

STATE OF MINNESOTA
COUNTY OF WABASHA

DISTRICT COURT
THIRD JUDICIAL DISTRICT

Case Type: Civil

State of Minnesota, by its Attorney General,
Keith Ellison,

Court File No. 79-CV-20-829

Plaintiff,

vs.

House of Iron, LLC d/b/a Plainview Wellness
Center,

**MEMORANDUM IN SUPPORT OF THE
STATE'S *EX PARTE* MOTION FOR
TEMPORARY RESTRAINING ORDER
AND TEMPORARY INJUNCTION**

Defendant.

The State of Minnesota, by its Attorney General, Keith Ellison, (the "State"), pursuant to Minnesota Rules of Civil Procedure 6.04, 7.02(a), 65.01, and 65.02; Minnesota Statutes sections 8.31, subdivision 3, and Governor Tim Walz's Emergency Executive Order 20-99, brings this *Ex Parte* Motion for a Temporary Restraining Order and Temporary Injunction against Defendant House of Iron, LLC d/b/a Plainview Wellness Center, (hereinafter "Plainview Wellness Center").

INTRODUCTION

In direct and knowing defiance of Governor Walz's Executive Order 20-99, which has the full force and effect of law during a declared peacetime emergency, Defendant Plainview Wellness Center has admitted that it plans to remain open to the public refusing to close its doors on or after November 21, 2020, to the approximately 200 members of the public who have gym memberships and those interested in signing up for new memberships, including for scheduled fitness classes. In doing so, Plainview Wellness Center is not only violating the law but is also placing the public health and safety of its own community at risk to increased community spread

of COVID-19 at a time when new confirmed COVID-19 cases in Minnesota and Wabasha County where Plainview Wellness Center is located are drastically increasing. It is also doing so despite fitness centers and gyms such as Plainview Wellness Center where individuals, frequently unmasked, congregate for extended periods while exhaling at an increased volume and rate, present substantial public health risks and are particularly fertile environments for the community spread of COVID-19. Accordingly, the Attorney General brings this action to enforce Executive Order 20-99 as well as to protect public health and safety of all Minnesota residents.

FACTUAL BACKGROUND

I. COMMUNITY SPREAD OF COVID-19 REPRESENTS ONE OF THE GREATEST PUBLIC HEALTH EMERGENCIES IN MINNESOTA'S HISTORY.

Minnesota's fight against the COVID-19 virus represents one of the greatest public health emergencies this state has handled in its 162-year history. In part, the magnitude of Minnesota's response has been in reaction to the uniquely virulent characteristics of the disease: In one study, researchers found that a single infected person likely spread the virus to 53 other people during the course of a single choir rehearsal.¹ Minnesota is fighting the infection, but the virus continues to spread, and the need for emergency preventative measures remains in order to protect public health and safety.

¹ Hammer et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, 69 MORBIDITY & MORTALITY WEEKLY R. 16, 606-10 (May 15, 2020), available at, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm>. Affidavit of Elizabeth Odette (“Odette Aff.”), Exhibit G.

COVID-19 kills people. In Minnesota alone, as of November 23, 2020, COVID-19 has already caused at least 3,265 deaths. 276,500 positive cases have been reported across the state with 6,353 of those positive cases reported just yesterday, November 23, 2020.²

Minnesota is currently experiencing the highest numbers of COVID-19 cases since the beginning of the pandemic. For example, it took Minnesota over 6 months to record its first 100,000 positive COVID-19 cases, but only 42 days to add an additional 100,000 new cases.

In the month of November 2020, Minnesota has been recording record numbers of daily new cases, hospitalizations, intensive care unit admissions, and deaths. Surging COVID-19 cases are pushing Minnesota's hospital system to a critical point.³ Due to unprecedented staffing shortages, many hospitals are diverting patients to other facilities and making difficult choices, like discharging patients that normally would have longer hospital stays. Hospitals are running out of critical care beds that are a necessity for COVID-19 patients experiencing severe symptoms. (*Id.*)

Minnesota's neighboring states, including Wisconsin, just across the river from Wabasha County, and less than a 30-minute drive from Plainview, MN, have been experiencing some of the highest number of cases per capita in the country.

