support of this motion, the State submits the following Memorandum of Law and attached Affirmations of State Epidemiologist Patsy Kelso and Chief Data Officer Kristin McClure, and Affidavits of Rutland Police Corporal A. Heath Plemmons and Castleton Police Chief Peter Mantello.

MEMORANDUM OF LAW

Background

COVID-19 is a new disease caused by a novel coronavirus known as SARS-CoV-2. *See* Attachment E, Affirmation of Patsy Kelso, State Epidemiologist (Kelso Aff.) ¶¶ 4, 11. The World Health Organization (WHO) declared the spread of COVID-19 to be a global pandemic on March 11, 2020.¹ Vermont recorded its first cases of COVID-19 in early March. *See* Attachment D, Affirmation of Kristin McClure, Chief Data Officer (McClure Aff.) ¶ 13. As of May 14, 2020, Vermont has recorded 932 total confirmed cases of COVID-19. McClure Aff. ¶ 15. There is no known cure or vaccine for COVID-19.

The virus that causes COVID-19 spreads quickly and easily. It also often spreads undetectably, as people with no symptoms may still transmit the virus. Kelso Aff. ¶ 10. “Community transmission” is when a communicable disease spreads

¹ WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19* (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

within a community and some people are unsure about how or where they became infected. Vermont has been experiencing community transmission at least since March 19, 2020. *Id.* ¶ 27.

COVID-19 can cause serious illness and death. McClure Aff. ¶¶ 9-10.

Patients who are seriously ill with COVID-19 may require hospitalization, including admission to an intensive care unit (ICU). Kelso Aff. ¶ 12. Because COVID-19 is caused by a novel virus, no one in the population has immunity, so anyone can catch COVID-19 and become seriously ill. McClure Aff. ¶ 8. The greatest risk to public health would be if many people fell ill with COVID-19 at the same time and overwhelmed the capacity of the State's health care resources to care for them—for example, if the State experienced shortages in inpatient hospital beds, intensive care unit beds, ventilators, and personal protective equipment. Kelso Aff. ¶ 15. If health care resources are overwhelmed, dramatically more people will die for lack of necessary care. Kelso Aff. ¶ 30; McClure Aff. ¶¶ 26-27.

To prevent these needless deaths, Vermont has attempted to slow the spread of COVID-19 throughout the State. The Governor has issued Executive Order 01-20, declaring a state of emergency, and has amended that order several times with various addenda and directives. Notably, Addendum 6 required all Vermonters to stay at home except for certain essential activities, and closed all non-essential businesses, on March 24, 2020. The closures worked, and Vermont is now projected to be past its initial peak surge in cases. McClure Aff. ¶ 19.

The danger to be prevented, going forward, is a second surge in cases, which again will threaten to overwhelm the State's healthcare system. Beginning April 17 with Addendum 10, the State is undergoing a phased re-opening of businesses and activities. The rate at which businesses and activities resume will affect the rate of transmission, and the likelihood of an unmanageable second surge in COVID-19 cases. McClure Aff. ¶¶ 26-27. It is therefore important that individuals and businesses follow the steps of the phased restart carefully, so that the State can monitor the changes in the rate of transmission and react accordingly. Kelso Aff. ¶¶ 29-33.

Not all businesses and activities carry the same risk of transmission. Because of the way the virus spreads, indoor, close-contact activities carry a greater risk of transmission than other kinds of activities. Kelso Aff. ¶¶ 18-21. Indoor, in-person fitness centers are places where the virus is particularly likely to be transmitted. Kelso Aff. ¶ 25.

Defendants operate two fitness center locations, one at 275 North Main Street, Rutland, Vermont (the Rutland location) and one at 912 Route 4A West, Castleton, Vermont (the Castleton location). Defendants have allowed in-person, indoor fitness center activities, such as weightlifting and running on treadmills, by Club Fitness members and/or members of the general public, at the Rutland location on May 3 and 6. *See* Attachment B, Affidavit of Corporal A. Heath Plemmons dated 5/7/2020 (Plemmons 5/7 Aff); Attachment F, Affidavit of Castleton Police Chief Peter Mantello (Mantello Aff.). After receiving a cease and desist letter

from the Attorney General's Office on May 5, 2020 (*see* Attachment G), followed by discussion with the Attorney General's Office, Defendants closed the Rutland location from May 9-11.

As of today, May 15, Defendants have re-opened both their Rutland and their Castleton Club Fitness locations for indoor, in-person fitness center activities. *See* Attachment C, Affidavit of Corporal A. Heath Plemmons dated 5/15/2020 (Plemmons 5/15 Aff.); Mantello Aff. Defendants are operating in violation of the Governor's emergency orders. In doing so, Defendants are jeopardizing the health of their members and the Vermont public-at-large.

Discussion

Pursuant to 20 V.S.A. § 40, the Attorney General "may bring an action for injunctive relief in the superior court of the county in which a violation occurs to compel compliance with the provisions of [the Emergency Management] chapter."

A party seeking injunctive relief pursuant to V.R.C.P. 65 must satisfy four factors: (1) that there exists a threat of irreparable harm; (2) that the threat of irreparable harm outweighs the potential harm to other parties; (3) that there is a likelihood of success on the merits; and (4) that injunctive relief is in the public interest. *In re J.G. Juvenile*, 160 Vt. 250, 255 n.2 (1993). These factors are functionally indistinguishable from factors considered under the analogous federal rule. *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19 n.3, 205 Vt. 586, 178 A.3d 313.

"A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if it clearly appears from specific

facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." V.R.C.P. 65(a); *see P.E.T.E.L. Properties, Inc. v. McDonnell*, Docket No. 396-6-07 Rdcv, 2007 WL 6787222 (Vt. Super. June 21, 2007) (emergency ex parte temporary restraining order granted where a clear and ongoing violation of the terms of an easement threatened a property owner's horse-boarding business); *see also Vt. Women's Health Ctr. v. Operation Rescue*, 159 Vt. 141, 617 A.2d 411 (1992) (temporary restraining order prohibiting, among other things, physically blocking the entrance to health center, attempting to enter the building, or directing bullhorns or yelling at the health center).

I. The State is likely to succeed on its Complaint for relief.

a. The Governor has the authority to order indoor, in-person fitness centers to be closed.

The Governor has the authority to order indoor, in-person fitness centers to be closed. First, the Governor had the authority to declare the COVID-19 pandemic to be a state of emergency. As a result, the Governor can properly access emergency police powers to protect public health. The Governor's orders closing close-contact businesses, and all non-essential businesses, are appropriate exercises of those powers, because they are rationally related to the public health and taken in good faith. The Governor's decision to re-open the economy in phases, and to allow some businesses and activities to open before others, is similarly justified. Even if the

Court applies a more stringent test, the Governor’s decision to keep indoor fitness centers closed at this time is lawful.

As a preliminary matter, the Governor was justified in declaring a state of emergency in Executive Order 01-20.² The Governor may declare a state of emergency “in the event of an all-hazards event . . . that causes or may cause substantial damage or injury to persons or property within the bounds of the State in any manner[.]” 20 V.S.A. § 9. An “all-hazards event” includes a “health or disease-related emergency . . . which poses a threat or may pose a threat . . . to property or public safety in Vermont[.]” 20 V.S.A. § 2(1). This language unambiguously encompasses current events surrounding COVID-19—a pandemic disease that has swiftly begun spreading throughout Vermont.

Moreover, although state statutes authorizing executive emergency powers vary to some extent, courts across the country have concluded that the pandemic qualifies as an emergency which justifies the use of state police powers. *See, e.g., Friends of DeVito v. Wolf*, __ A.3d __, 2020 WL 1847100, at *10-12 (Pa. 2020); Attachment A, *Binford v. Sununu*, docket no. 217-2020-cv-152, slip op. at 8 (N.H. Super. Ct. March 25, 2020) (“[T]here is overwhelming factual and legal support evincing [New Hampshire] Governor Sununu’s authority to declare a state of emergency” as a result of the COVID-19 pandemic).³

² Executive Order 01-20, and all associated addenda and directives, are available at <https://governor.vermont.gov/document-types/executive-orders>.

³ *But cf. Wisconsin Legislature v. Palm*, 2020 WI 42, __ N.W.2d __, 2020 WL 2465677 (Wis. May 13, 2020) (striking down emergency COVID-19 stay home order). *Wisconsin Legislature* is an outlier, which is distinguishable from this case and others nationwide because the emergency order in that case came from the state department of health and

When there is no state of emergency, the Governor has the general authority to “make, amend and rescind the necessary orders, rules and regulations to carry out the provisions of this [emergency management] chapter,” 20 V.S.A. § 8(b)(1). Now that he has correctly declared a state of emergency, the Governor also has the power to enforce those rules, 20 V.S.A. § 9(1), to “order the evacuation of persons living or working within all or a portion of an area for which a state of emergency has been proclaimed,” 20 V.S.A. § 9(9), and to “perform and exercise such other functions, powers and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population.” 20 V.S.A. § 11(6).

With these statutory authorizations, the Governor was authorized to close all close-contact businesses, and then all non-essential businesses, when he deemed it necessary to protect the public health and safety of Vermont from the emergent threat of COVID-19 infection. *See* Addenda 4, 6. And, now that the Governor’s emergency closures have successfully slowed the initial spread of the disease, the Governor has the power to loosen his orders in a controlled and rational fashion, to mitigate the risk of a second wave of infections. *See* Addenda 10-13.

The orders to close, and then gradually re-open, businesses in response to a deadly pandemic are also constitutionally sound as appropriate uses of the State’s police power. A State has inherent authority “to enact quarantine laws and ‘health

relied on a department of health statute, not on gubernatorial emergency powers. *Id.* ¶ 41. The court struck down the agency order as an overreach of statutory authority which should have been subject to notice and comment rulemaking procedures, but explicitly distinguished agency authority from gubernatorial emergency powers. The *Wisconsin Legislature* majority did not cite or examine *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the leading U.S. Supreme Court case on emergency executive powers.

laws of every description.” *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

“Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27. The police power is “the governmental power of conserving and safeguarding the public safety, health, and welfare.” *State v. Quattropani*, 99 Vt. 360, 133 A. 352, 353 (1926). And the executive’s powers are at their peak where the executive is expressly empowered by statute to act to protect public health.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

Statutes and executive powers aimed at protecting the public health during health emergencies have been upheld generally as validly enacted unless they bear “no real or substantial relation to [protecting the public health, the public morals, or the public safety] or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Jacobson*, 197 U.S. at 31. *Jacobson* upheld a city ordinance that required mandatory smallpox vaccination during an outbreak of smallpox. *Id.* at 25; see also *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902).

Jacobson is important precedent relevant to reviewing COVID-19 emergency orders. See *In re Rutledge*, No. 20-1791, ___ F.3d ___, 2020 WL 1933122, at *4 (8th Cir. Apr. 22, 2020) (reversing temporary restraining order enjoining COVID-19 emergency order because district court did not meaningfully apply *Jacobson*, 197 U.S. 11); *In re Abbott*, ___ F.3d ___, 2020 WL 1911216, at *12 (5th Cir. Apr. 20,

2020) (same); *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020) (same). And courts applying *Jacobson* frequently uphold COVID-19 emergency orders. *Commcan, Inc. v. Baker*, Docket No. 2084CV00808-BLS2, 2020 WL 1903822, at *5 (Super. Ct. Ma. Apr. 16, 2020) (unpub.) (finding COVID-19 emergency order justified under *Jacobson*); Attachment A, *Binford*, slip op. at 13 (upholding New Hampshire’s emergency ban on gatherings of more than 50 people and dining in restaurants and bars under *Jacobson* and *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996)).⁴

Similarly, this case is likely to succeed in enforcing the Governor’s order as a valid exercise of emergency power. And the public health justification for the Governor’s order restricting in-person interactions, including by closing non-essential close-contact businesses, overwhelmingly shows that order is necessary to promote and secure the safety and protection of the civilian population of Vermont during the COVID-19 pandemic. Suspending non-essential close-contact businesses is supported by authoritative public health guidance. *See McClure Aff.* ¶ 17 (“If COVID-19 spreads unchecked, it will overwhelm the capacity of the State’s health care system . . .”), ¶ 18 (“One of the only tools available to fight this imminent public health crisis is to try to slow the spread of the virus.”), ¶¶ 26-27 (comparing projected COVID-19 cases and deaths with and without the stay at home order); *see*

⁴ The Eleventh Circuit has employed a similarly deferential, two-pronged test in upholding a curfew during a state of emergency after a hurricane. *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996). That test is (1) whether the executive action was “taken in good faith” and (2) “whether there is some factual basis for the decision that the restrictions . . . imposed were necessary to maintain order.” *Id.* (quoting *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971) (upholding curfew)). The Governor’s orders pass this test, too, for the same reasons as described above.

also *Kelso Aff.* ¶¶ 15-16. As noted above, other jurisdictions have largely upheld emergency COVID-19 orders closing non-essential businesses based on similar facts, particularly where no constitutional rights are implicated. *See generally, e.g., Hartman*, 2020 WL 1932896; *Friends of DeVito*, 2020 WL 1847100; *Commcan, Inc.*, 2020 WL 1903822; *Binford*, Docket No. 217-2020-CV-152, attached.

