UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN RESTAURANT & LODGING ASSOCIATION, *et al.*, Plaintiffs,	)	No. 1:20-cv-1104
-v-	)	Honorable Paul L. Maloney
ROBERT GORDON, Defendant.	)	

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs' motion for a preliminary injunction (ECF No. 10). Plaintiffs seek to enjoin Defendant Director of Michigan Department of Health and Human Services Robert Gordon from enforcing his November 15, 2020 Emergency Order against them, effectively allowing Michigan bars and restaurants to resume indoor food and beverage service.

I.

On November 15, 2020, Director Gordon issued an emergency order closing Michigan bars and restaurants for indoor, in-person services for three weeks.[1] The order became effective on Wednesday, November 18, and it is set to expire at 11:59 P.M. on Tuesday, December 8.

[1] The Emergency Order imposes "gathering restrictions" on "particular types of facilities." Only certain "food service establishments" are permitted to hold indoor gatherings. Functionally, bars and restaurant cannot offer indoor dining services.

Plaintiffs seek a preliminary injunction enjoining enforcement of the November 15 Emergency Order ("EO")[2] (ECF No. 10). Plaintiffs filed an amended verified complaint (ECF No. 9) alleging five claims or counts. Plaintiffs allege the EO violates (1) the Interstate Commerce Clause; (2) procedural due process; (3) the Equal Protection Clause; (4) the Takings Clause of the United States and the Michigan Constitutions; and (5) the separation of powers and non-delegation clauses of the Michigan Constitution. Defendants oppose the motion (ECF No. 18), as does *amicus curiae* Michigan Health and Hospital Association (ECF No. 23). The Court heard argument on the motion on November 30, 2020.

II.

A trial court may issue a preliminary injunction under Federal Rule of Civil Procedure 65. A district court has discretion to grant or deny preliminary injunctions. *Planet Aid v. City of St. Johns, Michigan*, 782 F.3d 318, 323 (6th Cir. 2015). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002); *see Patio Enclosures, Inc. v. Herbst*, 39 F. App'x 964, 967 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)). The purpose of a preliminary injunction is to preserve the status quo. *Smith Wholesale Co., Inc. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 873 n. 13 (6th Cir. 2007) (quoting *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004)).

[2] Plaintiffs include a copy of the Emergency Order with their complaint (ECF No. 1 at PageID.21-28) and with their amended complaint (ECF No. 9 at PageID.57-64). Both pleadings present the Emergency Order as Exhibit 1. For both docket entries, the Emergency Order is not separately filed as a stand-alone document. When necessary to cite to the Emergency Order, the Court will identify the PageID for the exhibit attached to the initial complaint.

To determine whether a plaintiff has met this high bar, a court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (quoting *Northeast Ohio Coalition for Homeless & Service Employees Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)). The four factors are not prerequisites that must be established at the outset but are interconnected considerations that must be balanced together. *Northeast Ohio Coalition*, 467 F.3d at 1009; *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "When a party seeks a preliminary injunction on the basis of a potential constitutional violation, however, the liklihood of success on the merits often will be the determinative factor." *Commonwealth v. Beshear*, ___ F.3d ___, 2020 WL 7017858, at *2 (6th Cir. Nov. 29, 2020) (quoting *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014)) (cleaned up).

III.

As a preliminary matter, the Court recognizes that it must decide dispositive questions of state law before reaching federal constitutional claims. *See, e.g., Torres v. Precision Industries, Inc.*, 938 F.3d 752, 754 (6th Cir. 2019) ("Federal courts are not in the business of answering hypothetical questions. Let alone hypothetical questions of constitutional law."). In this case, Plaintiffs argue that M.C.L. § 333.2253 is an impermissible delegation of legislative authority, and they seek a declaration that the statute violates the Michigan Constitution. Such a finding would also dissolve Director Gordon's EO because the EO is