In Wabasha County, the 14-day case rate per 10,000 people has jumped dramatically from 23.72 for the reporting period of September 13, 2020 to September 26 to 93.02 for the

² *Situation Update for COVID-19, Updated November 23, 2020*, MINN. DEPT. OF HEALTH, <https://www.health.state.mn.us/diseases/coronavirus/situation.html#map1>. (Odette Aff., Ex. H).

³ Howatt, Glen, New bar, restaurant and gym COVID-19 restrictions expected in Minnesota, MINNEAPOLIS STAR TRIB. (Nov. 18, 2020), available at <https://www.startribune.com/new-bar-restaurant-and-gym-restrictions-expected-in-minn/573107051/>. (Odette Aff., Ex. F).

reporting period of October 25, 2020 to November 7, 2020.⁴ Distance learning is recommended for all school grade levels when the 14-day case rate per 10,000 people rises above 50. (*Id.*) This is the deadly backdrop against which the Defendant has decided to defy an order intended to stem community spread of a virus and remain open to the public.

People in proximity to one another in a gym, breathing heavily, contributes to the spread of COVID-19. One study on a COVID-19 outbreak traced to fitness studios in South Korea noted that “[t]he moist, warm atmosphere in a sports facility coupled with turbulent air flow generated by intense physical exercise can cause more dense transmission of isolated droplets.”⁵ Science shows us that exercise leads to higher levels of exertion and exhalation. Exercising individuals also frequently fail to wear a mask. That increased exertion and exhalation and resulting increase in airborne respiratory aerosol droplets provides more opportunities for COVID-19 to spread among people in gyms.

Even taking precautionary measures cannot completely prevent the spread of COVID-19 in gyms. (Danila Aff., ¶ 7). This is because, as explained below, gyms present high public health risks for the transmission of COVID-19 and constitute fertile environments for the community spread of this deadly virus. (*Id.*) When a spin studio in the Canadian city of Hamilton reopened in July of this year, they took several precautionary measures, reducing the number of stationary bikes by half, requiring masks when not riding (allowing them to be removed while exercising),

⁴ Data for K-12 Schools:14-day COVID-19 Case Rate by County Updated 11/19/2020, MINN. DEPT. OF HEALTH, <https://www.health.state.mn.us/diseases/coronavirus/stats/wschoool.pdf> (Odette Aff., Ex. I)

⁵ Jang et al., *Cluster of Coronavirus Disease Associated with Fitness Dance Classes, South Korea*, 26 EMERGING INFECTIOUS DISEASES 8 (August 2020) Available at https://wwwnc.cdc.gov/eid/article/26/8/20-0633_article. Affidavit of Richard Danila (“Danila Aff.”), Exhibit B)

and increasing sanitation measures.⁶ Yet from a single gym patron who was COVID-19 positive and asymptomatic while attending a spin class, as of October 26, 2020, that single case has spread to 54 primary cases (52 riders and two staff members) and at least 31 secondary cases such as family, friends or other contacts who were exposed to people infected there. (*Id.*)

An outbreak is generally defined as multiple cases of illness related by time and place in which an epidemiologic investigation suggests person-to-person transmission or contamination occurred. (Danila Aff., ¶ 10). It is challenging to document the full scope of any COVID-19 outbreak, by what is known as secondary and tertiary transmission of COVID-19. This is because a person may have COVID-19 and be asymptomatic or experience mild symptoms and never get tested, but still be able to infect others. And importantly, the contact tracing process relies on truthful and accurate self-reporting from persons infected or exposed to the virus. (*Id.*) If a person exposed to the virus does not fully disclose their symptoms, activities, or contacts, then the total numbers related to an outbreak will be underreported. Because of these challenges, the total impact of gym outbreaks in Minnesota will never be fully known. Instead, these documented outbreaks represent just the tip of the iceberg of transmission and there are likely many more cases from the outbreak source that haven't been identified. (*Id.*)

Minnesota Department of Health's contact tracing investigations have shown that apart from long term care settings, gyms are among the settings most frequently associated with COVID-19 outbreaks in Minnesota. (Danila Aff., ¶ 9). Specifically, the Minnesota Department of Health has already traced 49 COVID-19 outbreaks⁷ and 750 confirmed cases of COVID-19

⁶ Bobby Hristova, Here's How the COVID-19 Outbreak at Hamilton Spin Studio Spinco Spread," CBC NEWS (October 19, 2020), available at: <https://www.cbc.ca/news/canada/hamilton/covid-19-spinco-outbreak-graphic-1.5767688>. (Odette Aff., Ex. J).

⁷ The outbreak threshold MDH has established for gyms is seven or more COVID-19 cases

to gyms in Minnesota. (Danila Aff., ¶ 16). “The science shows [] that exercise leads to higher levels of exertion and exhalation—often by individuals who are not wearing masks—greatly increasing the amount of airborne respiratory aerosol droplets that can carry COVID-19.”⁸

Minnesota has had success in keeping its infection rate and mortality count relatively lower than some other areas, in part through its swift and decisive response in restricting social gatherings and in restricting social interactions at places of high interactivity, such as sit-down bar and restaurant spaces. Minnesota’s attempts to slow the spread of COVID-19 are an attempt to protect the health and safety of its residents. These efforts have been deemed necessary by the Governor, including in Wabasha County.

II. GOVERNOR WALZ ISSUED EMERGENCY EXECUTIVE ORDERS TO TEMPORARILY CLOSE GYMS AND FITNESS CENTERS, VENUES THAT PROVIDE INDOOR AND OUTDOOR ENTERTAINMENT, AND RESTAURANTS, BARS, AND TAVERNS FOR ON-PREMISES CONSUMPTION, IN ORDER TO LIMIT COMMUNITY SPREAD OF COVID-19.

On March 13, 2020, Governor Tim Walz declared a peacetime emergency as a result of the COVID-19 pandemic. At its emergency meeting on March 16, the Executive Council of the State of Minnesota approved the peacetime emergency to protect Minnesotans from COVID-19.⁹ The peacetime emergency was most recently extended and approved by the Executive Council until at least through December 14, 2020, pursuant to Executive Order 20-97.¹⁰

In order to protect public health and safety by slowing the “community spread” of COVID-19, on November 18, 2020, Governor Walz issued Executive Order 20-99, which, in relevant part, orders that “gymnasiums, fitness centers, recreation centers, . . . and exercise

from different households that report visiting the gym within one month.

⁸ See Executive Order 20-01, available at <https://www.leg.state.mn.us/archive/execorders/20-01.pdf>.

⁹ See Executive Order 20-99 at 2, available at <https://www.leg.mn.gov/archive/execorders/20-99.pdf>.

¹⁰ See Executive Order 20-97, available at <https://www.leg.mn.gov/archive/execorders/20-97.pdf>.

studios are closed to ingress, egress, use, and occupancy by members of the public” from November 20, 2020 at 11:59 until at least December 18, 2020 at 11:59 p.m.

Executive Order 20-99 was promulgated by the Governor under the authority of Minnesota Statutes section 12.21, subdivision 3, clause (1), was approved by the Executive Council, and filed in the Office of the Secretary of State.¹¹ Thus, pursuant to Minnesota Statutes section 12.32, Executive Order 20-99 has the full force and effect of law during the peacetime emergency. Moreover, Executive Order 20-99 authorizes the Attorney General to enforce its provisions and seek any relief available pursuant to Minnesota Statutes section 8.31, “including civil penalties up to \$25,000 per occurrence from businesses and injunctive relief.” (*Id.* at ¶ 10.)

III. THE PLAINVIEW WELLNESS CENTER REPRESENTED THEY WILL VIOLATE EXECUTIVE ORDER 20-99 BY REMAINING OPEN TO MEMBERS, HOSTING FITNESS CLASSES, AND SIGNING UP NEW MEMBERS TO ATTEND.

Defendant Plainview Wellness Center, a 24-hour fitness gym, has remained open on and after November 21, 2020, allowing its approximately 200 members to enter, occupy, and use its facilities, thus violating Executive Order 20-99. Plainview Wellness Center advertised on its Facebook page shortly after Executive Order 20-99 was announced on November 18, 2020 that it “will NOT be closing!” Affidavit of Nina Grove (“Grove Aff.”), ¶ 4. The post encouraged members to continue to use the gym in violation of the Executive Order. Also, on its Facebook page, Plainview Wellness Center posted a calendar schedule for November which shows it hosting spin class approximately three times per week and Yoga approximately one time per week. (*Id.*) This week spin class was scheduled for Monday, November 24, 2020, at 5:00 a.m. and Wednesday, November 26, 2020 at 7:00 a.m., with Wednesday’s dubbed the “Thanksgiving Turkey Trot Spin.” (*Id.*)

¹¹ Executive Order 20-99 at 3.

On November 20, 2020, the Minnesota Attorney General's Office received a report that the Plainview Wellness Center planned to remain open during the peacetime emergency and while Executive Order 20-99 is in effect prohibiting such activity. Odette Aff., ¶ 2.

On November 20, 2020, an Assistant Attorney General with the Minnesota Attorney General's Office called the Plainview Wellness Center's owner Brandon Reiter to inquire whether it was his intent to stay open once the Executive Order went into effect. Mr. Reiter responded "Yes, I do plan to remain open." (Odette Aff., ¶ 3; Grove Aff., ¶ 2.)

When it was explained to him that remaining open would be in violation of Executive Order 20-99 and potentially subject him to an enforcement action, he said he was "sick of this f***ing bullshit." (Odette Aff., ¶ 4; Grove Aff., ¶ 3.) When the Assistant Attorney General offered to explain the Minnesota Department of Health numbers linking certain confirmed cases of COVID-19 to fitness centers in Minnesota. He responded "[Y]our numbers are nothing but f***ing corrupt." (Odette Aff., ¶ 5.)

Mr. Reiter claimed that the Executive Order was unconstitutional and unjust. However, when it was suggested he could close the gym in compliance with the Executive Order and challenge the constitutionality of the Executive Order in Court if he wished to seek to open legally, he said he didn't care what the appropriate way to go about it was and reiterated his intent to stay open stating, "My doors will be open forever." (Odette Aff., ¶ 6; Grove Aff., ¶ 3.) He said that he did not have any [COVID-19 positive] cases in his gym. The Assistant Attorney General explained that the Executive Order applied statewide regardless of whether a gym had experience with a COVID-19 positive case. He said "I'll violate whatever I want. This is America." (Odette Aff., ¶ 7; Grove Aff., ¶ 3.) He was then told that if there was evidence of non-compliance with

the order, the Minnesota Attorney General's Office would be in touch with him. He replied, "Perfect! Be in touch with me because I will not comply." (Odette Aff., ¶ 8; Grove Aff., ¶ 3.)

Immediately following that conversation, the Minnesota Attorney General's Office sent him a letter via email requesting that he respond in writing that he would comply with Executive Order 20-99. (Odette Aff., Ex. D) He responded via e-mail shortly thereafter, "Refuse to sign. Unconstitutional unjust and unlawful." (Odette Aff., Ex. E)

On November 23, 2020, an Investigator with the Minnesota Attorney General's Office contacted the phone number listed for Plainview Wellness Center on its Facebook page. The Investigator asked if they were open. He confirmed that the fitness center would open and that he was scheduling member sign ups. (Grove Aff., ¶5, Ex. B) This is not the first time that Plainview Wellness Center has defied the Governor's Executive Orders. On May 8, 2020, Mr. Reiter was interviewed by Fox 47, the Fox Affiliate in Rochester, regarding his decision at that time to keep Plainview Wellness Center open to his approximately 200 gym members on May 1, 2020 in violation of the Governor's Executive Orders in effect at the time. (*Id.* at ¶ 6, Ex. C.)

Governor Walz's Emergency Executive Order 20-99 was issued to slow the community spread of COVID-19 and thereby protect public health and safety. (Danila Aff., ¶ 20.) This includes, in part, requiring settings that are especially high risk for the easy transmission of COVID-19 from person to person and out into the community to temporarily close to members of the public to protect the public's health and safety. Without such restrictions, the dangerous public health emergency Minnesota is currently facing would continue to worsen threatening the health, safety, and lives of Minnesotans. (*Id.*)

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER AND A TEMPORARY INJUNCTION ARE APPROPRIATE TO ENJOIN THE PLAINVIEW WELLNESS CENTER FROM VIOLATING EXECUTIVE ORDER 20-99.