Now that Vermont has passed the initial peak surge in COVID-19 infections, orders allowing for the gradual and orderly re-opening of some economic and social operations is also justified. By phasing the re-opening of different sectors and activities in a coordinated way, the State can monitor how reducing different restrictions correlates with changes in the transmission rate of the virus. *Kelso Aff.* ¶ 29. If any one phase of re-opening correlates with a greater than expected rate of transmission, the State can adjust subsequent phases accordingly. *Id.* ¶ 31. The goal is to keep the number of people needing hospitalization and acute care as a result of COVID-19 infections within the State's resources to care for them. *Id.* ¶ 30. If individuals and businesses do not follow the prescribed phases of re-opening, the State risks experiencing another surge in COVID-19 cases, which could overwhelm the State's healthcare resources. *Id.* ¶ 32. If the State has more patients than we have capacity to care for those patients—for example, if the State runs out of intensive care unit beds—more people will die. *Id.* ¶ 30; *McClure Aff.* ¶¶ 17, 26-27. As a result of these factors, the Governor is justified by concerns for public health and safety in his approach to re-opening the economy in a coordinated and phased manner.

Moreover, the decision to re-open some businesses and social opportunities but not in-person operations of indoor gyms is justified by public health concerns. First, while the State is in the process of re-opening some activities after several weeks of observing a stay home order, any place where people congregate with non-household members—or with people they have not otherwise been physically close to—risks increasing the rate of viral transmission from its current rate. *Kelso Aff.* ¶ 26. And because of the way the virus spreads, an indoor gym is an environment with a relatively high risk of transmission for the COVID-19 virus. *Id.* ¶ 25. While much is unknown about the virus, the best information we have indicates that the virus spreads through respiratory droplets produced through exhalation. *Id.* ¶ 18. It can live for several hours on surfaces. *Id.* ¶ 19. It spreads more easily indoors than outdoors. *Id.* ¶ 21. Transmission is more likely when people are in close proximity to one another. *Id.* ¶ 20. And people who are not showing any symptoms of the virus may still transmit it to one another. *Id.* ¶ 10. Indoor gyms are, in some ways, the perfect environment for otherwise healthy-seeming people to transmit the virus: “indoor gyms are enclosed spaces where people congregate to do strenuous activities involving shared equipment. With heavy breathing indoors and frequent touching of surfaces, the risk of transmission is high.” *Id.* ¶ 25. The Governor’s orders continuing the emergency closure of indoor gyms while gradually re-opening other activities is therefore also justified by public health concerns.

To be sure, the Governor’s emergency police powers are not unlimited—fundamental rights may still prevail over an otherwise valid emergency order. *See,*

e.g., *Adams & Boyle, P.C. v. Slatery*, ___ F.3d ___, 2020 WL 1982210, at *10 (6th Cir. 2020) (upholding preliminary injunction of COVID-19 emergency order to allow exercise of abortion rights); *Robinson v. Attorney General*, ___ F.3d ___, 2020 WL 1952370, at *5-8 (11th Cir. 2020) (declining to stay preliminary injunction of COVID-19 emergency order prohibiting exercise of abortion rights); *Maryville Baptist Church, Inc. v. Beshear*, ___ F.3d ___, 2020 WL 2111316, at *2 (6th Cir. 2020) (granting injunction of COVID-19 emergency order because church likely to succeed on its religious liberty claim for drive-in church services); *On Fire Christian Ctr., Inc. v. Fischer*, ___ F. Supp. 3d ___, 2020 WL 1820249, at *6-9 (W.D. Ky. 2020) (same).

Notably, however, several courts have found that even fundamental rights may be temporarily and provisionally limited by emergency police powers. *See, e.g.*, *Rutledge*, 2020 WL 1933122, at *4 (reversing temporary restraining order that would have allowed abortion clinics to operate despite COVID-19 emergency order); *Abbott II*, 2020 WL 1911216, at *12 (same); *Abbott I*, 954 F.3d at 786 (same); *Legacy Church, Inc. v. Kunkel*, ___ F. Supp. 3d ___, 2020 WL 1905586, at * (D.N.M. 2020) (denying request for temporary restraining order of COVID-19 emergency order and finding church unlikely to succeed on free exercise and assembly claims); *Lighthouse Fellowship Church v. Northam*, ___ F. Supp. 3d ___, 2020 WL 2110416 (E.D. Va. 2020) (same, and finding church unlikely to succeed on establishment clause, freedom of speech, and freedom of assembly claims); *Cross Culture Christian*

Ctr. v. Newsom, ___ F. Supp. 3d ___, 2020 WL 212111 (E.D. Cal. 2020) (same for speech, assembly, and freedom of religion claims).

In any event, Defendants can point to no fundamental right that entitles them to operate a fitness center in violation of the Governor's properly issued emergency order. *See generally, e.g., Hartman v. Acton*, ___ F. Supp. 3d ___, 2020 WL 1932896 (S.D. Ohio 2020) (denying bridal shop's request to enjoin COVID-19 emergency order closing non-essential businesses and finding shop unlikely to succeed on procedural due process or equal protection claims); *Friends of DeVito v. Wolf*, ___ A.3d ___, 2020 WL 1847100 (Pa. 2020) (same for variety of non-essential businesses and political organization asserting free speech, freedom of assembly, procedural due process, and takings claims, as well as violation of separation of powers); *Commcan*, 2020 WL 1903822, at *6-7 (upholding COVID-19 emergency order's classifications of essential and non-essential businesses as rational).

b. Defendants are violating the Governor's unambiguous order to close indoor fitness centers.

After declaring a state of emergency due to the spread of COVID-19 in Vermont on March 13, the Governor ordered that "gymnasiums, fitness centers and similar exercise facilities, hair salons and barbers, nail salons, spas and tattoo parlors shall cease all in-person operations" as of March 23, 2020. Addendum 4 ("Closure of close-contact businesses"), ¶ 1. Effective March 25, the Governor ordered Vermonters to stay home. leaving only for enumerated essential reasons, and ordered all but "essential" businesses to close. Addendum 6, ¶¶ 1, 3-5. Indoor fitness centers are not on the list of essential businesses in Addendum 6. *Id.* ¶ 5.

While the Governor has since allowed the phased re-opening of some businesses and activities, none of the Governor's orders or addenda have allowed indoor fitness centers to reopen since they were closed on March 23. *See* Addenda 10 through 13. As of May 7, 2020, organizations offering "outdoor recreation and outdoor fitness activities that require low or no direct physical contact may begin operations, subject to compliance with . . . health and safety guidelines," but indoor fitness facilities remain closed. Addendum 13. The relevant guidance from the Agency of Commerce and Community Development states:

Gyms, fitness studios, salons, spas, and other similar businesses and the retail operations that support these businesses should cease, including employee-to-employee interactions within the business. **The Phased Restart Work Safe Guidance does not allow these businesses to resume operations.**

Agency of Commerce and Community Development, *Stay Home Stay Safe Sector Specific Guidance: Health and Beauty*, <https://accd.vermont.gov/content/stay-home-stay-safe-sector-specific-guidance#health-beauty> (last visited May 14, 2020). The Governor's Executive Order 01-20 and all related addenda were extended through May 15, 2020. Addendum 9, ¶ 1. As of May 15, 2020, Executive Order 01-20 and all related addenda were extended through June 15, 2020. Addendum 14, ¶ 1. The Governor has given no indication whether, when, or under what circumstances fitness centers may safely reopen. *See id.* ¶ 5 ("Businesses and non-profit and government entities which have not been authorized to resume operations as of the date of this Executive Order shall be addressed at a later date.").

Both the Rutland and the Castleton locations of Club Fitness are fitness centers containing exercise equipment such as free weights, weight machines, treadmills, and similar fitness equipment. Plemmons 5/15 Aff. ¶ 2; Mantello Aff. These centers unambiguously fall within the category of “gymnasiums, fitness centers and similar exercise facilities” ordered closed by Addendum 4. The Rutland location is approximately 4,000 square feet.

Defendant Manovill has allowed customers to access the Club Fitness Rutland location on at least three occasions in the last two weeks, when the Rutland police visited on May 3, May 6, and May 15. Plemmons 5/7 Aff.; Plemmons 5/15 Aff. Club Fitness may have been open as early as May 1, when Rutland police received the first call about the club’s opening. *See* Plemmons 5/7 Aff. ¶¶ 1-4; Olivia Lyons, *Defiant Rutland fitness club owner violates emergency order*, WCAX, <https://www.wcax.com/content/news/Defiant-Rutland-fitness-club-owner-violates-emergency-order-570319581.html> (May 8, 2020) (“He opened the doors to his gym on May 1st.”).

On May 3, Rutland police Corporal A. Heath Plemmons drove to Club Fitness and observed two people actively exercising. They were less than six feet apart and not wearing masks. Corporal Plemmons did not observe anyone cleaning the equipment. Corporal Plemmons spoke with Defendant Manovill and informed him he was out of compliance with the Governor’s orders. Plemmons 5/7 Aff. ¶ 5.

On May 5, the Attorney General's Office sent Defendants a cease and desist letter, stating that Club Fitness must immediately cease all in-person operations. *See Attachment G.*

On May 6, Corporal Plemmons again drove to Club Fitness and observed six customers exercising and an employee in the gym. None of the people were wearing masks. Some of the customers were less than six feet apart. Two customers left while Corporal Plemmons was there, but no one began cleaning or sanitizing the equipment they had been using after they left. Defendant Manovill was not present. Corporal Plemmons spoke with Defendant Manovill on the phone and confirmed that Defendant Manovill had received a cease and desist letter from the Attorney General. Corporal Plemmons told Defendant Manovill he was at Club Fitness to confirm that the club was not complying with the Governor's order. Plemmons 5/7 Aff. ¶¶ 8-9.

On May 15, Corporal Plemmons went to the Rutland location and observed six vehicles in the parking lot, one of which had a New York license plate. Inside the business Corporal Plemmons observed five people actively exercising. No one was wearing masks. Some of them were less than six feet apart. There were no hand sanitizing stations and no signage advising customers to wear masks, keep a safe distance, or clean equipment. Defendant Manovill stated that he cleans the equipment himself and does not allow more than ten people in the building at a time. Plemmons 5/15 Aff.

On May 15, Castleton Police Chief Peter Mantello visited the Club Fitness Castleton location at 912 Route 4A West, Castleton, Vermont. Chief Mantello observed the door to the business wide open, with three people exercising and one staff member present. No one was wearing masks. No signs appeared to instruct customers present to wear masks, observe physical distancing, or clean equipment after use. The staff member present told Chief Mantello that “his boss, Sean, directed him in opening the business as long as they were compliant with the COVID-19 requirements.” *See Mantello Aff.* As noted above, however, there are no “COVID-19 requirements” that allow Defendants to legally operate indoor, in-person fitness centers at this time.

In short, Defendants are in repeated and flagrant violation of the Governor’s orders.

II. Defendants’ continued operation of a fitness club in defiance of the Governor’s orders will cause immediate and irreparable injury to the health and safety of Vermont.

The risks that someone may transmit or become infected with COVID-19 due to Defendants’ clear violation of the Governor’s executive order is too great to permit Defendants to continue indoor, in-person fitness center operations at this time.

As described above, the State’s response to the arrival of COVID-19 has been to limit the ways in which Vermonters could be exposed to the disease. The State has set a strategy to slow the spread in order to protect those at greatest risk, ensure capacity at healthcare facilities and minimize the risk to the public. This is,

in fact, the best tool we have to mitigate the spread of the disease. Kelso Aff. ¶ 16; McClure Aff. ¶ 18. Without the concerted cooperation of Vermonters modifying their behaviors in accordance with the Governor's orders, many more people will die. Kelso Aff. ¶¶ 30-33; McClure Aff. ¶¶ 26-27.

Also as described above, Defendants' continued operation of an indoor, in-person fitness center creates an especially high risk environment for the potential spread of the virus. By holding indoor, in-person fitness operations, Defendants are placing their own customers at risk, as well as the Vermont public-at-large.