issued "under M.C.L. § 333.2253." Success on the state law claim would provide Plaintiffs all the relief they seek, and in turn, it would render the federal constitutional claims moot. Thus, for a full adjudication of this case, the state law claim must be evaluated first. That said, this Court is mindful that the "last word" (or in this case, the first word) on the meaning of state statutes requiring judicial interpretation belongs not to federal district courts, but to the state supreme court. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499-500 (1941). The questions presented in this case about the constitutionality of M.C.L. § 333.2253 have not yet been considered by the Michigan courts.[3] Thus, rather than interpret a novel question of state law for the first time—particularly a question of state law that might affect every citizen in the state of Michigan—this Court will address only the federal constitutional questions for the purposes of this motion.

The Court must first determine whether Plaintiffs have established a liklihood of success on the merits of any of their federal claims. Much of this analysis remains unchanged from the Court's opinion denying Plaintiffs' request for a temporary restraining order (ECF No. 14), and the Court incorporates without repeating that opinion here. Only a few outstanding points merit discussion.

First, regarding Plaintiffs' equal protection claim: to succeed here, Plaintiffs must "negate 'every conceivable basis which might support [the emergency order].' " *League of*

[3] There is one case, *Semlow Peak Performance Chiropractic v. Whitmer*, No. 20-206-MZ (Mich. Ct. Claims), pending in the Michigan Court of Claims that is at least tangentially relevant. The *Semlow* case considers whether Director Gordon's Emergency Orders overstep the bounds of the authority granted to him by M.C.L. § 333.2253. However, the case does not consider whether M.C.L. § 333.2253 is itself constitutional. Further, the State Defendants in *Semlow* argue that Semlow does not have standing to bring that case, so it is possible that the Court of Claims will never reach the merits of the case. Thus, while *Semlow* may be relevant, it also may not resolve the non-delegation issue presented here.

Independent Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 128 (6th Cir. 2020) (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012)). So long as "there are 'plausible reasons' " for the order, the court's " 'inquiry is at an end.' " *FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 313-14 (1993) (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). Given this evidentiary burden the Court finds that a plausible explanation for the emergency order exists: Restaurant patrons cannot wear a mask while eating or drinking. Plaintiffs complain that they are being treated differently than similar businesses, but as the Court noted in its previous Order, individuals can patronize the businesses that remain open while wearing a mask. To the extent that restaurants are treated differently than other food service establishments—mall food courts and airports, for instance—the Court notes that those food service establishments are much more transitional than a sit-down, dine-in restaurant. A group might not linger in an airport restaurant as long as it would linger in a normal restaurant. Because this plausible reason for the distinction still exists, Plaintiffs have failed to meet their burden on this claim.

Plaintiffs have also failed to show a likelihood of success on their due process claim. In their reply brief, Plaintiffs address the holding in *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.,* 452 U.S. 264 (1981), for the first time. *Hodel* held that "deprivation of property to protect the public health and safety is one of the oldest examples of permissible summary action. Moreover, the administrative action provided through immediate cessation orders responds to situations in which swift action is necessary to protect the public health and safety." *Id.* at 300-01 (internal citations omitted). Plaintiffs argue that *Hodel* is distinguishable for three reasons. First, because a pandemic "with no end in sight" does not

require the same "swift" action as in *Hodel*, which involved imminent coal mining disasters. The Court is not persuaded by this argument. While the pandemic has been part of daily life since March, the amicus brief makes clear that the scale of the pandemic is vastly different now, such that swift action by the state might be justifiable (*see generally* ECF No. 23).

Second, Plaintiffs argue that the EO offers no post-deprivation process. They acknowledge that the level of process required might be different in an emergency, but some process is still required: The EO provides none, so the EO must be enjoined. However, the case that Plaintiffs cite in support of this position summarily found that *Hodel* barred a procedural due process claim related to Covid-19 emergency orders. *910 E. Main LLC v. Edwards*, Case No. 6:20-CV-00965, 2020 WL 4929256, at *10 (W.D. La. Aug. 21, 2020). Certainly, post-deprivation process would be preferable, but the Court is not aware of any cases supporting Plaintiffs' argument that a lack of post-deprivation process completely distinguishes *Hodel*.