Temporary injunctive relief should be issued upon a showing by the State that the Plainview Wellness Center “has violated, or is about to violate” Executive Order 20-99 and when injunctive relief would fulfill the purpose of the Order. *See State v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 572 (Minn. Ct. App. 2005) (quoting *Wadena Implement Co. v. Deere & Co., Inc.*, 480 N.W.2d 383, 389 (Minn. Ct. App. 1992)); *accord State v. Minn. School of Business, Inc.*, 899 N.W.2d 467, 471-72 (Minn. 2017) (recognizing “[t]he conditions that must be met to grant a statutory injunction are determined by the text of the statute authorizing the injunction.”).¹²

Here, the State brings this law enforcement action against the Plainview Wellness Center to “prevent and restrain” its promised violations of Executive Order 20-99, by keeping its 24-hour gym and/or fitness center open its approximately 200 members of the public. *See* Minn. Stat. § 8.31, subd. 3 (providing “the courts of this state are vested with jurisdiction to prevent and restrain violations”). Executive Order 20-99 expressly provides that it can be enforced by the

¹² Only when a law does not provide for injunctive relief are courts to evaluate the *Dahlberg* factors to determine whether sufficient grounds exist to issue a TRO or temporary injunction. *Cross Country Bank*, 703 N.W.2d at 573 (when statutes specifically provide for injunctive relief court is “not required to make findings on the *Dahlberg* factors to enjoin violation of the statute.”). Where a party “legitimately disputes” the applicability of the underlying statute authorizing injunctive relief, a district court “is not required” to grant a temporary injunction without consideration of the *Dahlberg* factors. *See State v. Int’l Assoc. of Entrepreneurs of Am.*, 527 N.W.2d 133, 137 (Minn. App. 1995) (citing *Pac. Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 918 (Minn. App. 1994)). This narrow exception, however, has no application to this case because the Plainview Wellness Center cannot legitimately dispute that they own and operate a 24-fitness center and/or gym that is subject to Executive Order 20-99, which may be enforced by the Attorney General pursuant to Minnesota Statutes section 8.31 and statutorily authorizes the Attorney General to, among other things, “sue for and have injunctive relief . . . against any . . . threatened violation.” *See* Minn. Stat. § 8.31, subd. 3.

Minnesota Attorney General's Office ("AGO") pursuant to Minnesota Statutes section 8.31. Section 8.31 authorizes the AGO to "sue for and have injunctive relief in any court of competent jurisdiction against any such violation *or threatened violation* without abridging the penalties provided by law." Minn. Stat. § 8.31, subd. 3 (emphasis added); *accord Minn. School of Business, Inc.*, 899 N.W.2d at 472. Accordingly, the State is entitled to a temporary restraining order (TRO) and temporary injunction (TI) by showing that: (1) Plainview Wellness Center violated, is violating, or "is about to" violate Executive Order 20-99; and (2) the injunctive relief sought by the State would fulfill the purpose of the statute and Order.

As described above, the Plainview Wellness Center has represented that they will knowingly violate Executive Order 20-99 by remaining open on November 21, 2020, for public access. (Odette Aff., ¶¶ 2-3, 6-8, 9-10; Grove Aff. ¶¶ 2-5.) Even when informed by an assistant attorney general that doing so would constitute a clear violation of the Order and describing the ramifications of such violation, including fines and other penalties, the Plainview Wellness Center insisted that they would remain open. (Odette Aff., ¶ 6-8, 9-10; Grove Aff. ¶¶ 2-5.) Consequently, the Court should temporarily enjoin the Plainview Wellness Center from violating the Executive Order and threatening public health and safety by remaining open to approximately 200 gym members and hosting classes as they have represented.

Lastly, the temporary injunctive relief the State requests undoubtedly would fulfill the purposes of Executive Order 20-99. It would protect public health and safety, slow the community spread of COVID-19, hospitalizations, intensive care unit admissions, and deaths related to COVID-19 by preventing congregation in a fitness establishment when community spread of COVID-19, test positivity rate, and new COVID-19 cases are at their highest in Minnesota since the beginning of the pandemic. The purpose of Executive Order 20-99 is to

protect the public from public health risks, to “safely bridge the gap to more permanent solutions to this pandemic.” (Executive Order 20-99 at 3.) Accordingly, the court should grant the State’s motion for temporary injunctive relief preventing the Plainview Wellness Center from violating Executive Order 20-99 and remaining open to its members, hosting fitness classes, and soliciting new members.

II. TEMPORARY INJUNCTIVE RELIEF IS NECESSARY EVEN ASSUMING *ARGUENDO* THAT THE *DAHLBERG* FACTORS WERE APPLICABLE HERE.

In any event, even assuming *arguendo* that the *Dahlberg* factors apply to the State’s motion, such factors weigh strongly in favor in granting the temporary restraining order and temporary injunctive relief sought by the State. Each of the following factors weigh in favor of the State: (1) relationship between the parties; (2) relative harm to the parties if injunctive relief is granted or denied; (3) the party’s likelihood of success on the merits; (4) any public interest or public policy involved; and (5) the administrative burdens involved in judicial supervision and enforcement. *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965).

A. Relationship of the Parties.

The first *Dahlberg* factor—“the nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief”—weighs heavily in favor of the State. *Dahlberg Bros.*, 137 N.W.2d at 321. Executive Order 20-99 empowers the Attorney General’s Office to take action against Places of Public Accommodation that are operating in violation of the Order. As the chief legal officer for the State of Minnesota, the Attorney General has authority to file a civil enforcement action seeking injunctive relief (among other remedies) to secure compliance with Executive Order 20-99. *See* Minn. Stat. § 8.31, subds. 3, 3a; Executive Order 20-99 at ¶ 11. Defendant is violating and has threatened to violate the Order, including but not limited to remaining open to the public on or after November 21, 2020.

Because the background and relationship of the parties is that of regulator and non-compliant regulated entity, the first *Dahlberg* factor heavily favors granting the State's requested relief. *Accord State ex rel. Swanson v. CashCall, Inc.*, Nos. A13-2086, A14-0028, 2014 WL 4056028, *5 (Minn. App. Aug. 18, 2014), *review denied* (Minn. Nov. 17, 2015).

B. Minnesotans will be Threatened with Real, Substantial, and Irreparable Injury Absent a Temporary Injunction.

The second *Dahlberg* factor requires the Court to balance the harms to be suffered if the temporary injunction is granted with the harms to be suffered if it is denied. *Dahlberg Bros.*, 137 N.W.2d at 321; *see also Indep. Sch. Dist. No. 35, Marshall County v. Engelstad*, 144 N.W.2d 245, 248 (Minn. 1966) (“There must be threatened injury which is real, substantial, and irreparable.”); *Cramond v. Am. Fed. of Labor & Congress of Indus. Organizations*, 126 N.W.2d 252, 256 (Minn. 1964) (recognizing irreparable injury may occur where the actions of an adverse party may render the relief sought by the other party “ineffectual”).

Here, Minnesotans will be threatened with real, substantial, and irreparable harms for which a future payment of money is not a “realistic remedy” if the Court does not grant the State's requested temporary injunctive relief. Minnesota is currently experiencing an alarming surge in COVID-19 cases, including the record high daily case numbers received this month and increasing reported deaths. Defendant's conduct risks further increasing the rate of community spread in Minnesota. Executive Order 20-99 was thoughtfully conceived by public health professionals to address the specific and deadly exigencies posed by the public health crisis facing our State. (*See Danila Aff.* at ¶¶7-8.) The Order seeks to restrict only that behavior most tied to outbreaks in Minnesota, even as infections grow dangerously higher. (*Id.*) The virus appears to spread most easily between people indoors for extended periods of time, (*Id.* at ¶ 9), and those situations are precisely what Defendant's conduct will foster. Compliance with the

Order is critical to slowing the spread of COVID-19 and protecting the capacity of Minnesota's health system.

Payment of money is not a realistic remedy in this situation, not only for members of the public who could become infected, but for the public as a whole. Such harm also far outweighs any interest Defendant may have in temporarily closing to the public for four weeks (*e.g.*, until December 18, 2020). Because the public health and safety of Minnesotans are threatened by Defendant's defiant actions absent a temporary restraining order and temporary injunction, this factor weighs strongly in favor of the State.

C. The State is Likely to Succeed on the Merits of Its Claims.

The State is likely to succeed on the merits of its claims because Defendant has admitted that it intends and has remained open to the public in clear violation of Executive Order 20-99. Defendant's purported rationale for its non-compliance appears to be that it does not believe Executive Order 20-99 is valid or constitutional. (*Odette Aff.*, ¶¶ 6-8, 9-10; *Grove Aff.* ¶¶ 2-5.)

Contrary to Defendant's claims, any suggestion that Executive Order 20-99 lacks the force and effect of law is meritless. Minn. Stat. § 12.32. Likewise, any suggestion by Defendant that Executive Order 20-99 is unconstitutional is specious. Efforts to invalidate executive orders issued during a public health crisis like the present one are evaluated under the framework of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). Under this framework, courts give significant deference to the emergency measures instituted during a public health crisis. "The Constitution does not compel courts to turn a blind eye to the realities of the COVID-19 crisis." *Cassell v. Snyders*, 20 C 50153, 2020 WL 2112374, at *6 (N.D. Ill. May 3, 2020) (citing *Jacobson*, 197 U.S. at 27).

Under *Jacobson*, state action is susceptible to constitutional challenge only if: (1) it has no real or substantial relation to the object of protecting the public health, safety, or morals; or (2) “is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” *Jacobson*, 197 U.S. at 31. The heightened deference courts apply during public health emergencies is rooted in the fact that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27.

Thus, the temporary executive actions the Governor has taken in response to the COVID-19 emergency are entitled to substantial judicial deference and courts may not “second-guess the wisdom or efficacy of the measures.” *Rutledge*, 956 F.3d at 1028 (internal quotations omitted). Courts throughout the country have applied *Jacobson* in upholding a variety of executive orders to combat the COVID-19 pandemic, including measures similar to those contained in Executive Order 20-99.¹³ Indeed, in Stearns County, the district court held that the State was likely to succeed on the merits against a similarly defiant restaurant that refused to comply with the

¹³ See, e.g., *Calvary Chapel Dayton Valley v. Sisolak*, No. 320-CV-00303, 2020 WL 4260438, at *2-3 (D. Nev. June 11, 2020); *Best Supplement Guide, LLC v. Newsom*, No. 220-CV-00965-JAM/CKD, 2020 WL 2615022, at *3 (E.D. Cal. May 22, 2020) (applying *Jacobson* to reject First and Fourteenth Amendment challenges to California’s executive orders closing gyms, and collecting cases); *Henry v. DeSantis*, No. 20-CV-80729, 2020 WL 2479447, at *6 (S.D. Fla. May 14, 2020) (rejecting First and Fourteenth Amendment challenges to Florida’s executive order closing bars and restaurants); *Friends of Danny DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *16 (Pa. Apr. 13, 2020) (applying *Jacobson* framework in affirming constitutionality of Pennsylvania’s stay-at-home order); *Commcan, Inc. et al. v. Baker*, No. 2084CV00808-BLS2, 2020 WL 1903822, at *6 (Mass. Super. Apr. 16, 2020) (rejecting Equal Protection challenge to executive order closing legal marijuana dispensaries but leaving other businesses open); *Talleywhacker, Inc. v. Cooper*, 2020 WL 3051207 (E.D.N.C.) (denying strip club that also served alcohol and food motion for temporary and rejecting claims under the First, Fifth, and Fourteenth Amendments); *Amato v. Elicker*, 2020 WL 2542788 (D. Conn.) (denying restaurants motion for temporary injunction from bar/restaurant closure order and rejecting First Amendment claims); *McCarthy v. Cuomo*, 2020 WL 3286530 (E.D.N.Y.) (denying strip club/bar/restaurant’s motion for a temporary injunction and rejecting First and Fifth Amendment claims).

Governor's Executive Orders early in the pandemic and granted the State's motion for temporary injunctive relief. (Odette Aff., Ex. K.)

Executive Order 20-99 has a clear connection to the protection of Minnesotans' health and safety, as shown in both the clear language of the Order and in the data on where COVID-19 spreads most readily. Neither requirement is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

The State has requested that Defendant comply with Executive Order 20-99. The State's requests, however, have been explicitly rejected. Because the Order has the force and effect of law, passes constitutional muster, and is being openly violated by Defendant, the third *Dahlberg* factor weighs in favor of granting the State's requested injunctive relief.

D. The Public Interest and Public Policies Strongly Weigh in Favor of the Temporary Injunction.

The fourth *Dahlberg* factor requires consideration of any public interest or public policy expressed in applicable statutes. *Dahlberg Bros.*, 137 N.W.2d at 321-22. As discussed above, the Governor issued Executive Order 20-99 to slow the spread of a deadly infectious disease. Defendant has violated these safety restrictions by remaining open to the public on and after November 21, 2020. Public policy clearly weighs in favor of temporary injunctive relief that requires Defendant to temporarily close to the public in accordance with Executive Order 20-99.

E. The State's Requested Temporary Injunctive Relief Poses No Administrative Burdens on The Court.

Finally, the Court must consider the administrative burdens a temporary injunction may impose upon the Court. *Dahlberg Bros.*, 137 N.W.2d at 322. Here, issuing a temporary injunction will impose no administrative burdens on the Court because all the State requests is that Defendant obey the Governor's Executive Order 20-99. Indeed, the State only requests that

Defendant conform its conduct to that of all other gyms and fitness centers throughout Minnesota. For this reason, this final *Dahlberg* factor also fully favors granting the State's requested temporary injunctive relief.

III. TEMPORARY INJUNCTIVE RELIEF IS NECESSARY BEFORE THE PLAINVIEW WELLNESS CENTER CAN BE HEARD IN OPPOSITION, NECESSITATING AN *EX PARTE* TRO.

The function of a TRO and TI is to preserve the status quo until the matter is adjudicated on the merits. *Prolife Minnesota v. Minnesota Pro-Life Committee*, 632 N.W.2d 748, 753 (Minn. Ct. App. 2001) (discussing purpose of TRO); *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. App. 2002) (discussing purpose of temporary injunction). In order to obtain temporary injunctive relief before the Plainview Wellness Center can be heard in opposition (*i.e.* an *ex parte* TRO), the State must show that:

- (1) 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, and
- (2) the applicant's attorney states to the court in writing the efforts, if any, which have been made to give notice or the reasons supporting the claim that notice should not be required.

Minn. R. Civ. P. 65.01.

Immediate and irreparable injury will result if the State is required to wait until Plainview Wellness Center can be fully heard in opposition to the State's request for temporary injunctive relief authorized by Minnesota Statutes section 8.31 and Executive Order 20-99. The Plainview Wellness Center has represented to the AGO that they will remain open for members of the public in violation of Executive Order 20-99. The Plainview Wellness Center remaining open is a continuing violation and a series of individual violations since Executive Order 20-99 went into effect. Indeed, if the Plainview Wellness Center is permitted to continue to defy Executive Order 20-99 and remain open at their whim, it will unreasonably put their own community's

health and safety at risk in a county and surrounding area that has seen a drastic increase in new COVID-19 cases due to community spread.

Given Defendant's ongoing and defiant violations of Executive Order 20-99, there is insufficient time to provide Defendant the ability to negotiate a time for a hearing or fully respond in writing. Nevertheless, the Minnesota Attorney General's Office has given/attempted to give notice of its motion to Defendant and does not oppose Defendant appearing for hearing so long as the State's Motion is heard expeditiously and in manner that does not prevent effective temporary relief.

The State has met all required elements for a TRO enjoining the Plainview Wellness Center from violating Executive Order 20-99 and remaining open for its approximately 200 members, hosting fitness classes, and soliciting new members. Accordingly, the Court should grant the State's Motion for a TRO and schedule a TI hearing at the earliest practical time.¹⁴ Minn. R. Civ. P. 65.01 (If a TRO is granted without notice to an opposing party, "the motion for a temporary injunction shall be set down for hearing at the earliest practicable time...and when the motion comes on for hearing, the party who obtained the [TRO] shall proceed with the application for a temporary injunction.")

¹⁴ Despite the requirements for security set forth in Minn. R. Civ. P. 65.03(a) and Minn. Stat. § 570.041, subd. 1, the State is entitled to temporary injunctive relief without the giving of a security or bond. *See* Minn. Stat. § 574.18 ("No undertaking or bond need be given upon any appeal or other proceeding instituted in favor of the state"); *State v. Nelson*, 189 Minn. 87, 89-90, 248 N.W. 751, 752 (1933) (recognizing the term "proceeding" includes "every proceeding before a competent court in the due course of the proper administration of justice and which is to result in any determination.").

CONCLUSION

For all of the above reasons, the State respectfully requests that the Court grant its *Ex Parte* Motion for a Temporary Restraining Order and Temporary Injunction and award the State the entirety of the temporary relief it seeks, as detailed in its accompanying proposed order.

Dated: November 24, 2020

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/s/ Elizabeth Odette

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MINN. STAT. § 549.211 ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211 (2019).

/s/ Elizabeth Odette

ELIZABETH ODETTE