Moreover, Defendants do not appear to be taking any precautions that would help to even partially mitigate their dangerous operation.⁵ Rutland police officers have visited the Club Fitness Rutland location at least three times, including today, May 15, and observed multiple customers and staff on the premises. None of the individuals appeared to be wearing masks. *See* Plemmons 5/7 Aff., ¶¶ 5, 8; Plemmons 5/15 Aff., ¶ 4. No one was observed wiping down or sanitizing the equipment used, even after customers finished working out and left. Plemmons 5/7 Aff., ¶ 5. Officers observed several customers well within six feet of one another. Plemmons 5/7 Aff. ¶¶ 5, 8. No signs or staff appeared to be advising or enforcing hygienic practices such as frequent hand and surface washing, mask wearing, or customer distancing. Plemmons 5/15 Aff. ¶¶ 4-5. At the Castleton location, no one

⁵ While behavioral changes such as wearing masks, frequent hand and surface washing, and physical distancing can help lower the risk of transmission, they cannot stop it altogether. Kelso Aff. ¶¶ 23-24; McClure Aff. ¶ 25.

was wearing masks and no signs appeared to require or suggest any special hygienic or safety procedures. Mantello Aff.

In other words, Defendants have created a virtual petri dish for spreading the COVID-19 virus. The virus spreads quickly and undetectably. Kelso Aff., ¶¶ 10, 22. One person who is unknowingly infected with COVID-19 could come into Club Fitness and easily spread it to everyone else in the gym. And a person who becomes infected at Club Fitness could go home and very quickly spread the disease to, at a minimum, everyone in their household.

While Vermont is beginning to re-open some businesses and activities, there are good reasons that the Governor has not simply flung open the doors to the economy—and there are good reasons to be particularly cautious about re-opening higher risk-of-transmission activities such as indoor fitness centers. *See supra* Part I; Kelso Aff. ¶ 25. The danger of COVID-19 spreading again in an uncontrolled manner is still present. Kelso Aff., ¶¶ 30, 32; McClure Aff., ¶¶ 26-27. Defendants, by flouting the Governor's orders, are not only at high risk of spreading the disease within Vermont. They are also setting an example that, if left unchecked, will undoubtedly encourage others to follow. In this way, too, their behavior spreads greater risk throughout the community and the State.

Immediate injunctive relief is necessary to prevent this imminent and irreparable injury to the State and the public. Irreparable injury does not exist if money damages or other legal relief are available and adequate to compensate a plaintiff. *Taylor*, 2017 VT 92, ¶ 40. Not so here. No other relief is available if the

virus spreads more rapidly as a result of Defendants' behavior. *See, e.g., Stagliano v. Herkimer Cent. Sch. Dist.*, 151 F. Supp. 3d 264, 273 (N.D.N.Y. 2015) (granting temporary restraining order allowing teachers to use sick leave for their children and noting that "the obvious potential for such issues as developing chronic health issues or spreading contagious diseases underscores the need for equitable relief"). Because virus transmission can occur daily, or even hourly, immediate injunctive relief is the only possible remedy.

This Court should grant the State's motion for a temporary restraining order to direct that Defendants—along with hundreds of other Vermont businesses—follow the Governor's orders to limit the spread of COVID-19 and to protect our collective public health.

III. Defendants' operation of an indoor, in-person fitness center causes harm to the public that outweighs the potential harm to Defendants from an injunction.

The harm to the public from Defendants' actions, as described above, outweighs any potential harm to Defendants from an injunction issued by this Court. Where harm to the plaintiff is not reparable with money damages, but harm to the defendant is reparable with money damages, this factor weighs in favor of granting the injunction. *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929); *see, e.g., Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1226 (10th Cir. 2009) (individual's liberty interest strongly outweighs monetary loss to company); *Cohen v. Brown Univ.*, 991 F.2d 888, 904-06 (1st Cir. 1993) (harm to varsity women athletes if

sports were downgraded to club status outweighed financial harm to university from continuing to fund varsity-level sports).

Harm from closure of a fitness center business, while burdensome, is entirely financial. *See Hartman*, 2020 WL 1932896, at *4 (finding that temporary closure of a business, in absence of constitutional violation or showing of imminent bankruptcy or permanent closure, does not constitute irreparable harm). As noted above, Defendants can point to no constitutional rights that will be violated by requiring them to abide by the same order as everyone else in the State. *See supra* Part I. In contrast to the harm Defendants are causing to the State, then, any harm to Defendants from closing their business is fully compensable with money damages. *Cf. Taylor*, 2017 VT 92, ¶ 40.

Nor can Defendants claim irreparable injury from some sort of lost opportunity to exercise. Notably, the Governor's order has always allowed Vermonters to leave home for personal exercise, such as biking, running, or walking. *See* Addendum 6, ¶ 1. Remote fitness services, such as online classes, coaching, or personal training, have never been prohibited. And as of May 7, the order allows for outdoor fitness and recreational operations, while observing physical distancing and hygiene protocols. *See* Addendum 13, ¶¶ 1, 4. Outdoor activities carry a lower risk of transmission than indoor activities. *Kelso Aff.*, ¶ 21.

IV. Injunctive relief is in the public interest.

For all the same reasons discussed above, an injunction restraining Defendants from continuing to operate an indoor, in-person fitness center while the

Governor’s order prohibits them from doing so is in the public interest. *See supra* Parts II & III; *Hartman*, 2020 WL 1932896, at *11 (“The final two factors—the balance of equities and the public interest—merge when the government opposes [or supports] the issuance of a temporary restraining order because ‘the government’s interest is the public interest.’”).

Moreover, where a violation of the law has been alleged, as it has here, that “has been considered a strong factor in favor of granting a preliminary injunction.” C. Wright & A. Miller, 11A *Fed. Prac. & Proc. Civil*, § 2948.4 (3d ed. 2020). “It even has been held that when the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor, nor a likelihood of success on the merits.” *Id.* As described above, operating an indoor, in-person fitness center is a clear violation of the Governor’s properly constituted emergency order. *See supra* Part I.

Finally, courts in other jurisdictions have found that the public interest weighs in favor of upholding COVID-19 emergency orders of the kind at issue here. *See Legacy Church*, 2020 WL 1905586, at *44 (finding the public interest in limiting the COVID-19 outbreak greater than the public interest in gathering together in a church, where no First Amendment issues were found); *Hartman*, 2020 WL 1932896, at *11 (“While the immediacy and irreparability of harm to Plaintiffs [business owners] is speculative, the harm to the public if the Director’s order is enjoined is potentially catastrophic.”). For the same reasons that upholding an

emergency order is in the public interest, enforcing the Governor's order in this case also serves the public interest.

This factor, like the others, weighs strongly in favor of granting a temporary restraining order here.

WHEREFORE, for the forgoing reasons, the State respectfully requests that the Court issue an order that:

1. grants this temporary restraining order immediately restraining Defendants from operating any indoor, in-person fitness center; and
2. sets a hearing date as soon as possible on this motion for preliminary injunction to require that Defendants comply with EO 01-20 and any and all addenda and guidance issued thereunder, including the prohibition of indoor, in-person fitness services so long as EO 01-20 prohibits them from doing so.

DATED at Burlington, Vermont this 15th day of May, 2020.

Respectfully submitted,

THOMAS J. DONOVAN, JR.
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ATTACHMENT A

Binford v. Sununu

The State of New Hampshire
MERRIMACK SUPERIOR COURT

BINFORD ET AL

v.

GOVERNOR SUNUNU

DOCKET NO. 217-2020-CV-00152

**ORDER ON PLAINTIFFS' PETITION FOR PRELIMINARY INJUNCTION AND
DEFENDANT'S MOTION TO DISMISS**

The plaintiffs, David W. Binford, Eric Couture, and Holly Rae Beene (collectively "Plaintiffs") have filed an Emergency Motion for Preliminary Injunction and Permanent Injunction against Governor Christopher Sununu in his official capacity as Governor of the State of New Hampshire (hereinafter the "State") on March 18, 2020. See Compl. (Doc. 1). Plaintiffs request an immediate preliminary injunction prohibiting the enforcement of Governor Sununu's Emergency Order # 2 (the "Emergency Order #2 ") issued on March 16, 2020 pursuant to Executive Order 2020-04 ("EO 2020-04). Id. at Prayer A–B. In the alternative, Plaintiffs request a declaratory judgment rendering the Emergency Order advisory as opposed to mandatory. Id. at ¶ 46. The Court held an emergency hearing on the matter on March 20, 2020 ("March 20 Hearing"). Immediately prior to the hearing, the State filed an objection to Plaintiff's request for preliminary and permanent injunction and a motion to dismiss. See State's Obj. (Doc. 5) and State's Mot. Dis. (Doc. 6). For the following reasons, Plaintiffs' petition for preliminary injunction is **DENIED**, and the State's motion to dismiss is **GRANTED**.

FACTS

The following facts are derived from the undisputed offers of proof at the March 20 Hearing and the undisputed facts contained within EO 2020-04 declaring a State of Emergency¹.

The Novel Coronavirus (“COVID-19”) first appeared in Wuhan, China in December of 2019. Doc.5, Ex. A at 1. On January 23, 2020, the Centers for Disease Control and Prevention (the “CDC”) activated its emergency response system to provide ongoing support in the United States in response to the growing number of cases of COVID-19 across the United States. Id. On January 30, 2020, the World Health Organization (the “WHO”) declared a public health emergency “of International Concern” related to COVID-19. Id. The following day, the United States Department of Health and Human Services (“USDHHS”) declared a national public health emergency concerning COVID-19. Id. On March 11, 2020, the WHO declared COVID-19 a global pandemic, expressing that in the coming weeks the number of cases, hospitalizations, and deaths would substantially increase. Id.

On March 12, 2020, the Division of Public Health (“DPH”) and the Division of Homeland Security and Emergency Management (“DHS”) announced that “211 NH” had been mobilized to handle all COVID-19 related calls in New Hampshire. Id. By March 13, 2020, various world health organizations reported over 124,000 confirmed cases of COVID-19 with 4,163 deaths worldwide. Id. Of those cases, 1,663 were confirmed in the United States, including six in New Hampshire. Id. at 2. On March 13, 2020, the President of the United States declared a National Emergency under the

¹ The Court notes that although Plaintiffs’ complaint argues that the factual basis contained within EO 2020-04 are insufficient to give rise to a state of emergency, Plaintiffs do not challenge the truth of the facts contained therein.

Stafford Act due to the global pandemic and national spread of COVID-19. Id. At the same time, DHS and the Department of Safety activated State Emergency Operations Centers to provide support to New Hampshire state and local authorities dealing with the crisis. Id.

The same day, Governor Sununu issued EO 2020-04, declaring a State of Emergency due to COVID-19. Id. Governor Sununu set forth seventeen recitations of fact upon which the EO was issued, including details about the threats to the health and safety of New Hampshire residents posed by the outbreak and the response necessary to combat the spread. Id. In EO 2020-04, Governor Sununu acknowledged that, although the majority of cases of COVID-19 will result in mild symptoms, many will require hospitalization and may lead to death. Id. As a result, Governor Sununu noted:

[I]f COVID-19 spreads in New Hampshire at a rate comparable to the rate of spread in other countries, the number of persons requiring medical care may exceed locally available resources, and controlling outbreaks minimizes the risk to the public, maintains the health and safety of the people of New Hampshire, and limits the spread of infection in our communities and within the healthcare delivery system

Id. Consequently, Governor Sununu articulated the need for New Hampshire to “implement measures to mitigate the spread of COVID-19, and to prepare and respond to an increasing number of individuals requiring medical care and hospitalization.” Id.

Pursuant to EO 2020-04, Governor Sununu invoked his powers under RSA 4:45 and 4:47. He further noted in EO 2020-04 that “additional temporary orders, directives, rules, and regulations may be issued either by the Governor or by designated state officials within the written approval of the Governor.” See id. at 6. Thereafter, on March 16, 2020, he issued Emergency Order #2, which provides:

1. In accordance with CDC guidelines, the following activities are prohibited within the State of New Hampshire:

Scheduled gatherings of 50 people or more for social, spiritual and recreational activities, including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. This prohibition does not apply to the General Court or to the day-to-day operations of businesses.

2. Food and beverage sales are restricted to carry-out, delivery, curbside pick up, and drive through only, to the extent permitted by current law. No onsite consumption is permitted, and all onsite consumption areas in restaurants, diners, bars, saloons, private clubs, or any other establishment that offers food and beverages for sale shall be closed to customers.
3. Section 2 of this order shall not apply to food and beverage service in (a) healthcare facilities, (b) airports, or (c) cafeterias located within a private business which are primarily intended to serve the employees of that business.
4. The Division of Public Health shall enforce this Order and if necessary may do so with the assistance of State or local police.
5. This Order shall remain in effect until Monday, April 6, 2020.

Doc. 5, Ex. B.

As of March 19, 2020, there were 44 confirmed cases of COVID-19 within the State of New Hampshire. In addition, there were 630 tests pending in the New Hampshire Public Health Laboratories, and 575 people were being monitored.

ANALYSIS

In response to Emergency Order #2, Plaintiffs brought this action on March 17, 2020. See Doc. 1. Plaintiffs seek an emergency and permanent injunction on Emergency Order #2 or, in the alternative, a declaratory judgment rendering Emergency Order #2 advisory rather than mandatory. Id. Plaintiffs argue that the governor does not have the authority to issue Emergency Order #2, the spread of COVID-19 does not

amount to an emergency under RSA 21-P:35, and Emergency Order #2 is unconstitutional. Id. The State objects arguing that the governor has the authority pursuant to RSA 4:45, Emergency Order #2 is enforceable, and it is constitutional. See Doc. 5. For the same reasons, the State also moves to dismiss. See Doc. 6

I. Motion for Preliminary Injunction

“A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits.” DuPont v. Nashua Police Dep’t, 167 N.H. 429, 434 (2015) (quotation omitted). It is the moving party’s burden to “show among other things that it would likely succeed on the merits.” Id. (quotation and brackets omitted). In addition to success on the merits, “[a]n injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, [and] there is no adequate remedy at law.” Pike v. Deutsche Bank Nat’l Trust Co., 168 N.H. 40, 45 (2015) (quotation omitted). “The trial court retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity.” Id.

Plaintiffs have the burden to demonstrate that all three factors are met in order for the Court to order the extraordinary relief of a preliminary injunction. As the Court finds that Plaintiffs are unlikely to succeed on the merits, it need not consider whether there is irreparable harm or an adequate remedy at law. Cf. Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that courts need not consider the party’s remaining arguments where one or more is dispositive of the case). Accordingly, the Court will limit its analysis to whether Plaintiffs are likely to succeed on the merits of the case.

In support of their position that they are likely to succeed on the merits, Plaintiffs argue: (1) Governor Sununu does not have the authority to issue Emergency Order #2; (2) Emergency Order #2 has no enforcement mechanism; and (3) Emergency Order #2 is unconstitutional under the State and Federal Constitutions. See Doc. 1 ¶¶ 23–45. The State asserts that Governor Sununu: (1) properly declared a state of emergency pursuant to RSA 4:45; (2) may use his emergency powers to temporarily suspend or limit fundamental rights if he does so in good faith and with a sufficient factual basis; and (3) Emergency Order #2 is a permissible time, place, and manner restriction on Plaintiffs' fundamental rights. See Doc. 5 a 10–20.

A. Executive Authority

Plaintiffs first argue that Governor Sununu lacks the authority to declare a state of emergency because he cannot meet the burden of showing that an emergency exists under RSA 141-C:14-a or RSA 4:45. Doc. 1 ¶ 27. As an initial matter, the governor's authority is not derived from RSA 141-C:14-a, which contemplates the power of the Commissioner of the Department of Health and Human Services. See RSA 141-C:2, IX. Rather, the governor's power to declare a state of emergency is derived from RSA 4:45 and RSA 4:47. As a result, the Court will consider the parties arguments under the aegis of RSA 4:45 and 4:47.

RSA 4:45, I provides:

The governor shall have the power to declare a state of emergency, as defined in RSA 21-P:35, VIII, by executive order if the governor finds that a natural, technological, or man-made disaster of major proportions is imminent or has occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section.

Once the governor has declared a state of emergency, he has “[t]he power to make, amend, suspend, and rescind necessary orders, rules and regulations to carry out the provisions of this subdivision in the event of a disaster beyond local control.” RSA 4:47, III. As the governor’s powers under a state of emergency are broad, invocation of the provisions in RSA 4:45 and RSA 4:47 requires the governor to specify the factual conditions that have brought about the emergency and the nature of the emergency itself. RSA 4:45, I(a)–(c). These factual assertions must establish that a state of emergency exists as defined in RSA 21-P:35, VIII, which states:

“State of emergency” means that condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm.

Here, Plaintiffs contend that Governor Sununu lacks the authority to declare a state of emergency because the circumstances surrounding the COVID-19 outbreak do not amount to an emergency under the definition of emergency in RSA 21-P:35. Doc. 1 ¶¶ 27–31. Plaintiffs argue that “New Hampshire has had just 17 people diagnosed with [COVID-19], and ZERO deaths. In a state of over 1 million people, those numbers alone make it clear this is not an ‘emergency.’” *Id.* ¶ 28 (emphasis in original). This argument is without merit.

It would be irrational to find that the governor must wait for the health care system of New Hampshire to be overwhelmed with patients suffering from COVID-19 before he is authorized to declare a state of emergency and take preventative measures to slow the spread of a highly contagious and potentially deadly disease. Indeed, RSA 4:45 contemplates the need to take preemptive action and explicitly authorizes the

governor to do so. Specifically, RSA 4:45, I permits the governor to declare a state of emergency where a disaster is “imminent or has occurred within this state.” (Emphasis added). As a result, Governor Sununu is expressly authorized to declare a state of emergency and order measures designed to address an imminent threat to New Hampshire public health and safety. That said, RSA 4:45 requires the governor to assert the factual basis or bases upon which the declaration rests. EO 2020-04 more than satisfies this requirement.

As stated in EO 2020-04, at the time of the March 20 Hearing, COVID-19 had infected roughly 124,000 people globally, of which nearly 5,000 have died. The WHO declared that COVID-19 is a global pandemic and warned the world to take precautions to slow the spread of the disease. The world’s experts on infectious diseases, including the WHO, CDC, and USDHHS, agree that these numbers will increase exponentially over the coming weeks and months, particularly if no measures are taken to stop the spread of COVID-19. This presents an enormous risk to the residents of New Hampshire, as the state only has limited local medical resources to combat the outbreak. As a result, “if COVID-19 spreads in New Hampshire at a rate comparable to the rate of spread in other countries, the number of persons requiring medical care may exceed locally available resources.” Doc. 5, Ex. A at 2. Correspondingly, “controlling outbreaks minimizes the risk to the public” and minimizes the strain on the state’s limited resources. Id. With this in mind, the Court finds that there is overwhelming factual and legal support evincing Governor Sununu’s authority to declare a state of emergency. Accordingly, the Court finds that EO 2020-04 sets out a sufficient factual basis to conclude that “a natural, technological, or man-made disaster of major

proportions is imminent” such that the governor is authorized to declare a state of emergency pursuant to RSA 4:45 and to issue executive orders designed to address the spread of COVID-19 pursuant to RSA 4:47, III.

Plaintiffs next argue that, even if the governor is authorized to declare a state of emergency and to issue executive orders related thereto, Emergency Order #2 lacks any legal enforcement mechanism and should therefore be declared advisory. Doc. 1 ¶¶ 44–46. Plaintiffs specifically point to RSA 21-P:47, which states “[i]f any person violates or attempts to violate any order, rule, or regulation made pursuant to this subdivision, such person shall be guilty of a misdemeanor.” Plaintiffs assert that the language “pursuant to this subdivision” expressly limits the governor’s enforcement power to orders issued pursuant to RSA 21-P. Plaintiffs argue that the legislature would have included express language indicating the governor’s power to enforce orders issued pursuant to RSA 4:45 if it had intended him to have the enforcement authority pursuant to that chapter.

This argument ignores the rest of the subdivision contained within RSA 21-P. RSA 21-P:45, titled “Enforcement,” expressly includes language authorizing enforcement of executive orders issued under RSA 4:45:

It shall be the duty of every organization for emergency management established under this subdivision and of the officers of such organization to execute and enforce such orders, rules, and regulations as may be made by the governor under authority of this subdivision or RSA 4:45.

(Emphasis added). RSA 21-P:45 expressly authorizes the governor to enforce emergency orders, while RSA 21-P:47 sets forth the penalty for failure to comply with emergency orders issued pursuant to RSA 4:45. Accordingly, the Court finds that not only does Governor Sununu have the authority to declare a state of emergency, but the

legislature has also imbued the executive with the authority to enforce emergency orders made pursuant to RSA 4:45. As a result of this clear legislative authority, the Court declines the request that Emergency Order #2 be declared advisory as opposed to mandatory.

B. Constitutionality of Emergency Order #2

Plaintiffs argue that Emergency Order #2 is unconstitutional because: (1) it violates their right to assemble under the First Amendment of the U.S. Constitution and Part I, art. 32 of the New Hampshire Constitution; (2) it violates their right to religious freedom under the First Amendment of the U.S. Constitution and Part I, art. 5 of the New Hampshire Constitution; (3) it violates the Part I, art. 34 New Hampshire Constitution prohibition on Martial Law; (4) it constitutes an unconstitutional taking under the U.S. Constitution; and (5) it violates their privilege of Habeas Corpus under Part 2, art. 91 of the New Hampshire Constitution. See Doc. 1. In response, the State contends: (1) during a state of emergency, executives are granted broad latitude to suspend civil liberties in order to address the emergency; and (2) even if the governor does not have broad latitude to suspend civil liberties during the state of emergency, Emergency Order #2 is a permissible time, place, and manner restriction on assembly and religion. Doc. 5 at 13–18. The State further maintains that Plaintiffs' arguments concerning martial law, unconstitutional taking, and habeas corpus are undeveloped, conclusory statements of the law that are without merit and do not warrant judicial review. Id. at 18–19.

As an initial matter, the Court agrees with the State that Plaintiffs' arguments concerning martial law, unconstitutional taking, and habeas corpus are undeveloped

and without merit. Plaintiffs do not assert any facts that would lead the Court to conclude that Governor Sununu has declared martial law, has taken any property from Plaintiffs without just compensation, or has exercised impermissible control over Plaintiffs' bodies. See Doc. 1. Accordingly, the Court will only consider Plaintiffs' developed arguments concerning freedom of assembly and freedom of religion.

i. Governor's Authority to Suspend Civil Liberties

As the State points out, there is not a wealth of case law in New Hampshire concerning the governor's authority to enact emergency orders during a state of emergency. As a result, the Court looks to other jurisdictions for guidance regarding the limit of the governor's authority under these circumstances.

Multiple jurisdictions have contemplated the executive's authority to suspend or infringe upon certain civil liberties during states of emergency. See e.g. Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) ("In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended."); United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971) ("The invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected."); In re Juan C., 33 Cal. Rptr.2d 919, 922 (Ct. App. 1994) ("An inherent tension exists between the exercise of First Amendment rights and the government's need to maintain order during a period of social strife. The desire for free and unfettered discussion and movement must be balanced against the desire to protect and preserve life and property from destruction."); ACLU of W. Tenn., Inc. v. Chandler, 458 F. Supp 456, 460 (W.D. Tenn. 1978) (explaining that the governor has the authority to impose "limitation on the exercise of [First Amendment rights] only in very unusual

circumstances were extreme action is necessary to protect the public from immediate and grave danger”).

The 11th Circuit has articulated a two-prong test to determine whether an executive order passes constitutional muster during a state of emergency. See Avino, 91 F.3d 105. In Avino, the Governor of the State of Florida issued an executive order declaring a state of emergency in the wake of Hurricane Andrew. Id. at 108. This executive order provided that Miami city and Metropolitan Dade County officials could impose curfews from August 24, 1992 through December 21, 1992. Id. The Miami Dade county manager set the curfew from 7:00 pm to 7:00 am and called in the National Guard and other law enforcement officials to aid local police. Id. By October 2, 1992, the curfew was in effect from 10:00 pm through 5:00 am. Id. County residents were required to stay in their homes during the curfew hours unless otherwise authorized. Id. The curfew was ultimately lifted on November 16, 1992. Id. The plaintiffs, residents of Dade County, filed suit against Metropolitan Dade County and the county manager, arguing that the curfew ordinance was unconstitutional. Id. at 107.

The Avino court began its analysis by establishing that the curfew ordinance must be considered “in the circumstances under which the curfew was instituted.” Id. at 108. The Avino court noted that the State of Florida was devastated by Hurricane Andrew and that all parties agreed that “[p]olice action was clearly required.” Id. at 109. The court went on to note that “[c]ases have consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction.” Id. (citing Chalk, 441 F.2d 1277; In re Juan C., 33 Cal. Rptr.2d 919; and Moorhead v.

Farrelly, 727 F. Supp. 193 (D.V.I. 1989)). The Avino court articulated that in a state of emergency, “governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency.” Id. Accordingly, the court held that “when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality is limited to a determination whether the executive’s actions were taken in good faith and whether there is some factual basis for the decision that the restrictions imposed were necessary to maintain order.” Id. The Avino court went on to hold that there was no suggestion that the Dade County officials acted in bad faith. Id. The Avino court further found that a factual emergency existed necessitating emergency intervention. Id. The court ultimately concluded that under extreme emergency circumstances, “fundamental rights such as the right of travel and free speech may be temporarily limited or suspended.” Id.

The case currently before the Court concerns a ban on gatherings in excess of 50 people and a ban on dining in at food and beverage service establishments in order to prevent the spread of a highly infectious and deadly disease. The Court finds that this type of ban is sufficiently analogous to a curfew in response to a riot or natural disaster such that the 11th Circuit’s two-prong test established in Avino would apply. The Court is also sufficiently persuaded by the 11th Circuit’s reasoning in Avino, and adopts that two-prong test here. Accordingly, the Court will review the constitutionality of Emergency Order #2 by examining whether: (1) the Governor has acted in good faith; and (2) whether the Governor has asserted a sufficient factual basis showing that the restrictions imposed were necessary.

Here, there is no allegation that Governor Sununu has acted in bad faith. Indeed, at the March 20 Hearing, Plaintiffs conceded that Governor Sununu acted in good faith in issuing Emergency Order #2. As a result, the Court need only consider whether the Governor has articulated a sufficient factual basis demonstrating that the restrictions imposed were necessary. Plaintiffs challenge Emergency Order #2's ban on gatherings of 50 or more people and ban on dine in services in public restaurants, alleging that there is no sufficient factual basis to conclude that these measures are necessary to combat COVID-19. The Court disagrees.

As stated above, EO 2020-04 set out ample factual bases to conclude that the Governor had the authority to declare a state of emergency concerning the global pandemic caused by COVID-19. These facts establish a strong need for immediate intervention. By March 16, 2020, both the United States District Court for the District of New Hampshire and the New Hampshire Supreme Court had issued orders suspending hearings and jury trials and restricting the number of people that had access to the courts. On March 16, 2020, the CDC and the White House put forth social distancing guidelines, recommending that events of ten or more people should be cancelled or held virtually. That day, Governor Sununu issued the ban on gatherings in excess of 50 people and suspended dine-in services at restaurants. These actions are consistent with similar actions taken by New Hampshire courts and are clearly supported by the recommendations put forth by the CDC and the White House. In issuing Emergency Order #2, the Governor acknowledged the ongoing emergency presented by the spread of COVID-19 and articulated the relationship between a ban on large gatherings and

dine-in services and addressing the emergency. Accordingly, the Court finds that there is a sufficient factual basis for the prohibitions contained within Emergency Order #2.

Further buttressing the Court's finding that the Governor's actions are constitutional is the fact that there are multiple checks on Governor Sununu's authority to enforce Emergency Orders pursuant to EO 2020-04. Absent a renewed factual finding by the Governor, EO 2020-04 will be in effect for only 21 days. RSA 4:45, I(d). In addition, the legislature has the authority "by concurrent resolution" to end the state of emergency at any time and can block the governor from renewing the state of emergency at the expiration of 21 days. RSA 4:45, II(c). Furthermore, Emergency Order #2 is in effect for a limited duration, beginning on March 16, 2020 and ending April 6, 2020. See State's Ex. B. During that time, should the factual bases for enforcing the Emergency Order change, it is subject to review by the Court. See Moorhead, 727 F. Supp. 193 ("A court's role in the aftermath of an emergency...is to review, with deference, the decision of the executive.").

In sum, because Governor Sununu has acted in good faith, and because there is a sufficient factual basis on which to conclude that the prohibitions contained within Emergency Order #2 are necessary, and because there are sufficient checks and balances on executive orders during a state of emergency, the Court finds that Emergency Order #2 passes constitutional muster.

ii. Time/Place/Manner Restrictions on Freedom of Speech and Freedom of Assembly

Although the Court finds that the Governor may suspend or limit constitutional rights during a state of emergency, for the purpose of establishing a complete record, the Court will also analyze the facial constitutionality of Emergency Order #2.

Part I, art. 32 of the New Hampshire Constitution provides: “The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good.” “This provision guarantees the same right to free speech and association as does the First Amendment to the Federal Constitution.” Opinion of the Justices (Voting Age in Primary Elections II), 158 N.H. 661, 667 (2009). “In interpreting Part I, Article 32, therefore, [the Court] rel[ies] upon federal cases interpreting the First Amendment to the Federal Constitution for guidance.” Id.

“The State constitutional right of free speech, N.H. CONST. pt. I, arts. 22 & 32, is not absolute, but may be subject to reasonable time, place and manner regulations.” State v. Comely, 130 N.H. 688, 691 (1988). “Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000). “Where ... a law regulates speech only incidentally, as a consequences of expressly regulating conduct, it will withstand first amendment scrutiny if, in its application to incidental speech, it is no more restrictive than a time, place, and manner regulation.” Comely, 130 N.H. at 691 (citing United States v. O’Brien, 391 U.S. 367, 376–77 (1968)). Determining whether a time, place, and manner regulation comports with the Constitution, requires the Court to

employ a three-prong test. Comely, 130 N.H. at 691. The Court must determine whether the regulation: (1) is content-neutral; (2) narrowly serves a significant governmental interest; and (3) allows for other opportunities for expression. Id. Although these cases consider laws rather than emergency orders, the effect of the emergency order is functionally the same. As a result, the Court concludes that the same standard is generally applicable to emergency orders enacted pursuant to RSA 4:45.

The first step of the analysis is to determine whether the restrictions contained within Emergency Order #2 are content neutral. Comely, 130 N.H. at 691. Plaintiffs contend that Emergency Order #2 is expressly content based because of the language in paragraph 1 banning “[s]cheduled gatherings of 50 people or more for social, spiritual and recreational activities.” See Doc. 1, Ex. A. Plaintiffs argue that inclusion of the word “spiritual” expressly targets religious activities and is therefore not content neutral. This argument ignores the remainder of paragraph one which includes an illustrative list detailing the types of events to which Emergency Order #2 applies. Id. (banning gatherings in excess of 50 people for events “including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities”). Based on the inclusion of this illustrative list, Emergency Order #2 is clearly content neutral in that it prohibits any gathering in excess of 50 people, regardless of the content of the event. Accordingly, the Court finds that Emergency Order #2 is content neutral and thereby satisfies the first prong of the time, place, and manner test.

The second step of the analysis is to determine whether the restriction is narrowly tailored to serve a significant government interest. Comely, 130 N.H. at 691. Courts have long held that public health, safety, and welfare constitute a significant government interest. See e.g. Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995). EO 2020-04 clearly declared a state of emergency as the result of an impending public health crisis in the State of New Hampshire, and Emergency Order #2 was issued by Governor Sununu to address the public health crisis established in that executive order. See Doc. 5, Ex. A. As a result, the State has established that it has a significant interest in promoting public health and safety as related to the spread of COVID-19.

The CDC and the White House have put forth guidelines recommending that gatherings be limited to ten people or fewer in order to slow the spread of COVID-19. Emergency Order #2 follows these guidelines, but is not so restrictive, allowing for gatherings of fewer than 50 people. Doc. 5 at 17. Emergency Order #2 also prohibits the onsite consumption of food or beverages in “restaurants, diners, bars, saloons, private clubs, or any other establishment.” Doc. 1, Ex. A ¶ 2. However, it does not completely prevent the sale of food and beverages, expressly authorizing “carry-out, delivery, curbside pick up, and drive through” services. Id. Thus, the only two restrictions imposed on public assembly are that scheduled gatherings cannot have in excess of 50 people, and dine-in services at public restaurants are suspended. The restrictions contained within Emergency Order #2 paragraphs 1 and 2 were specifically designed to comport with relevant CDC guidelines to slow the spread of COVID-19. See Doc. 1, Ex. A; see also Doc. 5, Ex. A at 3. In addition, Emergency Order #2 is not a permanent ban on all gatherings in excess of 50 people or dining-in at restaurants.

Rather, Emergency Order #2 has a fixed expiration date, April 6, 2020. Doc. 1, Ex. A ¶ 5. Should Governor Sununu determine that a sufficient factual basis exists to extend the state of emergency and thereafter extends the duration of Emergency Order #2, that expansion must only last for the duration necessary to respond to the public health emergency.

Accordingly, because Emergency Order #2 limits its restrictions to those suggested by the CDC to slow the spread of COVID-19, and because the effects of Emergency Order #2 have a limited duration, the Court finds that Emergency Order #2 is narrowly tailored to serve the government's significant interest.

The final step of the analysis is to determine whether Emergency Order #2 allows for alternative opportunities for expression. Comely, 130 N.H. at 691. This prong of the test is clearly satisfied. As stated above, Emergency Order #2 only bans scheduled gatherings of 50 or more people and dine-in restaurant services. People are free to attend scheduled gatherings with fewer people. They can attend impromptu gatherings of any kind. They are free to communicate via the internet or telephone. They may tune into televised events. They can continue to dine together in their homes or outdoors. There are a wealth of opportunities for individuals to exercise their right to freely assemble and associate that do not require them to gather in large groups or eat at a restaurant during a public health emergency. Accordingly, the Court finds that Emergency Order #2 allows for alternative opportunities of expression.

Because Emergency Order #2 is content neutral, narrowly tailored to serve the government's interest in slowing the spread of COVID-19, of a limited duration, and allows for alternative methods of speech, assembly, and association, the Court

concludes that it constitutes a reasonable time, place, and manner restriction, comports with the precepts of the First Amendment and Part I, art. 32 of the New Hampshire Constitution.

iii. Restrictions of Freedom of Religion

The Free Exercise clause of the First Amendment prohibits the government from seeking “to ban such acts or abstentions only when they are engaged in for religious reasons.” Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (superseded by statute on different grounds as stated in Holt v. Hobbs, 574 U.S. 352 (2015)). That said, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

As established above, Emergency Order #2 is content neutral. Nothing in Emergency Order #2 suggests that it is intended to target any religion or specific religious practice. While a ban on scheduled gatherings of 50 or more people may have an impact on the ability for a congregation to assemble at church, the Court concludes that such an impact is merely incidental to the neutral regulation and is otherwise reasonable given the limited duration of the order and public health threat facing the citizens of this State. Accordingly, for all the reasons set forth in the section above, the Court finds that Emergency Order #2 does not unconstitutionally infringe upon Plaintiffs’ freedom of religion.

Because the Court finds that Governor Sununu has the authority to suspend or limit fundamental rights during a state of emergency, and because Emergency Order #2

constitutes a reasonable time, place, and manner restriction, the Court finds that Plaintiffs are unlikely to succeed on the merits of their claim. Consequently, Plaintiffs' motion for preliminary injunction is **DENIED**.

II. Motion to Dismiss

In ruling on a motion to dismiss, the Court considers whether the allegations in the plaintiff's "pleadings are reasonably susceptible of a construction that would permit recovery." Riso v. Dwyer, 168 N.H. 652, 654 (2016) (quotation omitted). The Court must assume the truth of the factual allegations outlined in the complaint, and construe all reasonable inferences in the light most favorable to the plaintiff. Id. The Court does not, however, "assume the truth of the statements in the [third-party] complaint that are conclusions of law." Id. (quotation omitted). In other words, because the Court is only required to accept "well-pleaded facts," it is not required to accept conclusory allegations which contain no articulable facts that can be tested. See Snierson v. Scruton, 145 N.H. 73, 76 (2000); Baxter Int'l Inc. v. State, 140 N.H. 214, 218–19 (1995). The pertinent inquiry is whether the facts alleged constitute a basis for relief. Riso, 168 N.H. at 654. If they do not, the Court shall grant the State's motion to dismiss. Id.

Plaintiffs have challenged the constitutionality of EO 2020-04 and Emergency Order #2 on their face, rather than as applied. As a result, the Court is presented with a question of law rather than fact, which can be appropriately decided on a motion to dismiss. The Court has already considered the merits of Plaintiffs' arguments, supra at 5–20, and has found that Plaintiffs cannot succeed on the merits of their claim as the governor's emergency declarations pass constitutional muster. It logically follows that,

for the same reasons stated above, Plaintiffs have failed to state a claim for which relief may be granted. Consequently, the State's motion to dismiss is **GRANTED**.

CONCLUSION

For the forgoing reasons, Plaintiffs petition for preliminary injunctive relief is **DENIED**, and the State's motion to dismiss is **GRANTED**.

SO ORDERED.

DATE

3/25/2020



John C. Kissinger
Presiding Justice

ATTACHMENT B

Plemmons 5/7 Affidavit

AFFIDAVIT

NOW COMES, **Corporal A. Heath Plemmons** affiant, being duly sworn on oath, deposes and says he has probable cause to believe that,

I'm employed by the City of Rutland as a full time Police Officer. I'm certified by the Vermont Criminal Justice Training Council as a full time Police Officer.

1. On Friday May 1st 2020, at around 0913 hours, Central Dispatch received a phone call from an anonymous caller stating that they had called Club Fitness in Rutland City and were told that the business was open from 8 to 5 on that day. The caller was concerned that the business should not be open due to the Governor's order.
2. Club Fitness is a fitness center located at 275 N Main St. in the City of Rutland Vermont. It is equipped with free weights, weight machines, treadmills and other fitness equipment.
3. At around 0917 hours on the same date, Central Dispatch received a second call complaining about the business being open.
4. On May 1st 2020 at around 0942 hours, Officer Jared Dumas spoke with the owner of Club Fitness Sean Manovill (DOB 06/24/1981). He told Officer Dumas that he was only open for renovations and he was allowing a few friends to come in and workout.
5. On Sunday, May 3rd 2020, Central Dispatch received more complaints in reference to Club Fitness being open for business. I drove to the business and personally spoke with Manovill (who was not wearing a mask). I informed him that his business was not considered an essential business by the Governor's order and that I was there to ask for compliance. Manovill told me that he believed that people's fitness was essential and that he was doing nothing wrong. I agreed with him that health and fitness is essential but that people did not need to come to a gym to stay fit or healthy. While at the business I observed two subjects (one male and one female) actively exercising. They were not practicing social distancing with one another and they were not wearing masks. I did not observe whether or not they wiped down or sanitized the equipment after use.
6. This information was passed along Sgt. Whitehead who in turn passed the information up the chain of command then to the State's Attorney General's Office.
7. On Wednesday, May 6th Central Dispatch received another call stating that Club Fitness was open for business again and that it had been daily. Also the caller stated that other gyms were losing memberships to this gym by abiding by the Governor's order and this gym is not abiding.

Subscribed and Sworn before me on

this 7 day of May 2020



(Notary Public T.E. 01-31-21)



(Affiant)

5-7-20

(Date)

AFFIDAVIT

8. At around 1623 hours on May 6th I returned to Club Fitness and spoke with an employee. I asked if the owner was around and he told me that Sean had just left. I asked for him to call him for me and he did. There were 6 customers in the gym at the time I arrived. The customers were not practicing social distancing. Two of them were side by side on treadmills no more than two feet apart. Two others left while I was there and I did not see anyone clean or sanitize the equipment they had been using after they left. None of the people including staff were wearing masks.


9. Manovill was called and I spoke with him on the phone. I asked him if he had been in contact with the Attorney General's office and he said that he had been. I told him that it was our understanding that he had been issued a cease and desist order and he confirmed that he had. Manovill told me that he was awaiting a call from the Governor's office because there were "other things" going on the need to talk about. I told him that I was there to confirm that he was not complying with the order. This ended my involvement.

Subscribed and Sworn before me on

this 7 day of May 2020



(Notary Public T.E. 01-31-21)



(Affiant)

5-7-20

(Date)

ATTACHMENT C

Plemmons 5/15 Affidavit

AFFIDAVIT


NOW COMES, **Corporal A. Heath Plemmons** affiant, being duly sworn on oath, deposes and says he has probable cause to believe that,

I'm employed by the City of Rutland as a full time Police Officer. I'm certified by the Vermont Criminal Justice Training Council as a full time Police Officer.

1. On Friday May 15th 2020, at around 1130 hours, Sgt. Charles Whitehead and I responded to Club Fitness in Rutland City to observe compliance to the Governor's order.
2. Club Fitness is a fitness center located at 275 N Main St. in the City of Rutland Vermont. It is equipped with free weights, weight machines, treadmills and other fitness equipment. The building is approximately 4,000 square feet.
3. Upon my arrival, Sgt. Whitehead was already on scene and was speaking with the owner of the business Sean Manovill (DOB 06/24/1981) outside. I observed six vehicles in the parking lot, one of which had a New York license plate. They then walked in to the building and I followed.
4. Once inside the business I observed five subjects (one male and four females) actively exercising. They were not practicing social distancing with one another and they were not wearing masks. There were two females on stationary bicycles sitting side by side no more than a couple of feet apart. Manovill said that they were sisters from the same household. I did not observe whether or not they wiped down or sanitized the equipment after use.
5. There were no hand sanitizing stations and no signage advising customers to wear masks, keep a safe distance, or clean equipment.
6. Manovill did advise Sgt. Whitehead that he cleans equipment after customers use it and that he does not allow more than 10 people in the building at a time.

Subscribed and Sworn before me on

this 15 day of May 2020


(Notary Public T.E. 01-31-21)


(Affiant)

5-15-2020
(Date)

ATTACHMENT D

McClure Affirmation

STATE OF VERMONT

SUPERIOR COURT
RUTLAND UNIT

CIVIL DIVISION
DOCKET NO.

STATE OF VERMONT,)
Plaintiff,)
)
v.)
)
CLUB FITNESS OF VERMONT and)
SEAN MANOVILL,)
Defendants.)
)

AFFIRMATION OF KRISTIN MCCLURE, CHIEF DATA OFFICER

I hereby affirm:

1. My name is Kristin McClure.
2. I am currently employed as the Chief Data Officer with the Vermont Agency of Digital Services Data Management Division. I have worked as Chief Data Officer for the State of Vermont since January 2020.
3. I earned a Bachelor of Arts in Economics from the University of Pennsylvania in 2000. I received a certificate in big data and social analytics from the Massachusetts Institute of Technology in 2017. I studied graduate level data science at Johns Hopkins University in 2018, and finished my Master's Degree in data science at the University of Vermont in 2019. After graduating, I worked at Capgemini as a manager of data science and artificial intelligence until I started my current position with the State of Vermont.

4. Prior to my graduate studies, I worked at IBM for over 14 years in various positions, beginning as a supply chain analyst in 2001 and eventually becoming a senior manager in enterprise information technology and data analytics before leaving IBM in 2015. I then worked as a senior manager in process, data, and information technologies systems at Global Foundries from 2015-2016.
5. As the State's Chief Data Officer, I develop data procedures and policies, work closely with various Vermont State Agencies and Departments to collect, prepare, organize, protect and analyze data assets while ensuring that the State of Vermont meets industry best practices.
6. Specifically, in responding to the COVID-19 pandemic I have reviewed, organized, and interpreted data related to COVID-19 cases, including data regarding the locations of cases. I have also reviewed and analyzed the projections from experts which provide insight into Vermont's projected trajectories in COVID-19 infections under different return-to-work and population behavior models. I have reviewed and utilized data and models to prevent the spread of the COVID-19 virus in this work.
7. Since December 2019, the State has been working in close collaboration with the national Centers for Disease Control and Prevention (CDC) and with the United States Health and Human Services Agency to monitor and plan for the potential for an outbreak of respiratory illness due to a novel coronavirus, which causes a disease now known as COVID-19.

8. Most people (about 80%) recover from the disease without needing special treatment. Some people become infected but don't develop any symptoms and don't feel unwell. Around 1 out of every 5 people who gets COVID-19 becomes seriously ill and develops difficulty breathing. Older people and those with underlying medical problems are more likely to develop serious illness. However, anyone can catch COVID-19 and become seriously ill.
9. People who become seriously ill with COVID-19 may require hospitalization, including admission to an Intensive Care Unit (ICU). These patients often require a ventilator to help them breathe. Vermont's hospital equipment and ICU bed capacity has been major limiting factors for Vermont's expected ability to manage the projected rate-of-infection models I have reviewed.
10. COVID-19 has an overall fatality rate of approximately 1.8 – 5.7% in the U.S. There is no known cure or vaccine for COVID-19.
11. Due to the rapidly growing global concern over COVID-19, the Governor directed the Vermont Department of Health (VDH) to activate the State's Health Operations Center in February 2020 when VDH began to monitor and later test Vermonters who may have been exposed to COVID-19.
12. In March 2020, the Governor directed Vermont Emergency Management (VEM) to assemble an interagency taskforce, and later to activate the Vermont State Emergency Operations Center (SEOC), in accordance with the Vermont State Emergency Management Plan, to organize prevention,

- response, and mitigation efforts and share information with local and State officials.
13. On March 7 and 11 of 2020, VDH detected the first two cases of COVID-19 in Vermont.
 14. Transmission has occurred within Vermont communities and surrounding states and community transmission is expected to continue. During community transmission, some people who are infected with COVID-19 are not sure how or where they became infected.
 15. As of the morning of May 14, 2020, VDH reports:
 - a. 932 total cases of COVID-19 in Vermont;
 - b. 53 deaths attributed to COVID-19 in Vermont;
 - c. 5 currently hospitalized due to COVID-19;
 - d. 13 hospitalized “under investigation” related to COVID-19; and
 - e. 27 people being monitored in Vermont for COVID-19.
 16. COVID-19 cases have been documented in every county in Vermont. Rutland County has 49 reported cases and one death as of the morning of May 14, 2020.
 17. If COVID-19 spreads unchecked, it will overwhelm the capacity of the State’s health care system to care for those with serious illness. The State will likely experience shortages in needed inpatient hospital beds, intensive care unit beds, and personal protective equipment for hospital staff.

18. One of the only tools available to fight this imminent public health crisis is to try to slow the spread of the virus. Slowing the spread of the virus will reduce the number of patients needing emergent medical care at the same time. This is the best way to try to ensure that everyone who needs life-saving medical resources in Vermont will have access to them when they are most needed.
19. As of early May, Vermont is projected to have passed its initial “peak” of COVID-19 cases. At this time, Vermont is gradually beginning to “reopen” some of the activities that had been shut down during the initial spread of the virus.
20. The speed and manner in which Vermont reopens its economy will affect the rate of transmission of COVID-19 cases.
21. I regularly review updated best- and worst-case scenarios for Vermont’s projected future numbers of COVID-19 cases.
22. An executive summary and graph of the State’s recent projections is attached as Exhibits A to this affidavit.
23. Some of the factors that influence the rate of infection in these models include whether and to what extent the State resumes “non-essential” work, and whether and to what extent the State adopts behavioral changes. Behavioral changes include wearing masks, continued social distancing, and continued personal and organizational hygiene such as frequent washing of hands and surfaces.

24. COVID-19 infection rates vary dramatically based on the above factors, but especially based on the extent to which non-essential businesses re-open. If only half of the workforce resumes non-essential work, the transmissibility of COVID-19 will be about 50% of what it would be if everybody resumes work.¹ See Exhibit A at 2.
25. Masks and other behavioral changes are only projected to reduce transmissibility by an additional 5% when half the work force returns to non-essential business. See *id.*
26. According to the most recent projections, if Vermont were to continue the stay at home order for all but essential businesses, by June 28 the State would be hospitalizing 0-6 patients per day, have 0-2 patients in the ICU every day, and have less than one death per week.
27. By contrast, if the State were to re-open the entire economy with the exception of schools,² by June 28 the State would need to hospitalize 1000-2000 patients per day, with 300-500 ICU patients per day. Roughly 30-80 people would die every day as a result of COVID-19 in this scenario.

I declare that the above statement is true and accurate to the best of my knowledge and belief. I understand that if the above statement is false, I will be subject to the penalty of perjury or other sanctions in the discretion of the court.

¹ With the exception of schools, which are assumed to remain closed in every model.

² Based on a re-opening date of May 11, 2020.

DATED at South, Vermont on May 15, 2020

Burlington

Kristin McClure

Kristin McClure

Chief Data Officer, Vermont Agency of Digital Services

MCCLURE AFFIRMATION EXHIBIT A



CENTER FOR
INFERENCE &
DYNAMICS
OF INFECTIOUS DISEASES



Northeastern

COVID-19 (april 26)

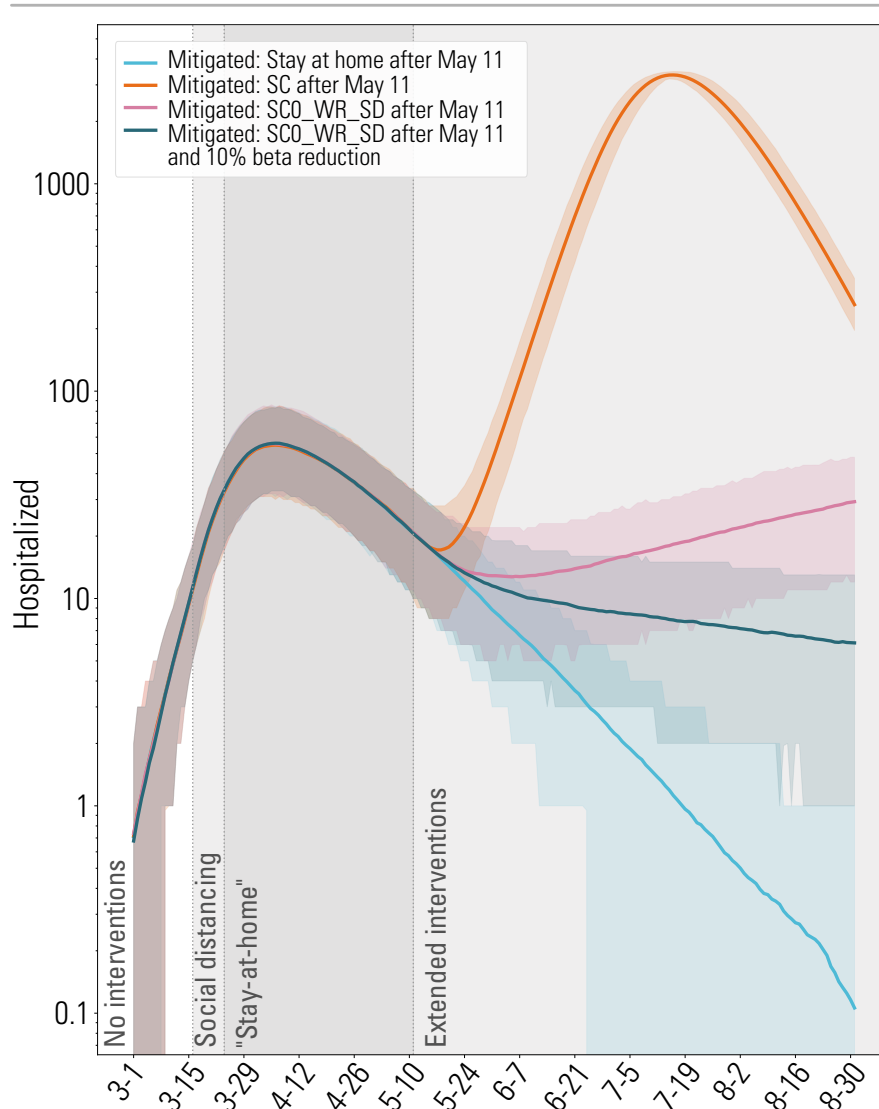


Laboratory for the
Modeling of Biological +
Socio-technical Systems

Alessandro Vespignani
@alexvespi

Re-opening scenarios implemented May 15th

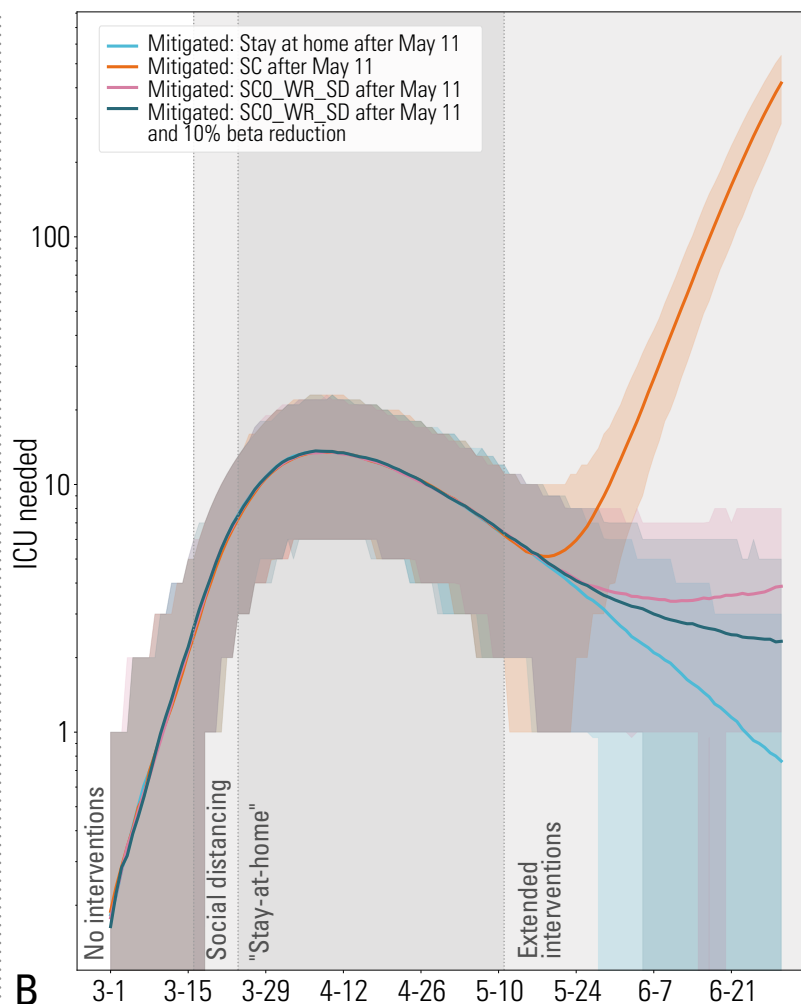
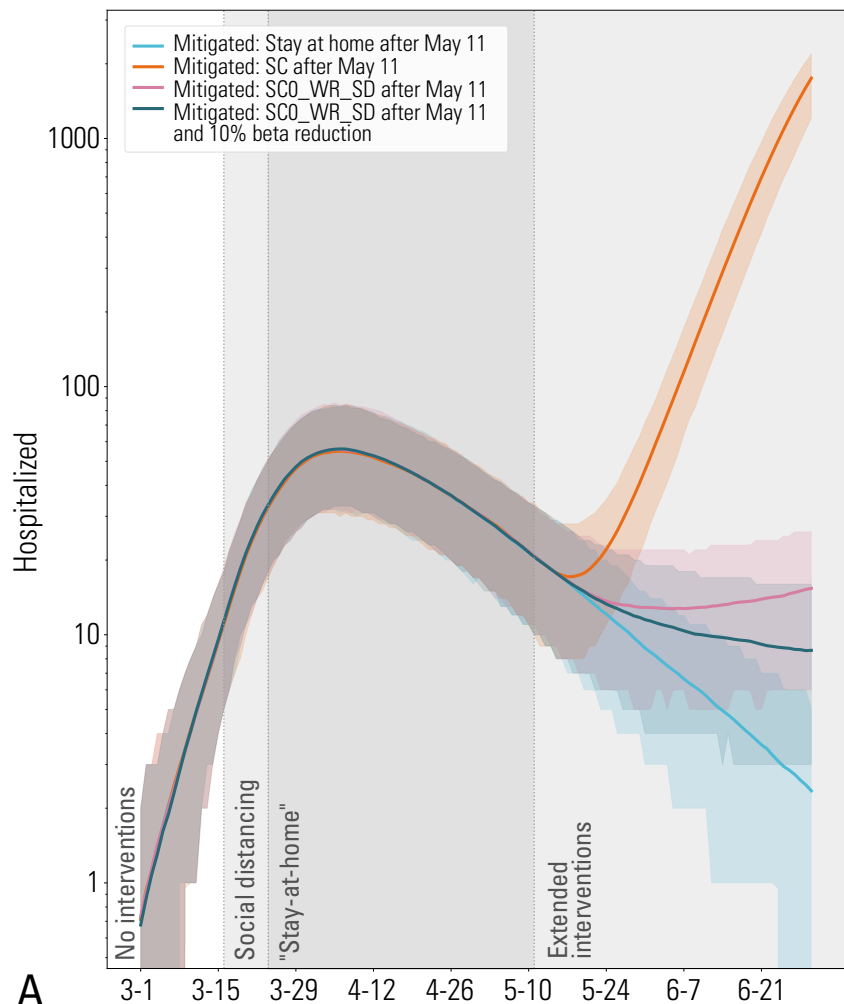
Vermont



- (azur line) “stay at home” continued. Transmissibility reduction 70%.
- (Blue line) Resume non-essential work for about 50% of the work force +additional transmissibility reduction (masks, behavioral changes etc.). Total transmissibility reduction 55%.
- (Purple line) Resume non-essential work for about 50% of the work force. Transmissibility reduction 50%.
- (red line) Back to normal except school closure.

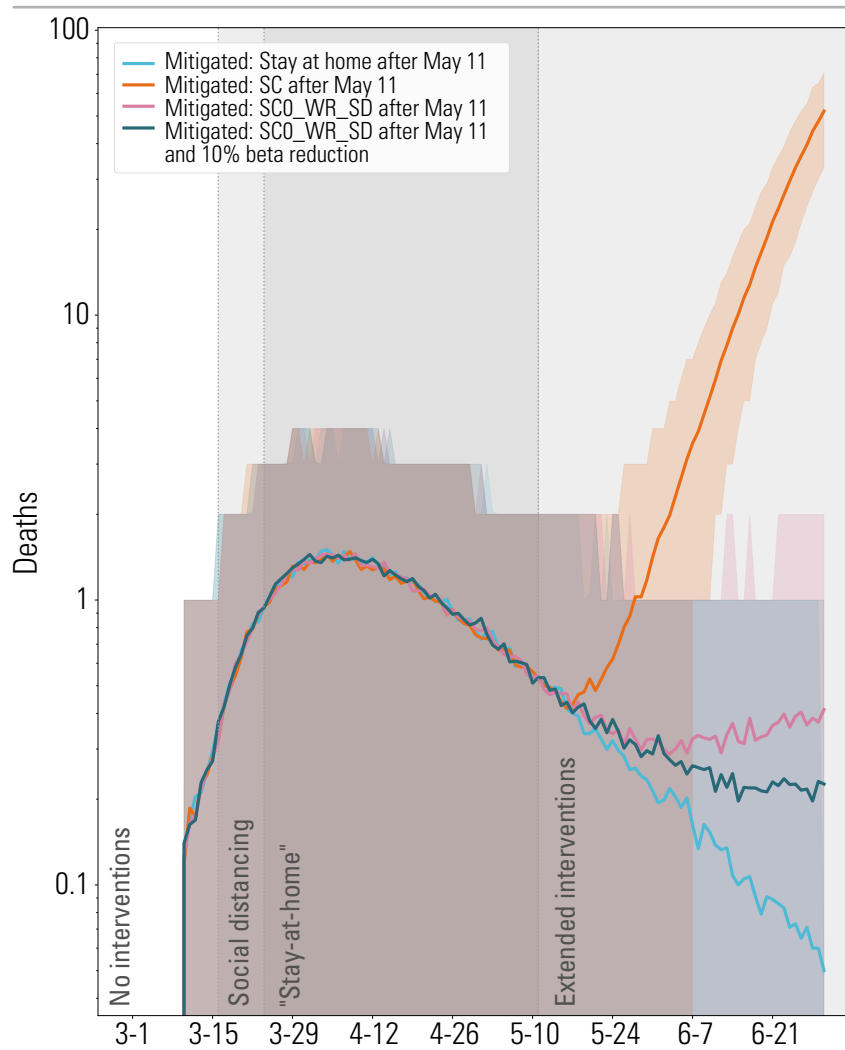
Re-opening projections

Vermont



Re-opening projections

Vermont



Discussion and caveats

- We do not consider in the scenarios specific strategies for enhancing contact tracing, testing and early isolation of cases.
- We are also not considering potential changes to the virus transmissibility due to environmental factors, in particular seasonal drivers such as temperature and humidity.
- The model is stochastic and age structured, considering the interaction of individuals in single years from 0 to 85+. The contact patterns account for the interaction of individuals in different settings: households, schools, workplaces, and the general community. This compartmentalization of settings allows the estimation of the different interventions. ***The model may change as new data become available, revising specific characteristic rates and times estimates.***
- There are very large uncertainties around the transmission of COVID-19, the effectiveness of different policies and the extent to which the population is compliant to social distancing policies. The presented material is based on modeling scenario assumptions informed by current knowledge of the disease, and subject to change as more data will be available. ***Future decisions on when and for how long to relax policies must be informed by ongoing surveillance.*** Additional modeling and data studies are required to assess the level and effectiveness of additional non-pharmaceutical interventions required to lift current social distancing interventions.

ATTACHMENT E

Kelso Affirmation

STATE OF VERMONT

SUPERIOR COURT
RUTLAND UNIT

CIVIL DIVISION
DOCKET NO.

STATE OF VERMONT,)
Plaintiff,)
)
v.)
)
CLUB FITNESS OF VERMONT and)
SEAN MANOVILL,)
Defendants.)
)

AFFIRMATION OF PATSY KELSO, STATE EPIDEMIOLOGIST

I hereby affirm:

1. My name is Patsy Kelso.
2. I am currently employed as the State Epidemiologist with the Vermont Department of Health. I have worked as State Epidemiologist for the State of Vermont since April 2009. Prior to my current position, I worked as a Senior Epidemiologist for the Vermont Department of Health from February 2000 to April 2009.
3. I earned a Bachelor of Arts in Biology from Johns Hopkins University in 1991. I earned a PhD in epidemiology from the Johns Hopkins Bloomberg School of Public Health in 1999.
4. COVID-19 is caused by the SARS-CoV-2 virus.
5. As the State Epidemiologist, I have been closely involved with the State's response to the COVID-19 pandemic.

6. I am familiar with Governor Scott's Executive Order 01-20 and its associated Addenda and Directives.
7. On an ongoing basis, I have created and reviewed the Vermont Department of Health's guidance to the Governor and guidance to the public. Specifically, I oversee the state's epidemiologic response including surveillance, prevention and disease control. This includes, but is not limited to, creating and approving policies and protocols, advising the public as well as government and private sector businesses on preventing the spread of COVID-19, and developing and implementing COVID-19 mitigation strategies for health care and other sectors.
8. There is no known cure or vaccine for COVID-19.
9. People with COVID-19 can experience a wide range of symptoms, ranging from mild illness to severe or critical illness. Some people become infected but do not develop any symptoms and do not feel unwell.
10. SARS-CoV-2 is able to be transmitted during the pre-symptomatic incubation period, and by people who are infected but are asymptomatic.
11. COVID-19 is a new disease and there is limited information regarding risk factors for severe disease. Older people and those with underlying medical problems are more likely to develop serious illness or to die, but anyone infected with COVID-19 is at some risk of developing serious illness and dying.

12. People who become seriously ill with COVID-19 may require hospitalization, including admission to an Intensive Care Unit (ICU). These patients often require a ventilator to help them breathe.
13. COVID-19 has an overall case fatality ratio of approximately 6.1% in the U.S.
14. On March 7 and 11 of 2020, VDH detected the first two cases of COVID-19 in Vermont.
15. If COVID-19 spreads unchecked, it could overwhelm the capacity of the State's health care system to care for those with serious illness. The State could experience shortages in needed inpatient hospital beds, intensive care unit beds, ventilators, and personal protective equipment for hospital staff.
16. One of the only tools available to fight this public health crisis is to try to slow the spread of the virus. Slowing the spread of the virus will reduce the number of patients needing emergent medical care at the same time. This is the best way to try to ensure that everyone who needs life-saving medical resources in Vermont will have access to them when they are most needed.
17. The incubation period for the virus—the period during which a person who has been exposed to the virus does not yet show symptoms of infection—is thought to be between 2 and 14 days.
18. As far as we know at this time, the virus that causes COVID-19 spreads mainly from person to person, primarily through respiratory droplets produced when an infected person coughs or sneezes, or possibly even breathes.

19. The virus can live for several hours on surfaces.
20. Viral transmission is more likely when people are in close proximity or contact with one another.
21. There is evidence that the virus spreads more easily indoors than outdoors. The virus may be most transmissible in indoor spaces with poor ventilation or air circulation.
22. The best tools we have for managing the spread of the virus in Vermont involve behavioral modifications to reduce transmission of the virus. Without any behavioral modifications, the virus spreads very easily and sustainably between people.
23. Behavioral modifications that slow the spread of the virus include: wearing masks, frequent hand washing, frequent washing of surfaces touched by many people, and distancing from other people by at least six feet.
24. Even with behavioral modifications, the virus can and does spread.
25. Because of the way the virus spreads, indoor gyms or fitness centers are places where the virus is particularly likely to be transmitted. This is because indoor gyms are enclosed spaces where people congregate to do strenuous activities involving shared equipment. With heavy breathing indoors and frequent touching of surfaces, the risk of transmission is high.
26. In addition, any place where people congregate with non-household members risks increasing the rate of viral transmission from its current rate under the Stay Home order in Vermont.

27. We have community transmission of the virus in Vermont, which means that some people who get infected with the virus are unsure about how or where they became infected. We have been experiencing community transmission at least since March 19, 2020.
28. Vermont has been under a variety of emergency restrictions for several weeks, including a stay-at-home order issued on April 24, in order to slow the spread of the virus. Vermont currently appears to be past the initial peak surge in COVID-19 cases.
29. At this time, Vermont is starting to “re-open” parts of the economy. It is important that we do so slowly and deliberately. Because of the incubation period of the virus, it takes approximately two weeks for the change in transmission rate to be revealed in the population’s incidence of infection. By phasing in the re-opening of different sectors and activities in a coordinated way, we can monitor how reducing different restrictions correlates with changes in the transmission rate.
30. One of the State’s goals throughout the pandemic is to keep the number of people needing hospitalization and acute care as a result of COVID-19 infections within the State’s resources to care for them. If we have more patients than we have capacity to care for those patients—for example, if we run out of intensive care unit beds or ventilators—more people will die.

31. One benefit of the phased approach is that, if any one phase of re-opening correlates with a greater than expected rate of transmission, we can adjust subsequent phases accordingly.
32. If individuals and businesses do not follow the prescribed phases of re-opening, we risk experiencing a second surge in COVID-19 cases which could overwhelm the State's healthcare resources including the ability to supply sufficient personal protective equipment and critical medical equipment to handle a dramatic surge in need.
33. There is still much we do not know about the virus and its transmission. If individuals and businesses do not follow the prescribed phases of re-opening, we risk the health and safety of workers in critical industries and of those living and working in high-risk facilities such as long-term care facilities.

I declare that the above statement is true and accurate to the best of my knowledge and belief. I understand that if the above statement is false, I will be subject to the penalty of perjury or other sanctions in the discretion of the court.

DATED at Peru, New York on May 15, 2020



Patsy Kelso
Patsy Kelso
State Epidemiologist, Vermont Department of Health

ATTACHMENT F

Affidavit of Chief Peter Mantello

CASTLETON POLICE DEPARTMENT
AFFIDAVIT

NOW COMES Peter J. Mantello, Affiant, being duly sworn and on oath deposes and says the following:

I, Peter J. Mantello, am a certified law enforcement officer by the Vermont Criminal Justice Training Council since 1990 as a level 3 certified police officer (and re-certified 2009) and employed by the Castleton Police Department as a full-time law enforcement officer, Chief of Police, since 2014.

On 5/15/20 at approximately 1115 hours while on duty for the Castleton Police Department I was contacted (via email, time stamped at 1104 hours) by Ultan Doyle, Assistant Attorney General (AAG), of the Vermont Attorney General's Office in Montpelier. AAG Doyle requested me to check on a local business in the Town of Castleton. The business is called Club Fitness of Route 4A West, Castleton, VT. Club Fitness is a customer based and privately operated gym that has various exercise equipment inside the business. AAG Doyle stated that there was a complaint from an unknown Rutland City Police Officer that Club Fitness was open for business. AAG Doyle advised me that this case was time sensitive and that he needed to verify the complaint to determine if the business was open to the public. AAG Doyle stated that if Club Fitness was open verify the following information:

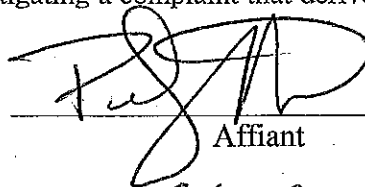
- Number of people exercising
- Number of people wearing masks
- Any social distancing practices
- Observation of anyone cleaning equipment
- Whether there are posted signs advising customers to wear masks, or maintain safe distancing.
- Where there are staff or signs limiting the number of people in the gym
- Approximate size of the gym.

At approximately 1130 hours I arrived at Club Fitness's location in Castleton. I observed the front entrance wide open with an American Flag hanging outside the entrance. I heard music playing inside the business. I observed no signs posted outside or inside the facility (verified on a second return visit) advising customers to wear masks or warnings of COVID-19 precautions. I entered the business and observed 3 customers exercising. One customer was on a treadmill, customers 2 and 3 (appearing as a paired couple) sharing a weight resistant machine. The customers were approximately 15 to 20 feet apart. They were not wearing masks. I introduced myself to a lone staff member, Andrew Graciano (3/31/97) of Castleton, VT. I told him that I was investigating a complaint that derived from the

Subscribed and sworn to before me
this 15th day of May, 2020



Notary Public
My commission expires:



Affiant

5/15/20

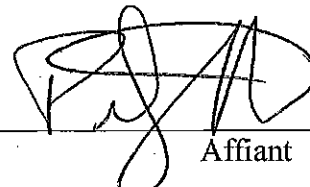
Date

Attorney General's Office. Andrew was not wearing a mask. Andrew stated that his boss, Sean directed him in opening the business as long as they were compliant with the COVID-19 requirements. I advised him that I would relay this information to the Attorney General's Office. While I was talking to Andrew, customers 2 and 3 used another exercise area. I exited the business before I could verify whether Andrew wiped down any equipment that was used for exercise.

Subscribed and sworn to before me
this 15th day of May, 2020



Notary Public
My commission expires:



Affiant

5/15/20

Date

ATTACHMENT G

Cease and desist letter

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

JOSHUA R. DIAMOND
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON
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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

May 5, 2020

VIA EMAIL – sean@clubfitness.com

Sean Manovill, Owner
Club Fitness
275 N. Main St.
Rutland, VT 05701

Re: Violations of Executive Order 01-20

Dear Mr. Manovill:

The State of Vermont has declared a public health emergency and has issued orders to keep Vermonters safe and at home to prevent the spread of COVID-19 (also known as the “coronavirus”). You are receiving this letter because one or more members of the public have expressed concern to responsible State agencies that you may be carrying on activities in violation of those orders. It is our understanding that the Rutland Police Department met with you yesterday and advised you of the obligations to comply with the Governor’s Executive Order and not to open your facility for any form of in-person business or services.

On March 21, Governor Scott issued [Addendum 4 to Executive Order 01-20](#) (closure of close-contact businesses) ordering all “gymnasiums, fitness centers and similar exercise facilities” to “cease all in-person operations” as of 8 p.m. on March 23. On March 24, Governor Scott issued [Addendum 6 to Executive Order 01-20](#) ordering all Vermonters not engaged in essential activities to “stay safe” and “stay home.” Addendum 6 specifically requires that except in limited cases, “effective Wednesday, March 25, 2020 at 5 p.m. . . . all businesses and not-for-profit entities in the state shall suspend in-person business operations.” Addendum 6 excepted only “[b]usinesses and entities providing services or functions deemed critical to public health and safety, as well as economic and national security” Such businesses “shall remain in operation” subject to “strict adherence to CDC and VDH guidance to ensure recommended social distancing.” The list of “[s]ervices or functions in Vermont deemed critical to public health and safety, as well economic and national security” provided in Addendum 6 does not include health clubs or gyms. On April 10, Governor Scott extended the state of emergency and the effective date of Executive Order 01-20, and all Addenda issued thereunder, until midnight on May 15, 2020.

The Vermont Agency of Commerce and Community Development (ACCD) has developed “Sector Specific Guidance” to help Vermont businesses determine whether it meets the definition of “critical to public health and safety, as well as economic and national security.” See ACCD website “Stay Home Stay Safe Sector Specific Guidance” available at: <https://accd.vermont.gov/content/stay-home-stay-safe-sector-specific-guidance>.

The ACCD Sector Specific Guidance for “[Health and Beauty](#)” states:

*Gyms, fitness studios, salons, spas, and other similar businesses and the retail operations that support these businesses should cease, including employee-to-employee interactions within the business. **The [Phased Restart Work Safe Guidance](#) does not allow these businesses to resume operations.***

The Governor’s Order and ACCD guidance is clear: gyms and fitness centers may not operate at this time. The need to protect elderly or immunocompromised persons is still urgent. Within just over a month and a half—from March 15 to May 5—Vermont saw the number of COVID-19 cases increase from 12 to 907. We now have 52 Vermonters who have died from the disease. While the state is starting to take small steps—a “phased restart”—towards re-opening some businesses and services, we must do so slowly and carefully. We must avoid a second wave of cases that could overwhelm our health care system and undo all the sacrifices we have made so far.

The State recognizes the difficulties the emergency order is placing on Vermonters and Vermont businesses. However, the risks associated with the spread of COVID-19 are simply too great. All organizations must follow the same rules. **We wish to be very clear: you must immediately cease all in-person operations in your health club facilities.** Feel free to conduct alternative services, such as over live video streaming. Should you do so, however, you must eliminate in-person contact.

Please immediately advise me by email to Eleanor.Spottswood@vermont.gov or by calling (802) 828-3178 of your intention to comply with the above. If you do not intend to comply, or if I do not hear from you by **noon tomorrow, May 6, 2020**, the Attorney General will seek a court order to compel Club Fitness to immediately cease in-person business and services and may pursue penalties as provided in Vermont law.¹

Sincerely,



Eleanor L.P. Spottswood
Assistant Attorney General

¹ A violation of an emergency executive order is a criminal misdemeanor and punishable by imprisonment of up to six months and a criminal fine of up to \$500. 20 V.S.A. § 24. A violation of an emergency executive order may also be punished by civil penalties of up to \$1000 per violation per day. 20 V.S.A. § 40(b). And the Attorney General may pursue a restraining order against your business to ensure it stays closed. 20 V.S.A. § 40(c).