Finally, Plaintiffs argue that the Act at issue in *Hodel* provided specific criteria that helped prevent erroneous deprivations, but the statute from which Director Gordon draws his authority, M.C.L. § 333.2253, does not provide any such criteria. This argument overlaps with the claim that the statute is an impermissible delegation of legislative authority, and as described above, the Court declines to rule on the state law issue before the Michigan Courts are given a chance to do so. In sum, Plaintiffs have failed to distinguish *Hodel*, so they have not demonstrated a likelihood of success on their procedural due process claim.

Finally, Plaintiffs reiterate their arguments regarding the dormant Commerce Clause, the Court finds that they have not presented anything that changes the analysis contained in

the TRO opinion. Given the December 8 termination date, Plaintiffs have not demonstrated that the EO's burden on interstate commerce is excessive when balanced against the purported benefits to Michigan. Therefore, Plaintiffs have not met their burden on this claim.

Plaintiffs have failed to establish any liklihood of success on the merits of their claims. While the Court is sensitive to the risk of irreparable harm to Michigan restaurants,[4] the unlikelihood of success on the merits is determinative and the request for preliminary injunctive relief must be denied. *Commonwealth v. Beshear*, 2020 WL 7017858, at *4.

IV.

At this stage, the Court finds that Plaintiffs have failed to demonstrate a substantial liklihood of success on the merits of their federal claims, and accordingly, the request for a preliminary injunction will be denied. But because the state law claims require consideration before the merits of the federal claims can be fully adjudicated, and because the Michigan courts have not yet had an opportunity to evaluate the constitutionality of M.C.L. § 333.2253, the Court is considering certifying questions to the Michigan Supreme Court pursuant to Local Civil Rule 83.1 and Michigan Court Rule 7.308(A)(2). The Court has preliminarily drafted the following questions:

[4] Generally, irreparable harm is harm that cannot be remedied with money damages. *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 550 (6th Cir. 2007). However, irreparable harm may exist if a plaintiff's business is threatened with insolvency or its financial viability is threatened. *See Performance Unlimited, Inc. v. Questar Publishers Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1985). The "impending loss or financial ruin" of a business constitutes irreparable injury. *Id.* Many Michigan restaurants have been forced to lay off or furlough employees, and about 2,000 restaurants have permanently closed this year (Winslow Affidavit, ECF No. 27-1 at ¶¶ 4-5). The continued partial shutdown of restaurants threatens at least temporary closure of an additional 40% of full-service restaurants (*Id.* at ¶ 10). These statistics make clear that many Michigan restaurants are at risk of, or have already suffered, irreparable harm under Director Gordon's EO.

1. Is M.C.L. § 333.2253(1) an impermissible delegation of legislative authority such that it violates the non-delegation clause of the Michigan Constitution?
2. If M.C.L. § 333.2253(1) is a permissible delegation of legislative authority, does Michigan Department of Health and Human Services Director Robert Gordon possess the authority under that statute to develop and promulgate a comprehensive regulatory scheme, such as the November 15 Emergency Order?

To determine whether certification of these questions would be appropriate, a hearing is scheduled for **December 17, 2020** at **1:30 P.M.**, 174 Federal Building, 410 W. Michigan Ave., Kalamazoo, Michigan.

ORDER

For the reasons stated in this opinion,

IT IS HEREBY ORDERED that Plaintiffs' motion for a preliminary injunction (ECF No. 10) is **DENIED**.

IT IS FURTHER ORDERED that if either party wishes to file a brief in advance of the certification hearing, it is due no later than **December 11, 2020 at 12:00 p.m.** (noon).

IT IS SO ORDERED.

Date: December 2, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge