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2021CV345317
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Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

TRACY SMART, et al.,	
Plaintiffs,	
v.	CIVIL ACTION NO. 2021CV345317
GOVERNOR BRIAN KEMP,	
Defendant.	

DEFENDANT'S BRIEF IN SUPPORT OF HIS MOTION TO DISMISS

Defendant Governor Brian Kemp submits this brief in support of his motion to dismiss, showing the Court as follows:

INTRODUCTION

Plaintiffs bring this action against Governor Kemp in both his official and personal capacities asserting a variety of both specified and unspecified harms and injuries purportedly arising from both the United States and Georgia Constitutions in connection with Governor Kemp's efforts to protect Georgians from the COVID-19 pandemic. The Plaintiffs' assertions do not account for the legal reality of their perceived "rights," and therefore fail to accurately state claims on which relief may be granted. "Every one's rights must be exercised with due regard to the rights of others. 'Sic utere tuo ut alienum non laedas'[1] has been a maxim of legal application since the days of

[1] "Use your own property in such a manner as not to injure that of another." https://bnblegal.com/sic-utera-tuo-ut-alienam-non-laedas/

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the civil law of the Roman Empire." *Ferguson v. Moultrie*, 71 Ga.App. 15, 19 (1944). In English,

> the underlying principle of laws passed under the inherent police power of the government is that it is the duty of each citizen to use his property and exercise his rights and privileges with due regard to the personal and property rights of others. The old saying, "my right ends where your nose begins," though trite, is applicable. The safety of the people is the supreme law of the land.

De Berry v. La Grange, 62 Ga.App. 74, 77-78 (1940). Accordingly, where an action "is injurious to the rights of others, or inconsistent with the public welfare, it may be regulated or prohibited altogether by the State or its delegated authorities." *Id.* at 78.

As argued in more detail below, Plaintiffs' claims against Governor Kemp are barred by sovereign and qualified immunity, or should otherwise be dismissed for failure to state a claim upon which relief can be granted. Additionally, Plaintiff has presented his claims in an improper format and, at least for the state-law claims, has sued the wrong party.

I. Plaintiffs present their claims in an improper shotgun complaint.

The Complaint's conclusory allegations, vague undifferentiated claims, and a seeming inability to specify which portions of a massive number of documents had caused each one harm are the essence of shotgun pleading which has been rejected by Georgia courts. *See generally Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 91 (2011). More specifically, the Complaint

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should be struck for failure to adhere to the requirements of the Civil Procedure Act regarding pleadings.[2] This Court would be well within its discretion to order the Plaintiffs to amend the pleadings with a more definite statement of their claims, and to dismiss the case if Plaintiffs fail to comply with this Court's instructions. *See, e.g., id.*, at 92.

O.C.G.A. § 9-11-8(a)(2)(A) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Averments must be "simple, concise, and direct" (O.C.G.A. § 9-11-8(e)(1)), and claims must be pled in distinct counts to the extent that a "separation facilitates the clear presentation of the matters set forth" (O.C.G.A. § 9-11-10(b)). At the same time, pleadings must "include enough detail to afford the defendant fair notice of the nature of the claim and a fair opportunity to frame a responsive pleading." *Bush*, 313 Ga.App. at 89-90, (*quoting Benedict v. State Farm Bank, FSB*, 309 Ga. App. 133 (2011)). Pleadings that fail to observe these requirements, which are "requirements, not just suggestions," not only harm the defendant by failing to provide adequate notice and opportunity frame a response, but they "harm the court by impeding its ability to administer justice." *Id.* at 90-91, *quoting Byrne v. Nezhat*, 261 F3d 1075, 1131 (11th Cir. 2001).

[2] O.C.G.A. § 9-11-12(e) requires, in part, that "[if] a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a proper responsive pleading, he shall nevertheless answer or respond to the best of his ability." Pursuant to this requirement, Governor Kemp has endeavored to answer the Complaint to the best of his ability despite the arguments contained in this section.

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Taking guidance from decisions of the Eleventh Circuit,[3] the Georgia Court of Appeals has illustrated factors marking an improper shotgun pleading:

> Although the concept of a shotgun pleading is not one susceptible to terse definition, the Eleventh Circuit has identified several characteristics that typically mark such pleadings. A shotgun complaint, for instance, often contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts contain irrelevant factual allegations and legal conclusions, combines multiple claims together in one count, and various material allegations beneath innumerable pages of rambling irrelevancies.

Bush, 313 Ga. App. 84, 90 (2011) (*citing Strategic Income Fund v. Speak, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002) (internal quotations omitted). The instant Complaint bears numerous markers of a shotgun pleading that more than adequately support an order to give a more definite statement of claims. [4]

Plaintiffs commit the so-called "cardinal sin" of shotgun pleadings by incorporating by reference allegations from previous sections. *Weissman v. Nat'l Ass'n of Sec. Dealers, Inc.*, 500 F.3d 1293, 1311 (11th Cir. 2007) (*en banc*) (Tjoflat, J., dissenting). All but two sections of the Complaint, including

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[3] In finding the decisions of the Eleventh Circuit "instructive," the Court of Appeals cited the shared requirement of a "short and plain statement" of a claim. *Bush*, 313 Ga. App. at 90 n.13.

[4] See also, *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1320-23, n. 9-15 (11th Cir. 2015), for an exhaustive collection of Eleventh Circuit decisions regarding impermissible shotgun pleadings.

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those purporting to present separate counts of the Plaintiffs' claim, incorporate by reference "all preceding paragraphs" of the claim, making each count an amalgamation of all preceding claims and allegations. (Compl., ¶¶ 11, 26, 52, 58, 64, 74). As such, each count includes a mass of irrelevant allegations, legal conclusions and facts, insofar as Plaintiffs present facts instead of conclusory assertions. This unfairly shifts the burden to Governor Kemp, who is forced to repeatedly sift through the entire Complaint to determine which allegations may pertain to which counts. This factor alone would mark the Complaint as a "quintessential shotgun complaint." *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1326 n.6 (11th Cir. 1998).

Further, Plaintiffs' individual counts are not supported by simple and concise statements of the law under which they are being claimed, they are not supported by a provision of specific factual allegations, and they often fail to separate claims under disparate legal and factual theories. Individually, the counts each contain merely a single sentence amalgamating all previous paragraphs into the count, followed by bald legal conclusions couched as factual allegations. They fail to specify which Executive Orders allegedly caused them harm, instead referring to the Executive Orders as a whole and occasionally adding quotation marks around words or phrases without citing to any specific Executive Order from which the phrases purportedly derive. As an illustrative example, Plaintiffs' final count is captioned "42 U.S.C.. § 1983–First Amendment, Fourth Amendment and Other Individual Rights

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Under the Georgia State Constitution." It contains no further separation of the claim by its constituent parts, and makes no specific factual allegations regarding the harm suffered or the individual Plaintiffs affected. Indeed, most of the Complaint fails to differentiate between which individual or individuals are involved in each aspect of each "claim."

Plaintiffs further fail to state the harm that they have suffered with any specificity. The Complaint provides no allegations as to the actual and specific harm suffered by their businesses, nor does it provide any factual allegations supporting claims of an inability to visit with their family members. Without a specific statement of the actual harm suffered, it is impossible for Governor Kemp and the Court to assess the pleadings concerning issues of redressability, causation, or whether a claim has even been stated.

Compounding the confusion caused by these amalgamated, nonspecific, and unsupported claims, the Complaint fails to identify which portions of the Executive Orders caused them harm in all but one instance.[5] Instead,

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[5] Plaintiffs allege in Paragraphs 46 and 47 that an order issued on November 20, 2020 regarding vaccine information distribution violated their right to privacy. To further illustrate the failure of Plaintiffs to provide a simple and concise statement of their case, these paragraphs are included under a section titled "Factual Background," but Paragraph 47 is only a conclusory statement that the November 20, 2020 Order "directly contravened Georgia citizens' privacy rights." This privacy issue is brought up again only in Paragraph 71, which is located in a section titled "42 U.S.C. § 1983–Due Process and Takings," cites to "HIPAA and Georgia law" as sole legal justification for a conclusory statement of illegality, and is sandwiched between a paragraph concerning a claim under the Takings Clause and a

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Plaintiffs ask the Court to take judicial notice of "all publicly filed Executive Ordered entered by Governor Kemp since March 14, 2020." Doc. 1, n. 4. This one-sentence footnote asks the Court, and by extension Governor Kemp, to incorporate into the complaint a haystack of over six hundred (600) executive orders, alleging that somewhere among the thousands of pages is a needle that caused them harm. Plaintiff's pleading thus improperly requires Governor Kemp to sift through this mountain of documents in an attempt to glean those portions with which the Plaintiffs *might* be taking issue to frame a responsive pleading. Not only does this cause confusion in the process of adjudicating their claims, it would impermissibly expand the scope of discovery and waste resources by incorporating mountains of irrelevant documents.

The conclusory, vague, and overbroad nature of the pleadings are plainly in violation of the Civil Procedure Act. The Complaint is not simple, concise, or direct, nor does it provide Governor Kemp with fair notice of the nature of the claims, thus precluding Governor Kemp from having a fair opportunity to frame a responsive pleading. The Court, should it not choose to dismiss the Complaint on its merits, should strike the Complaint and order Plaintiffs to provide a more definite statement of their claims pursuant to O.C.G.A. 9-11-12(e) so that Governor Kemp may adequately prepare his defense. Should Plaintiffs fail to abide by such an order and provide

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paragraph of allegations concerning both due process and separation of powers.

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pleadings with the requisite clarity, specificity, and directness, the matter should be dismissed.

II. Plaintiffs fail to state a claim under state law.

Sovereign immunity is a threshold matter, which reaches the issue of whether the trial court is properly vested with subject matter jurisdiction. *James v. Ga. Dep't of Pub. Safety,* 337 Ga. App. 864, 867 (2016); *Murray v. Dep't of Transp.,* 240 Ga. App. 285, 285 (1999). "Where the sovereign has sovereign immunity from a cause of action, and has not waived that immunity, the immunity rises to a constitutional right and cannot be abrogated by any court." *Tyson v. Bd. of Regents of the Univ. Sys. of Ga.*, 212 Ga. App. 550, 550-551 (1994). The Georgia Constitution extends sovereign immunity to the state and all of its departments, agencies, and officers and employees in their official capacity, except as specifically provided in Paragraph IX(e) of Article I, Section II. As the Chief Executive Officer of the State of Georgia, sovereign immunity is expressly extended to Governor Kemp in his official capacity. Ga. Const. Art. V, § II, ¶ I; *Lathrop v. Deal*, 301 Ga. 408 (2017). Governor Kemp is thus immune from suit except as specifically waived in the Constitution or except as provided by an act of the General Assembly specifically providing that sovereign immunity has been waived and the extent thereof. *Woodard v. Laurens County*, 265 Ga. 404, 405 (1995). The burden of demonstrating a waiver of sovereign immunity rests with the person filing suit. *Bd. of Regents of the Univ. Sys. of Ga. v. Winters,*

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331 Ga. App. 528, 534-35 (2015); *Dep't of Transp. v. Dupree,* 256 Ga. App. 668, 671 (2002); *Bd. of Regents of the Univ. Sys. of Ga. v. Daniels*, 264 Ga. 328, 329 (1994).

To meet this burden on its state-law claims, Plaintiffs presumably rely upon the 2020 amendment to Article I, Section II of the Georgia Constitution, which now provides, in pertinent part:

> Sovereign immunity is hereby waived for actions in the superior court ***seeking declaratory relief*** from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof or any county, consolidated government, or municipality of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, ***only after awarding declaratory relief***, enjoin such acts to enforce its judgment. Such waiver of sovereign immunity under this Paragraph shall apply to past, current, and prospective ***acts which occur on or after January 1, 2021***.

Ga. Const. art. I, sect. II, para. V(b)(1) (emphasis added).[6]

A. Governor Kemp is not the proper Defendant for Plaintiffs' state-law injunctive relief claims.

As a threshold matter, Plaintiffs have not named the proper Defendant for its state-law injunctive and declaratory relief claims. The 2020 constitutional amendment also provides:

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[6] Prior to this amendment, sovereign immunity barred claims for declaratory and injunctive relief against the State, its departments and agencies, and its officers and employees in their official capacities. *See Lathrop*, 301 Ga. at 408-09, 444; *Walker v. Owens*, 298 Ga. 516 (2016); *Olvera v. University System of Georgia's Board of Regents*, 298 Ga. 425 (2016); *Georgia Dep't of Natural Resources v. Center for a Sustainable Coast, Inc.*, 294 Ga. 593 (2014).

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> ***Actions filed pursuant to this Paragraph against this state or any*** agency, authority, branch, board, bureau, commission, department, office, or *public corporation of this state* or **officer** or employee thereof ***shall be brought exclusively against the state and in the name of the State of Georgia***. Actions filed pursuant to this Paragraph against any county, consolidated government, or municipality of the state or officer or employee thereof shall be brought exclusively against such county, consolidated government, or municipality and in the name of such county, consolidated government, or municipality. ***Actions filed pursuant to this Paragraph naming as a defendant any*** individual, ***officer***, or entity ***other than as expressly authorized under this Paragraph shall be dismissed***.

Ga. Const. art. I, sect. II, para. V(b)(1) (emphasis added). Plaintiffs named Governor Kemp as Defendant in this lawsuit, not the State of Georgia. Because Plaintiffs named an "officer … other than as expressly authorized" under the clear Constitutional language, their claims for declarative and injunctive relief in this lawsuit must be dismissed.

B. State-law injunctive and declaratory claims based on 2020 conduct are barred.

To the extent Plaintiffs allege a legal wrong that occurred in 2020—and this is actually all that the Complaint asserts—the state-law injunctive and declaratory claims are barred by sovereign immunity. Such actions are not an act which occurred "on or after January 1, 2021," and thus, the waiver provided by the new constitutional provision does not apply. Ga. Const. art. I, sect. II, para. V(b)(1).

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C. Plaintiff's cannot pursue a money damages claim for a violation of the Georgia Constitution.

It has long been the law in Georgia that claims for money damages for alleged violations of the Georgia Constitution are not permitted. There is no state "equivalent to 42 U.S.C. § 1983," providing a cause of action for violation of the state constitution. *Howard v. Miller*, 222 Ga. App. 868, 872 (1996); *Davis*, 275 Ga. App. at 772 n. 2; *Draper v. Reynolds*, 278 Ga. App. 401, 403 n. 2 (2006). Nothing in the recent constitutional amendment changes this. Indeed, "[n]o damages, attorney's fees, or costs of litigation shall be awarded in an action filed pursuant to this Paragraph, unless specifically authorized by Act of the General Assembly." Ga. Const. art. I, sect. II, para. V(b)(4). As there has been no authorizing Act from the General Assembly, Plaintiffs' state constitution-based claims for money damages must be dismissed.

D. Plaintiffs fail to allege a violation of the Georgia Constitution.

Even if Plaintiffs had brought suit against the proper Defendant, they fail to state a claim under the Georgia Constitution. It is not even clear what provisions of the Georgia Constitution they seek to pursue claims under. The final substantive count of the Complaint is labeled "42 U.S.C. § 1983—First Amendment, Fourth Amendment and Other Individual Rights Under the Georgia Constitution," but it cites no actual provision of the Georgia Constitution. (Compl., p 9). They vaguely refer to the Georgia Constitution

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in other sections of the Complaint. (*Id.*, ¶¶ 51, 72). Even under principles of notice pleading, this is insufficient. Although notice pleading is all that the law requires, the complaint must actually give that notice. *See Allen v. Bergman*, 201 Ga. App. 781, 783 (3) (b) (412 SE2d 549) (1991); *Patrick v. Verizon Directories Corp.*, 284 Ga. App. 123, 124 (2007). Early in the Complaint, Plaintiffs do generically refer to certain provisions of the Georgia Constitution, but none of those will support a cause of action here and Plaintiffs never specifically tie these sections to their "claims." (Compl., ¶¶ 14-18). More important, Plaintiffs allege no actionable claim under any paragraph of the Constitution.

1. *The Right to Assemble*

The Georgia Constitution states that "[t]he people have the right to assemble peaceably for their common good and to apply by petition or remonstrance to those vested with the powers of government for redress of grievances." Ga.Const., art. I, ¶ I, § 9. Nothing in this constitutional provision affords Georgians a perfect right to get together with anyone else at any time for any purpose. Instead, the Constitution permits assembly "for the[] common good" to pursue the ends of good government. No assembly of that type is described or sought in the Complaint. Instead, Plaintiffs insist upon a right to gather with other persons for personal reasons. There appears to be no ruling, however, holding that Georgians have a right to assemble for private or personal causes. Indeed, there is not even a right to

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assemble on private property (presumably where Plaintiffs wish to assemble here with their loved ones) for political purposes. *See Citizens for Ethical Gov't v. Gwinnett Place Assoc., L.P.*, 260 Ga. 245 (1990). Plaintiffs' desires to assemble for personal or business purposes are even further afield, and so, should be rejected.

2. *Takings and Due Process.*

Georgia's Constitution provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law." Georgia's due process clause was not intended to "interfere with the police power of the State." *Davis v. Stark*, 198 Ga. 223, 230 (1944). If a state action that "falls within the circle of the police power, it lies out of the orbit of the due-process clause[]." *Id.* The police power, in turn, "is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." *Id.*

"[T]he regulation of the property to prevent its use in a manner detrimental to the public interest" is an exercise of the police power, not a taking; no compensation is required in such circumstances. *Pope v. Atlanta*, 242 Ga. 331, 334 (1978). Yet such, if even that, is all that Plaintiffs allege here. The Executive Orders designed to protect the health of Georgians against a deadly, contagious disease do not rise to the level of a taking or any other type of due process violation.

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3. *Separation of Powers*

Plaintiffs use the words "separation of powers" apparently, though not clearly, suggesting that Governor Kemp's actions were *ultra vires*. But this is not supported by the Constitution or the laws of Georgia. To be sure, the Constitution does indicate that "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided." Ga.Const., art. I, § II, ¶ III.

But "separation of powers is not a rigid principle." *Greer v. State*, 233 Ga. 667, 668 (1975). "The separation of powers principle is sufficiently flexible to permit practical arrangements in a complex government, and … it is not always easy to draw a line between executive functions and legislative functions …." *Id.* at 669. "The three departments of government are not kept wholly separate in the Georgia Constitution." *In re Pending Cases, Augusta Judicial Circuit*, 234 Ga. 264, 265-66 (1975).

In this case, the General Assembly has granted the Governor substantial powers to manage public health emergencies. O.C.G.A. § 38-3-51. Governor Kemp has invoked those powers many times since March 2020 in an effort to protect Georgians from a deadly pandemic. Though Plaintiffs clearly are dissatisfied with the impact of some of those measures on their lives, nothing set forth in the Complaint comes anywhere close to demonstrating that Kemp acted outside of his powers as Governor.

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4. *Privacy*

It is certainly true that Georgians have a right to privacy in their medical information founded on the Georgia Constitution's due process clause. *See King v. State*, 272 Ga. 788, 789-90 (2000). The State, however, can contravene that privacy right when acting "pursuant to a statute which effectuates a compelling state interest and which is narrowly tailored to promote only that interest." *Id.* at 790.

Plaintiffs allege that their privacy rights were violated by the Executive Order issued November 20, 2020, which allowed the sharing of certain vaccination related information with the United States Department of Health and Human Services. That Order was issued pursuant to a statute, O.C.G.A. § 38-3-51, which sets for the Governor's emergency powers, and specifically subsection (i)(1), which provides that:

> The Governor may direct the Department of Public Health to coordinate all matters pertaining to the response of the state to a public health emergency including without limitation:
> (A) Planning and executing public health emergency assessments, mitigation, preparedness response, and recovery for the state;
> (B) Coordinating public health emergency responses between state and local authorities;
> (C) Collaborating with appropriate federal government authorities, elected officials of other states, private organizations, or private sector companies;
> (D) Coordinating recovery operations and mitigation initiatives subsequent to public health emergencies;

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> (E) Organizing public information activities regarding state public health emergency response operations; and
> (F) Providing for special identification for public health personnel involved in a public health emergency.

The operation of the Executive Order was narrowly tailored to allow the State and federal government to appropriately design and implement programs to vaccinate the people of Georgia against COVID-19. (*See generally* Executive Order 11.20.20.1). At this moment, it would be difficult to find a more compelling State interest than accomplishing this vaccination program, especially since doing so could and likely will result in the ultimate lifting of all the other restrictions that Plaintiffs deem so onerous. Plaintiffs therefore fail to state a violation of any privacy right.

III. Plaintiffs fail to state a claim for money damages under federal law against Governor Kemp in his official capacity.

A. Plaintiffs' federal money damages claims against Governor Kemp in his official capacity are barred by the Eleventh Amendment.

Under federal law, claims against state officials in their official capacity are effectively claims against the state itself. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). The Eleventh Amendment bars actions against a state or one of its agencies, departments or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest or when any monetary recovery would be paid from State funds. *See, e.g., id.*, at 169; *Pennhurst State School and Hospital v.*

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Halderman, 465 U.S. 89, 100-01 (1984). The immunity provided by the Eleventh Amendment applies both to states and to those entities that are considered "arms of the state." *See*, *e.g.*, *Fouche v. Jekyll Island State Park Auth.*, 713 F.2d 1518, 1520 (11th Cir. 1983). As the Supreme Court has repeatedly recognized, Congress has not overridden the protections of the Eleventh Amendment in the context of § 1983 lawsuits. *See, e.g., Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989); *Graham*, 473 U.S. at 169 n. 17. The State has not consented to suit under 42 U.S.C. § 1983. *See* Ga. Const. Art. 1, § 2, ¶ 9(f) ("[n]o waiver of sovereign immunity . . . shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution"). Accordingly, any federal claims for money damages against Defendant in his official capacity are barred by the Eleventh Amendment and must be dismissed.

B. Governor Kemp in his official capacity is not a "person" amendable to suit under § 1983.

The specific language of § 1983 allows a plaintiff to sue only "person[s]" who violate his civil rights. *See* 42 U.S.C. § 1983. In other words, the statutory language of 42 U.S.C. § 1983 "creates no remedy against a State." *Arizonans for Official English*, 520 U.S. at 69. Federal courts have made clear that a state governmental official acting in his official capacity is not a "person" within the meaning of § 1983. *See, e.g., Will,* 491 U.S. at 71. Because Governor Kemp in his official capacity is not a "person" under § 1983,

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Plaintiff's official capacity claims against him are not cognizable and must be dismissed.

IV. Plaintiffs fail to state a claim under federal law against Governor Kemp in his individual capacity.

Plaintiffs contend that the executive orders issued by Governor Kemp in response to the COVID-19 pandemic violate their federal constitutional rights. In particular, pursuant to 42 U.S.C. § 1983, Plaintiffs assert claims under the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution. They fail to state a claim under any constitutional provision.

A. Plaintiffs fail to state a claim under the First Amendment.

Plaintiffs contend that the challenged orders violated their First Amendment rights of association and assembly by preventing them from associating, speaking, socializing and spending time with others, including family members, and by "discourag[ing] socialization, gathering, association, and in-person communication" at public locations, private businesses, and homes. (*See* Compl., ¶¶ 76, 77). They contend the Orders "prevent[ed] them from going to certain businesses, nursing homes, and restaurants" and "restrict[ed] who can associate and engage in society." (*Id.*, ¶ 75). Their allegations state no plausible claim under the First Amendment.

"The First Amendment protects two different forms of association: expressive association and intimate association." *Gaines v. Wardynski*, 871

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F.3d 1203, 1212 (11th Cir. 2017) (*citing McCabe v. Sharrett*, 12 F.3d 1558, 1562-63 (11th Cir. 1994)). "The right of expressive association—the freedom to associate for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, petition for the redress of grievances, and the exercise of religion—is protected by the First Amendment as a necessary corollary of the rights that the amendment protects by its terms." *Id.* (*quoting McCabe*, 12 F.3d at 1563, and *citing Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)). "The right of intimate association ... is 'the freedom to choose to enter into and maintain certain intimate human relationships,' and it is protected from undue government intrusion 'as a fundamental aspect of personal liberty.'" *Id.* (quoting *McCabe*, 12 F.3d at 1563). The Complaint fails to allege an infringement of either.

First, the Complaint is devoid of allegations that the activities Plaintiffs contend have been limited by Governor Kemp's executive orders amount to "expressive association." Plaintiffs point to limitations on their ability to socialize and spend time with others at private and public locations, such as homes, restaurants, nursing homes, and other businesses. (*See* Compl., ¶¶ 75-77). But the Complaint contains no allegations that any of the "associations" to which Plaintiffs vaguely refer were or are undertaken for the purpose of engaging in activities protected by the First Amendment. Simply because an interaction, meeting or gathering "might be described as 'associational' in the common parlance," it does not necessarily follow that it

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involves "the sort of expressive association that the First Amendment has been held to protect." *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (finding no expressive association in the gathering of patrons at a dance hall and observing that the patrons were not "members of any organized association" and there was "no suggestion that the[] patrons take positions on public questions"). Indeed, courts generally refuse to extend First Amendment protection to individuals or organizations that assert the freedom of association in a context that does not include the assertion of a separate First Amendment right. *Id.* (to come within ambit of First Amendment's expressive association protection, "a group must engage in some form of expression, whether it be public or private"). In other words, courts only "recognize[] a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. *See also City of Dallas*, 490 U.S. at 24 (to come within ambit of First Amendment's expressive association protection, "a group must engage in some form of expression, whether it be public or private"). Plaintiffs do not allege such a purpose. Because the complaint does not identify any expressive purpose for the association at issue, the First Amendment right of expressive association is not implicated here.[7]

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[7] To the extent Plaintiffs seek to raise a free speech claim (which does not appear to be the case), it fails for the same basic reason: "Free speech claims require speech." *Belle Garden Estate, LLC v. Northam*, 2021 U.S. Dist. LEXIS

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Second, Plaintiffs' general allegations related to "socializing/associating with close family and others" and "engag[ing] in society" do not constitute to the sort of intimate association sufficient to implicate the First Amendment. (Compl., ¶¶ 75-76). "The Supreme Court has not found a 'generalized right of 'social association'" under the First Amendment's freedom of association. *Henry v. DeSantis*, 461 F. Supp. 3d 1244, 1254 (S.D. Fla. 2020); *see also Chrenko v. Riley*, 560 F. App'x 832, 834 (11th Cir. 2014) ("The Supreme Court has stated, however, that the right to 'social association' is not protected by the First Amendment."). The same is true of Plaintiffs' allegations of interference with business relationships—they do not amount to the sort of intimate associations which implicate First Amendment protections. *See, e.g., Roberts,* 468 U.S. at 620; *Fla. Action Comm., Inc. v. Seminole Cty.*, 212 F. Supp. 3d 1213, 1227 (M.D. Fla. 2016) ("relationships which are completely unattached from the creation and maintenance of a family, such as business and employment relationships and mere acquaintanceships ... are not sufficient to warrant first amendment protection"); *City of Dallas*, 490 U.S. at 24 (patrons of dance hall not engaged in intimate association for First Amendment purposes); *Michaelidis v. Berry*, 502 F. App'x 94, 96-97 (2d Cir. 2013) (relationships between plaintiffs and

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57609, at *11 (W.D. Va. Mar. 26, 2021) (rejecting First Amendment challenge to COVID-19 executive orders). And while the First Amendment protects written and verbal speech as well as expressive conduct, "a plaintiff may only invoke its protections if she is engaged in some form of expression." *Id.* Plaintiffs allege none here.

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"their restaurant customers, and their employees are not sufficiently intimate to implicate [First Amendment] protection"); *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995) (relationships of bar owner with patrons and employees not type of intimate relationship protected by First Amendment).

To be sure, the complaint alleges that at least some of the Plaintiffs were limited in their ability to visit with close family members, including mothers and a daughter, and "intimate association" includes such familial relationships. *See McCabe*, 12 F.3d at 1563 (11th Cir. 1994) ("[a]t a minimum, the right of intimate association encompasses the personal relationships that attend the creation and sustenance of a family," including marriage). But even assuming these allegations sufficiently allege associations protected by the First Amendment, Plaintiffs' First Amendment claim still fails.

The First Amendment's guarantees are not absolute. Even in the absence of a public health crisis, the government may impose content-neutral restrictions on the time, place, or manner of protected speech and association. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Id.* Here, to the extent that the Complaint alleges facts, all of the restrictions set forth in the challenged orders are content neutral. They apply to social and business-related gatherings regardless of expressive content. And their

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purpose—protecting public health and preventing the spread of COVID-19—is unrelated to speech. *See Ward*, 491 U.S. at 791. Thus, the orders are subject only to intermediate scrutiny, which requires that the regulation be narrowly tailored to serve a substantial governmental interest and leave open ample alternative channels for communication. *See, e.g., Ward*, 491 U.S. at 791. That test is easily met here.

First, the State's interest in preventing the spread of COVID-19 and protecting individuals' health is a substantial—indeed, compelling—state interest. *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) ("Stemming the spread of COVID-19 is unquestionably a compelling interest."). Second, the challenged orders are narrowly tailored to serve the State's interest. A regulation is narrowly tailored "so long as [it] promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 782-83. The State's interest in stemming the spread of COVID-19 would surely be achieved less effectively absent the orders' limitations on social gatherings and visitations to nursing homes, inpatient hospice, assisted living facilities, and other locations which house groups at higher risk of serious complications from COVID-19. And because narrow tailoring does not require the least restrictive means of achieving the State's interest, it is of no consequence that less restrictive measures could have been utilized. *See Ward*, 491 U.S. at 798 ("Lest any confusion on the point remain, we reaffirm

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today that a regulation of the time, place, or manner of protected speech . . . need not be the least restrictive or least intrusive means of doing so."). Third, the orders leave open ample methods of communication. They do not limit communication between close family members through audio or visual means, and the orders contain numerous exceptions to the shelter-in-place and visitation provisions, including an exception for visitations during end-of-life circumstances. *See generally, e.g.*, State of Georgia Executive Order (April 2, 2020).

To the extent Governor Kemp's executive orders implicate Plaintiffs' right to intimate association, they are a reasonable time, place and manner restriction on the same. They do not, therefore, violate the First Amendment. Plaintiffs' claim should be dismissed.

B. Plaintiffs fail to state a claim under the Fourth Amendment.

Plaintiffs reference a Fourth Amendment "right to privacy and autonomy" (*see* Compl., ¶ 21), although it is not entirely clear what conduct they contend implicates this right. It appears, however, that the claim is based on the allegation that Governor Kemp's November 20, 2020, executive order permits the State to "share private health details of Georgians, including but not limited to 'individually identifiable COVID-19 vaccination information' with the U.S. Department of Health and Human Services." *Id.*, ¶¶ 46-47. Plaintiffs seem to be alleging that this provision violates the Fourth Amendment by permitting the state to provide medical information in which

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they have a reasonable expectation of privacy to a federal agency. The claim fails.

The Fourth Amendment guarantees that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "The primary purpose of the Fourth Amendment is to 'prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Weaver*, 282 F.3d 302, 309 (4th Cir. 2002) (quoting *INS v. Delgado*, 466 U.S. 210, 215 (1984)). The Supreme Court has noted that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved . . . the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977). But it "has not definitively recognized a constitutional right to informational privacy," *Ezzard v. Eatonton-Putnam Water & Sewer Auth.*, 2013 U.S. Dist. LEXIS 139012, at *53 (M.D. Ga. Sep. 27, 2013), and instead has only "assume[d], without deciding, that the Constitution protects a privacy right of th[is] sort," *NASA v. Nelson*, 562 U.S. 134, 138, 146 n. 9 (2011) (observing that "no ... decision has squarely addressed a constitutional right to informational privacy" and that lower state and federal courts vary in their interpretations of *Whalen*, with some employing a test balancing the individual's interests against the governments and others expressing doubts about the constitutionality of a "right" to informational privacy). *See also*

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Harris v. Thigpen, 941 F.2d 1495, 1513 n.26 (11th Cir. 1991) (recognizing that the "scope" any "right to privacy in preventing the non-consensual disclosure of one's medical condition or diagnosis" is far from settled).

As an initial matter, Defendant is unaware of any Eleventh Circuit ruling squarely recognizing the existence of a constitutional right to "informational privacy." *See Elkins v. Elenz*, 2012 U.S. Dist. LEXIS 100232, at *4-5 (M.D. Fla. July 19, 2012) (observing that, at the time, the split among circuits on the question of whether the Constitution protects "informational privacy" "includes no Eleventh Circuit decision"). Nor is it clear that any such right, to the extent it exists, is grounded in the Fourth Amendment. *See Thigpen*, 941 F.2d at 1513, n.26 (observing that Supreme Court privacy jurisprudence is "grounded primarily in the fourteenth amendment's concept of personal liberty and restrictions upon state action"). Nonetheless, even assuming Plaintiffs have a privacy interest in the medical information at issue, and further assuming that the Fourth Amendment is applicable to such interest, a Fourth Amendment analysis readily shows the absence of any claim here.

The Fourth Amendment protects against "unreasonable" seizures. *See* U.S. Const. amend. IV. Although reasonableness in most Fourth Amendment cases depends on the government's obtaining a warrant and/or probable cause, the Supreme Court has emphasized "the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of

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individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). Searches have also been upheld in "special needs" cases, such as "to protect the country's borders," "to maintain order within prisons," and "to achieve certain administrative purposes." *Padgett v. Donald*, 401 F.3d 1273, 1277 (11th Cir. 2005) (internal citations omitted). *See also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (finding "special needs" searches constitutional in public school context because a warrant requirement "would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools") (internal citations omitted). In determining whether "special needs" are present, courts consider (1) "the nature of the privacy interest upon which the search . . . at issue intrudes," *id.* at 652; (2) "the character of the intrusion that is complained of," *id.* at 658; and (3) "the nature and immediacy of the governmental concern at issue, and the efficacy of [the] means for meeting [that concern]." *Id.* at 660. The Supreme Court has also noted in this regard that a "risk to public safety [that] is substantial and real" may justify "blanket suspicionless searches calibrated to the risk," citing as examples the routine searches conducted at airports and entrances to some official buildings. *See Chandler v. Miller*, 520 U.S. 305, 323 (1997).

Here, the nature of any privacy interest which may exist—i.e., an interest in the non-disclosure of "individually identifiable vaccination

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information"—is readily outweighed by the immediacy of the government concern at issue. Indeed, the executive order at issue only raises the possibility that such information may be released, and, even then, it permits release only to another government agency, the U.S. Department of Health and Human Services. *See* State of Georgia Executive Order, dated November 20, 2020. And the scope of the medical information at issue is narrow—limited only to vaccination information. *Id*. Moreover, the COVID-19 pandemic and the State's corresponding need to coordinate with the Centers for Disease Control for the purpose of efficient management and administration of vaccine planning and distribution" (*see id*. at p. 6), which prompted the executive order at issue, indisputably concerns, and is aimed at addressing, a very real and substantial "risk to public safety." The nature and immediacy of the governmental concern at issue here are, indeed, significant. Because the factors tip the balance in favor of the government, to the extent the challenged disclosure of information implicates the Fourth Amendment, it is reasonable and comports with the Fourth Amendment's requirements. Any Fourth Amendment "informational privacy" claim Plaintiffs seek to raise fails and must be dismissed.[8]

[8] Plaintiffs also vaguely refer to HIPAA (the Health Insurance Portability and Accountability Act) in the Due Process and Takings section of their Complaint. (Compl., ¶ 71 n. 5). But there is no private right of action under this statute. *See Brush v. Miami Beach Healthcare Grp. Ltd.*, 238 F. Supp. 3d 1359, 1367-68 (S.D. Fla. 2017).

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C. Plaintiffs fail to state a claim under the Fifth Amendment.

1. *Plaintiff fails to state a claim under the Takings Clause.*

The Fifth Amendment Takings Clause provides that "private property shall not be taken for public use, without just compensation." U.S. Const. amend. V. It is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Penn Cent. Transp. Co. v. New York City*, 438 U. S. 104, 123-124, (1978), *quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960). Takings are found where the government directly appropriates or physically invades private property, or where a regulation is so onerous that its effect is "tantamount to direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Courts recognize *per-se* regulatory takings in narrow situations where "a state regulation forces a property owner to submit to a permanent physical occupation… or deprives him of all economically beneficial use of his property." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010), *citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 425-426 (1982) and *Lucas v. S.C. Coastal Council*, 505 U. S. 1003, 1019 (1992).[9] Actions outside

[9] A *per se* taking based on regulation is dependent upon the destruction of all economically beneficial uses. Courts have held that "neither deprivation of the most beneficial use of the land… nor a severe decease in the value of property… measures up to an unlawful taking." *Nasser v. Homewood*, 671 F.2d 432, 438 (11th Cir. 1982), *citations omitted.* Indeed, a *per se* regulatory

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these categories are assessed by three factors: (1) the impact of the regulation, (2) the extent of interference with distinct investment-backed expectations, and (3) the character of the government action. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

Plaintiffs' takings claim must be dismissed for several reasons. First, their Complaint fails to point to a constitutionally protected property interest impacted by the Executive Orders. Second, their claims regarding the application of the Executive Orders are not ripe for review, leaving only a facial challenge upon which the Plaintiffs cannot succeed. And finally, their Complaint fails to show that a compensable taking occurred given the nature of the Executive Orders.

i. *Plaintiffs fail to identify a constitutionally protected property interest impacted by the Executive Orders.*

Before bringing a takings claim, a plaintiff must first identify a constitutionally protected property interest, then show that the "deprivation or reduction of that interest constitutes a 'taking.'" *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064, 1066 (11th Cir. 2004). Courts hearing federal takings claims look to existing state laws and the rules that stem from them to determine whether a property interest exists. *Id.*

Plaintiffs fail to identify a particular constitutionally protected property right. While the Plaintiffs list a few examples of actions that do

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taking must leave *"no* productive or economically beneficial use of land" *Lucas,* 505 U.S. at 1017.

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involve protected property interests in Paragraph 65 of their Complaint, they do not allege that any of these actions apply to their case.[10] Regarding their own situations, they provide only a brief general statement of their professions followed by a number of conclusory statements that the Executive Orders caused them economic harm both directly and indirectly. Plaintiffs allege a downturn in business, closures of businesses, and the cancellation of events, all without reference to specific instances or the scope of said closures or downturns. (*See, e.g.*, Compl. ¶¶ 66, 69, 70). They make no specific, factual allegations as to what constitutionally-protected property rights are at issue, nor do they state with any specificity the applicability of the Orders to these protected interests. Plaintiffs are unable to make a § 1983 claim under the Takings Clause through such vague assertions. *See, e.g.*, *Cummings v. Desantis*, 2020 U.S. Dist. LEXIS 150120, *8-9 (M.D. Fla. 2020) (plaintiff failed to state a takings claim in relying only on broad allegations not specific to the plaintiff).

Plaintiffs do cite to a case in support of their claim, but fail to elaborate upon either the holding of the case or how it applies to their claim. (Compl. n. 1[11]). In fact, the case cited has a holding opposite to many of the averments made by the Plaintiffs. In the case of *Goldrush II v. City of Marietta*, the

[10] Plaintiffs cite the removal of a permit, civil forfeiture, probation revocation, and incarceration. (Compl. ¶ 65).

[11] The Complaint cites *Goldrush II v. City of Marietta*, 267 Ga. 683 (1997), for a "discussion of expectations of business owners' rights in operating a business." (Compl. n. 1).

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Georgia Supreme Court held that while vested property rights do attach to some aspects of operating a business, business owners do not have a vested right to operate their business unchanged by government regulation. *Goldrush II*, 267 Ga. 683, 696-698. Indeed, the court includes an extended quotation relevant to the clams made by Plaintiffs:

> In organized society, every [person] holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense.

Goldrush II, 267 Ga. at 697, *quoting* Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union, pp. 746-747 (Vol. 2) (8th ed. 1927).

By failing to allege a vested property interest protected by law, Plaintiffs fail to meet the threshold of bringing action under the Takings Clause, and their claims should be dismissed.

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ii. *Plaintiffs' Takings claims are not ripe for an as-applied challenge, and fail to state a facial challenge to the "mere enactment" of the Orders.*

"[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations *to the property at issue*." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, (1985) (emphasis added).[12] As inquiries into takings claims are necessarily "ad hoc, factual inquiries," the Supreme Court has repeatedly held that it is critical that they only be conducted "with respect to specific property, and the particular economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981). This limitation allows state entities the opportunity to exercise discretion in the reach and enforcement of a regulation, including whether waivers or exemptions may be granted in particular circumstances. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-621 (2001). Where a plaintiff fails to show a "concrete controversy" regarding a specific application of a regulation, the court is left to decide only whether the "mere enactment" of the regulation is a 'taking' through a facial challenge of the regulation. *Hodel*, 452 U.S. at 295, *quoting Agins v. Tiburon*, 447 U.S. 255, 260 (1980). Facial

[12] *Knick v. Twp. of Scott*, 139 S. Ct. 2162, (2019), which overruled *Williamson County*'s requirements that a plaintiff exhaust state remedies before bringing a takings claim, explicitly leaves intact the finality requirement enunciated by *Williamson County*. See *Knick*, 139 S. Ct. at 2169.

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challenges are "an uphill battle" with a heavy burden of proof, and a plaintiff must show that the regulation amounts to a *per se* taking that eliminates "all viable economic use" of their property to succeed. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002), quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, (1987).

Here, Plaintiffs have not alleged any action, by Governor Kemp or any person, to enforce the Executive Orders. They allege generally that the Orders "[caused] their businesses to temporarily or permanently close, or [restricted] revenue to the businesses" (Compl. ¶ 69), but they do not allege any action specifically forcing those closures. They allege that their rights to "participate and associate with customers" (Compl. ¶ 66) were infringed, but do not allege any instances where actual enforcement of the Executive Orders specifically and directly impacted their ability to interact with their customers. They allege that the Orders "required people to stay at home, or [forced] events to be cancelled" (Compl. ¶ 70), but do not cite to a single incident where Governor Kemp or any other individual under his authority directly required a specific person to remain at home, or mandated the cancellation of an event under the auspices of the Executive Orders. Instead, Plaintiffs merely plead broad assertions of generalized financial harm that they attribute to the Orders through conclusory statements of illegality. Without pleading a specific enforcement of the regulation that applied the regulation to them directly, Plaintiffs' claims are not ripe for judicial review

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as an “as-applied” challenge. They are left only with the ability to make a facial challenge to the Orders.

To succeed on this facial challenge, Plaintiffs would need to show that the Orders mandate a permanent physical intrusion upon their property, or that the Orders eliminate all viable economic use of their property. Plaintiffs have not alleged any physical intrusion or seizure of their property, and they have not provided any factual pleadings that would suggest the Orders left them *“no* productive or economically beneficial use” of their property. *Lucas,* 505 U.S. at 1017. Additionally, they have failed to point to any specific portion of the Orders that could be used support such an allegation. For these reasons, their facial challenge must fail.

iii. *Plaintiffs’ Complaint fails to state a claim that the Orders constitute a Taking.*

Even if Plaintiffs had presented allegations sufficient to assert an action under the Takings Clause, they would not succeed in showing that a taking has occurred. As argued above, the Plaintiffs have not alleged or shown that the Orders fall into either category of *per se* regulatory takings. Thus, we are left with the three-pronged test enunciated in *Penn Central.*

Under this test’s first two prongs, a plaintiff must show that the economic impact of a regulation and its interference with their legitimate property interests are “of such a magnitude that ‘there must be an exercise of eminent domain and compensation to sustain [it].’” *Penn. Central. Transp. Co.*, 438 U.S. at 136, *quoting Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,

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413 (1922). Under the third prong, the character of the government action at issue is assessed. Actions that "may be characterized as acquisitions of resources" are more likely to be takings, *Penn. Cent. Transp. Co.*, 488 U.S. at 128, but a loss or diminution of property value does not require compensation when accomplished by government action under a power "other than the power of eminent domain," such as the police power. *Bennis v. Michigan*, 516 U.S. 442, 452 (1996). Losses suffered by a property owner that "[arise] from a public program that adjusts the benefits and burdens of economic life to promote the common good… [do] not constitute a taking requiring Government compensation." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986).

In a recent decision upholding business closure orders related to COVID-19, the Tennessee Western District Court found that

> the Supreme Court has consistently stated that the Takings Clause does not require compensation when a government entity validly exercises its police powers. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) ("[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." (citations omitted)); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962) ("If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."); *Mugler* [*v. Kansas*,] 123 U.S.

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> [623,] 668-69 [(1887)] ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."); *see also Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1215 (N.D. Fla. 2020) (collecting cases) (finding that plaintiffs did not allege a compensable taking of their property where an amendment to the Florida Constitution prohibiting commercial dog racing in connection with wagering was a valid exercise of Florida's police powers).

TJM 64, Inc. v. Shelby Cty. Mayor, 2021 U.S. Dist. LEXIS 42750, at *8 (W.D. Tenn. Mar. 8, 2021).[13]

The Complaint does not bear adequate factual allegations to even begin to engage in analysis under the *Penn Central* test, which requires the court to assess the severity of the regulation's impact on the Plaintiffs and how it interferes with their investment-backed expectations. Plaintiffs fail to make a single factual allegation regarding the extent or nature of the impact of the regulations on their individual businesses, relying instead on vague, conclusory assertions of economic losses. Without more, Plaintiffs cannot show that the impact's extent and nature rises to the level of a taking.

Moreover, even if the Plaintiffs did provide specific factual allegations, they would not be able to show a compensable taking based on the nature of the Executive Orders, which are clearly temporary measures promulgated

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[13] The court in *TJM 64* further provides a collection of decisions from multiple courts, each holding that police power actions "cannot constitute a taking for 'public use,'" and applies this reasoning to a COVID-19 business closure order. *TJM 64*, 2021 U.S. Dist. LEXIS 42750 at *9.

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under the state's police powers that do not require compensation. "It is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens.'" *Hill v. Colorado*, 530 U.S. 703, 715, (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 476, (1996)). The Orders were clearly issued in an effort to curb the spread COVID-19 and protect the citizens of Georgia from the serious risk it posed to their health and safety during a global health crisis, and Plaintiffs have not alleged facts to contradict that.

A number of courts have entertained similar claims that COVID-related executive orders amounted to takings, and they have overwhelmingly upheld the restrictions.[14] This court would be following a well-trod path in recognizing that the impact of the Executive Orders passed in Georgia do not amount to a legal taking.

2. *Plaintiff fails to state a claim under the Fifth Amendment Due Process Clause.*

The Fifth Amendment applies only to violations of constitutional rights by the United States or a federal actor. *See Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000). The Fourteenth Amendment has its own due process clause, specifically applicable to the States. This is discussed below.

[14] For a extensive lists of district court cases upholding COVID-related orders and their restrictions, please see *McCarthy v. Cuomo*, 2020 U.S.Dist. LEXIS 107195, *9-10 (E.D.N.Y. 2020) and *TJM 64*, 2021 U.S. Dist. LEXIS 42750 at *9.

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D. Plaintiffs fail to state a claim under the Ninth and Tenth Amendments.

Plaintiffs vaguely allege that Governor Kemp's actions "directly violate[] the basic human rights and freedoms to not be infringed by any government," citing the Ninth and Tenth Amendments, the catch-all provisions of the U.S. Constitution. (Compl, ¶ 25). It is not clear what rights they mean; most of the rights they allege have some basis in some more specific provision of the Constitution. There is no cognizable cause of action here.

The Tenth Amendment

> states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

United States v. *Darby*, 312 U.S. 100, 124 (1941). Similarly, the Ninth Amendment does not independently secure any constitutional right that can form the basis for a civil rights claim. *Serpentfoot v. Unum Life Ins. Co. of Am.*, 2008 U.S. Dist. LEXIS 143815, *27-28, (N.D. Ga. Sept. 2, 2008).

To the extent that Plaintiffs intend one of these Amendments to be the source of one of the more nebulous rights they assert, the right to travel, their claims are no more availing.

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"The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence. *Saenz v. Roe*, 526 U.S. 489, 498 (1999), *citing United States v. Guest*, 383 U.S. 745, 757 (1966). This right has three components:

> [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz, 526 U.S. at 500.

On the other hand,

> In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order .... This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress.

Hendrick v. State of Maryland, 235 U.S. 610, 622-23 (1915).

Plaintiffs here invoke none of the recognized components of any cognizable right to travel. Instead, they complain of the intrastate applications of the State's police powers, invoked for the preservation of health and safety. No such violation is alleged in the Complaint.

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E. Plaintiffs fail to state a claim under the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. "Of course, most laws differentiate in some fashion between classes of persons," and the Clause does not forbid all such classifications. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). As a "general rule," social and economic legislation is reviewed under a rational-basis standard. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Rational-basis review gives way to heightened scrutiny only if the law infringes on a "fundamental constitutional right" or classifies persons based on a "suspect" characteristic. *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012). The challenged classifications here—namely, defining some, but not all, businesses and industries as "Essential Services" and "Critical Infrastructure" (*see* Compl., ¶ 60)—do neither.

First, "the regulation of business operations does not 'impinge on fundamental rights.'" *Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 537 (E.D.N.C. June 8, 2020) (no fundamental right implicated in equal protection challenge to COVID executive order requiring plaintiffs' businesses to remain closed while allowing certain restaurants, breweries, wineries, and distilleries to reopen); *Alsop v. DeSantis*, 2020 U.S. Dist. LEXIS 152083, at *6 (M.D. Fla. Aug. 21, 2020) ("restricting a business's permissible mode of operation impinges no 'fundamental right'"). The Constitution "does not

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guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases." *Nebbia v. New York*, 291 U.S. 502, 527-28 (1934). *See also City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) (the right to pursue a business is not a fundamental right for the purposes of equal protection analysis); *Pollard v. Cockrell*, 578 F.2d 1002, 1012 (5th Cir. 1978) (rejecting the notion of a fundamental "right to pursue a legitimate business"); *Harper v. Lindsay*, 616 F.2d 849, 854 (5th Cir. 1980) (the right to pursue a business is not a fundamental right for the purposes of equal protection analysis). Second, the challenged classifications are not based on any suspect or quasi-suspect class, such as race, sex, religion, alienage, legitimacy or national origin. They thus need only be rationally related to a legitimate state interest. That test is easily met here.

A classification survives a rational-basis inquiry "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour*, 566 U.S. at 680. This test is "highly deferential" to the government. *Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 (11th Cir. 2002). It "accords 'wide latitude' to policy determinations," *see Dukes*, 427 U.S. at 303, and does not license courts to "judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Indeed, a classification "must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*,

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508 U.S. 307, 313 (1993) (emphasis added). And where, as here, a state official "undertakes to act in areas fraught with medical and scientific uncertainties," the official enjoys an "especially broad" latitude. *South Bay,* 140 S. Ct. 1613 (citing *Marshall v. United States*, 414 U.S. 417, 427 (1974)). A rule "purporting to have been enacted to protect the public health" is subject to challenge only if the rule "has no real or substantial relation to those objects, or is, beyond all question, a plain palpable invasion of rights secured by the fundamental law." *Jacobson v. Massachusetts*, 197 U.S. 11, 37-38 (1905) (upholding a compulsory vaccination law enacted during the smallpox epidemic). As one court recently observed, a governor responding to the COVID-19 pandemic enjoys "awesome responsibility" because "[t]here are no manuals on how to handle crises." *Henry v. DeSantis*, 461 F. Supp. 3d 1244, 1257 (S.D. Fla. 2020) (rejecting equal protection challenge to Governor of Florida's emergency-powers authority during a public-health crisis to compel businesses to close and to restrict the free movement of residents).

Moreover, a state "has no obligation to produce evidence" to make a showing of rationality, and the architect of the classification need not have ever "actually articulate[d] … the purpose or rationale supporting [it]." *Heller*, 509 U.S. at 320 (quoting *Nordlinger*, 505 U.S. at 15); *see also Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1384 (S.D. Fla. 2001) ("Under the rational basis test, the government has no obligation to produce evidence to sustain the rationality of a statutory classification."). Instead, rational-basis analysis

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starts with the presumption that the challenged provision satisfies equal protection, and the "burden is on the one attacking [it] to negative *every conceivable basis* which might support it whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320 (emphasis added); *see also FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993) ("those attacking the rationality of the legislative classification have the burden "'to negative every conceivable basis which might support it'") (*quoting Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The rational basis standard is easily met here. Governor Kemp's Executive Orders were implemented following a Declaration of a Public Health State of Emergency in Georgia, with which the Georgia General Assembly concurred by joint resolution. *See, e.g.*, State of Georgia Executive Order (April 2, 2020), at 1-2. There is nothing arbitrary about the Governor's actions, which were based on input and findings from the Georgia Department of Public Health, the Centers for Disease Control and Prevention (CDC), and the Governor's Coronavirus Task Force. *See id.* (citing the Department of Health's determination that COVID-19 was spreading throughout the state and the CDC's determination that certain people and groups may be at risk of serious complications from the disease). And the restrictions were implemented in an effort to limit the spread of COVID-19 and the rising number of cases in Georgia by limiting person-to-person contact, and thereby protecting the health and safety of individuals living in

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the state. For example, as stated in the original COVID-19 Executive Order, entitled "Declaration of Public Health State of Emergency," explaining the need for the Declaration:

> WHEREAS: In late 2019, a new and significant outbreak of respiratory disease caused by a novel coronavirus emerged in Wuhan, China; and
>
> WHEREAS: The respiratory disease caused by the novel coronavirus, known as "COVID-19," is an infections virus that can spread from person-to-person and can result in serious illness or death; and
>
> WHEREAS: On March 13, 2020, President Donald Trump declared the outbreak of COVID-19 a national emergency; and
>
> WHEREAS: The Centers for Disease Control and Prevention has identified the potential public health threat posed by COVID-19 both globally and in the United States, and has advised that the person-to-person spread of COVID-19 will continue to occur globally, including within the United States; and
>
> WHEREAS: The Centers for Disease Control and Prevention has noted that COVID-19 is proliferating via "community spread," meaning people have contracted the virus in areas of Georgia as a result of direct or indirect contact with infected persons, including some who are not sure how or where they became infected; ….

Executive Order 03.14.20.01 at 1.

Addressing this public health emergency is most certainly a "legitimate" government interest. *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) ("Stemming the

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spread of COVID-19 is unquestionably a compelling interest"); *In re Abbott*, 954 F.3d 772, 795 (5th Cir. 2020) ("[The governor's] interest in protecting public health during such a time is at its zenith"). And there is certainly some basis for the Order's distinction between non-essential and essential businesses, and between critical and non-critical infrastructure. Indeed, the Governor could have determined that spread of the highly-contagious disease would be slowed by limiting interaction among residents through a shelter-in-place order and limitations on business operations, but that exceptions were necessary to enable residents to obtain items such as food, medical supplies, mediations, products needed to maintain safety and sanitation, equipment to work from home, and similar provisions.

Plaintiffs' allegations do not negate this. They allege that the differing treatment of certain types of businesses and industries "fail[s] to have even a rational basis." (Compl., ¶ 60). But this is wholly conclusory, and to survive a motion to dismiss for failure to state a claim, a plaintiff "must offer more than a 'conclusory assertion that the policy is 'without rational basis.'" *Dixon v. D.C.*, 666 F.3d 1337, 1342 (D.C. Cir. 2011) (quoting *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir.1992)). *See also Serpentfoot v. Rome City Comm'n*, 322 F. App'x 801, 806 (11th Cir. 2009) (affirming dismissal of equal-protection claim because the complaint "cited no specific facts" to support a "purely legal conclusion" that the law in question was "arbitrary and capricious and does not substantially relate to the public welfare"). To be

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sure, Plaintiffs also allege that COVID-19 could "potentially be[] spread by any person, not just those people working in certain industries or without certain regulations." (Compl., ¶ 60). They complain, in essence, that there is an "imperfect fit" between the classification and its conceivable ends. *Heller*, 509 U.S. at 321. The law is clear, however, that an "imperfect fit" is not fatal under rational basis scrutiny. *See Heller*, 509 U.S. at 321 (plaintiff's burden cannot be met by showing an "imperfect fit" between the classification and its conceivable ends). On the contrary, "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* The Orders do not, in other words, violate the Equal Protection Clause simply because they do not close every business where transmission is possible. *Talleywhacker*, 465 F. Supp. 3d at 539 (the decision to close certain industries and not others did not violate the Equal Protection Clause because the governor "need[s] to consider a myriad of factors, sometimes in tension with each other, in balancing multiple public needs across the spectrum of the state economy and social fabric.").[15]

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[15] Courts in the wake of the current pandemic have upheld executive orders mandating differential treatment within a single industry, as well as between different types of business establishments open to the public. *See e.g., Talleywhacker*, 465 F. Supp. 3d 523, 538 (E.D.N.C. June 8, 2020) (executive order which required entertainment and fitness facilities to remain closed, but allowed restaurants, breweries, wineries, and distilleries to reopen, along with personal care, grooming, and tattoo businesses, did not violate Equal Protection Clause); *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020) (upholding executive order that required health care professionals to postpone non-essential surgeries and procedures in order to preserve critical medial resources for treatment of COVID-19 patients); *Altman v. Cty. of Santa*

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Because there is at least one conceivable basis for the classifications in Governor Kemp's executive orders, the orders pass constitutional muster under rational basis review. Plaintiffs' equal protection claim must be dismissed.

F. Plaintiffs fail to state a claim under the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Two types of due process exist: substantive and procedural. *See, e.g., McKinney v. Pate*, 20 F.3d 1550, 1555 (11th Cir. 1994). The Complaint does state whether Plaintiffs are asserting a substantive or procedural due process claim, although Plaintiffs' repeated reference to an absence of notice and an opportunity to be heard before implementation of challenged orders suggest the latter. Regardless, the Complaint fails to state a claim for violation of either type of due process.

Clara, 2020 U.S. Dist. LEXIS 97535 (N.D. Cal. June 2, 2020) (upholding orders that "exempted 21 categories of 'essential businesses,' such as grocery stores, health care operations, and banks," while "firearm and ammunition retailers and shooting ranges were not exempted"); *Best Supplement Guide, LLC v. Newsom*, 2020 U.S. Dist. LEXIS 90608 (E.D. Cal. May 22, 2020) (upholding executive order that required gyms to remain closed but allowed other businesses to reopen); *Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22 (D. Me. May 29, 2020) (upholding executive order despite plaintiffs' claim that it "discriminates-arbitrarily [] in favor of business in rural counties").

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1. Substantive Due Process

"[S]ubstantive due process has two strands—one that protects against deprivation of fundamental rights and one that protects against arbitrary legislation." *Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292, 1297 (11th Cir. 2019). The first strand is implicated only when a "fundamental right" is at issue—i.e., a right so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *See Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937); *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994). The Supreme Court has recognized that fundamental rights include those guaranteed by the Bill of Rights as well as certain "liberty" and privacy interests implicit in the due process clause, including "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The second strand of substantive due process is implicated by the deprivation of non-fundamental rights by a legislative act which is oppressive, irrational and arbitrary. *See, e.g., Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292, 1299 (11th Cir. 2019); *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279-80 (11th Cir. 2014). Because challenges under this strand do not implicate fundamental rights, they are reviewed under a rational basis standard. *See, e.g., Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 945 (11th Cir. 2013) ("When a challenged law does not infringe upon a fundamental

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right, we review substantive due process challenges under the rational basis standard.").

The Complaint's allegations fail to implicate either form of substantive due process protection. As to the first, Plaintiffs do not allege the deprivation of a fundamental right. Their "due process" claim centers on the alleged loss of business revenue and business opportunities which followed implementation of the Orders. *See* Compl., ¶¶ 65-70. But this does not describe a fundamental right. *See Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010) ("[W]e have held for many years (logically or not) that the 'liberties' protected by Substantive Due Process do not include economic liberties.") (citing *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).[16]

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[16] Notably, numerous courts adjudicating substantive due process challenges to government orders instituted to combat COVID-19 have held that there is no fundamental right to pursue a career or run a business. *See Henry v. DeSantis*, 461 F. Supp. 3d 1244, 1255 (S.D. Fla. 2020) (order closing bars and restaurants did not violate the plaintiff's substantive due process rights because '[t]ime and again, the Supreme Court has determined that there is no fundamental right to a job, or right to work"); *4 Aces Enterprises, LLC v. Edwards*, 2020 U.S. Dist. LEXIS 147721 (E.D. La. Aug. 17, 2020) (rejecting the plaintiff's argument that it had a fundamental right to run a business for purposes of a substantive due process claim); *Vill. of Orland Park v. Pritzker*, 475 F. Supp. 3d 866, 884 (N.D. Ill. 2020) ("the right to work is not a fundamental right for purposes of the plaintiffs' substantive due process claim"); *Prof'l Beauty Fed'n of California v. Newsom*, 2020 U.S. Dist. LEXIS 102019 (C.D. Cal. June 8, 2020) ("The right to work is not a fundamental right; laws affecting the right to work are subject to rational basis review."); *In SH3 Health Consulting, LLC v. Page*, 459 F. Supp. 3d 1212 (E.D. Mo. 2020) ("The Eighth Circuit has consistently rejected right-to-conduct-business/right-to-earn-a-living due-process claims.").

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As to the second, even if Plaintiffs could establish some protected interest which was denied by the challenged orders, and even assuming the orders are sufficiently legislative in nature to constitute a "legislative act" for purposes of substantive due process,[17] the claim fails. That is because implementation of the orders does not amount to conduct which is arbitrary, capricious, and without rational basis. "The relevant question for consideration is whether there existed a rational basis for [the denial] or, phrased in the alternative, whether the . . . action bore no substantial relation to the general welfare." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989). Here, as shown above in connection with Plaintiffs' equal protection claim, the challenged Orders are clearly related to the general welfare and are rationally related to Georgia's legitimate interest in limiting the spread of COVID-19. In other words, they readily pass a rational basis inquiry. "When the legislative action has a rational basis, the substantive due process arbitrary and capricious analysis ends." *LHR Farms, Inc. v. White Cty.*, 2012 U.S. Dist. LEXIS 197999, at *77 (N.D. Ga. Mar. 22, 2012). Such is the case here. To the extent Plaintiffs raise a substantive due process challenge to the orders, it fails. Any such claim must be dismissed.

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[17] The Eleventh Circuit discussed the distinction between legislative and executive acts for purposes of substantive due process in *McKinney*, explaining that whereas legislative acts "generally apply to a larger segment of—if not all of—society," executive acts "characteristically apply to a limited number of persons (and often to only one person)." *McKinney*, 20 F.3d at 1557 n.9.

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2. Procedural Due Process

Procedural due process is a guarantee of fair procedures whereby the state may not deprive a person of life, liberty or property without providing "appropriate procedural safeguards." *Daniels v. Williams*, 474 U.S. 327 (1986). "The fundamental requirement of [procedural] due process is the opportunity to be heard." *Parratt v. Taylor*, 451 U.S. 527, 540 (1981). A court's analysis of a procedural due process claim proceeds in two steps: (1) determine whether there exists a liberty or property interest of which a person has been deprived and, if so, (2) determine whether the procedures followed by the State were constitutionally sufficient. *See, e.g., New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1287-88 (11th Cir. 2020) (citing *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011)). Notably, procedural due process violations are not complete unless and until the state refuses to provide due process. *See, e.g., McKinney*, 20 F.3d at 1562. Thus, the state can cure a procedural deprivation by providing a later procedural remedy. *Id.* at 1557. Only when the state refuses to provide a process sufficient to remedy the deprivation does a constitutional violation become actionable under § 1983. *Id.*

Here, Plaintiffs complain that they were not provided notice and an opportunity to be heard prior to the issuance of the challenged executive orders. *See* Compl., 65-70. And they appear to claim that the orders resulted in deprivations of "property" interests – in particular, the temporary or

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permanent closure of their businesses, reduced business revenue, and the cancellation of income-generating events. (*See* Compl., ¶¶ 65-70). Their allegations are insufficient to state a procedural due process claim for several reasons.

As an initial matter, the orders at issue do not amount to adjudicative action; instead, they are more akin to legislative action. Thus, the procedural protections of the Due Process Clause are inapplicable here. "[T]he Supreme Court has long distinguished between legislative and adjudicative action" when deciding "what the Due Process Clause requires." *Jones v. Governor of Florida*, 975 F.3d 1016, 1048 (11th Cir. 2020) (*citing Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915)). As the Eleventh Circuit recently observed, "[t]he State often deprives persons of liberty or property through legislative action—general laws that apply 'to more than a few people.'" *Id.* (quoting *Bi-Metallic*, 239 U.S. at 445). "When the State does so, the affected persons are not entitled to any process beyond that provided by the legislative process." *Id.* "In contrast, the Due Process Clause may require individual process when a State deprives persons of liberty or property through adjudicative actions—those that concern a 'relatively small number of persons' who are 'exceptionally affected, in each case upon individual grounds,' by the state action." *Id.* (quoting *Bi-Metallic*, 239 U.S. at 446).

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Here, Governor Kemp declared a Public Health State of Emergency on March 14, 2020, with which the Georgia General Assembly concurred by joint resolution on March 16, 2020. *See, e.g.*, Executive Order 04.02.20.01 at 1-2. Governor Kemp then issued the challenged executive orders pursuant to the powers vested in him by O.C.G.A. § 38-3-51. *Id.* Although the Georgia General Assembly has the authority to terminate the state of emergency, *see* O.C.G.A. § 38-3-51(a), it has not done so. And while Governor Kemp's Orders do not amount to legislative acts, they neither single out Plaintiffs' businesses nor adjudicate facts in Plaintiffs' cases. On the contrary, they apply generally to businesses and individuals across the State of Georgia. The Orders are, while not legislation *per se*, legislative in nature. Accordingly, they are not subject to the notice and hearing requirements of the due process clause. *See 75 Acres, LLC v. Miami-Dade County*, 338 F.3d 1288, 1296 (11th Cir. 2003) (finding government action legislative because it was "enacted by a legislative body" performing a "fundamentally legislative" function or, alternatively, because it was "generally applicable" and "prospective in nature").[18]

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[18] Several courts considering procedural due process challenges to similar COVID-19 executive orders have found the orders to be legislative in nature and not within the purview of procedural due process protections. *See, e.g., Our Wicked Lady LLC v. Cuomo*, 2021 U.S. Dist. LEXIS 44505, at *13 (S.D.N.Y. Mar. 9, 2021) ("The challenged orders are legislative in nature because they apply prospectively to all restaurants and fitness centers in the City" and thus "the orders are not subject to the notice and hearing requirements that apply to adjudicative functions of government"); *Culinary Studios, Inc. v. Newsom*, 2021 U.S. Dist. LEXIS 23775, at *58 (E.D. Cal. Feb.

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Second, even assuming procedural due process protections apply here, Plaintiffs identify no constitutionally cognizable life, liberty, or property interest of which they have been deprived. To be sure, they complain that restrictions imposed by the orders caused their businesses to "temporarily and permanently close" and limited their business volume and revenue. (*See* Compl., ¶¶ 65-70). While "[t]he assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment," "business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). *See also Pollard v. Cockrell*, 578 F.2d 1002, 1012 (5th Cir. 1978) (rejecting the "notion" of a fundamental "right to pursue a legitimate business").

Finally, even if Governor Kemp's executive orders deprived the Plaintiffs of a protectable interest in property, the State provides Plaintiffs with an adequate post-deprivation remedy. In particular, O.C.G.A. § 51-10-1 provides that "[t]he owner of personalty is entitled to its possession," and "[a]ny deprivation of such possession is a tort for which an action lies."

5, 2021) (finding that no plausible procedural due process challenge could be raised to executive orders placing restrictions on business in light of COVID-19 "because the emergency orders at issue are legislative in nature"); *Steel MMA, LLC v. Newsom*, 2021 U.S. Dist. LEXIS 37709, at *13 (S.D. Cal. Mar. 1, 2021) ("The COVID-related restrictions being challenged here are legislative in nature because they affect all citizens of California and at their most particular direct restrictions towards nationwide groups and classes of individuals and businesses.") (internal quotations omitted).

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O.C.G.A. § 51-10-1. Because the state provides an adequate post-deprivation remedy when a plaintiff claims that the state has retained his property without due process of law, no due process claim exists here. *See Lindsey v. Storey*, 936 F.2d 554, 561 (11th Cir. 1991); *see also Allen v. Peal*, 2012 U.S. Dist. LEXIS 97150 (S.D. Ga. June 18, 2012) (dismissing a due process claim for lost or seized personal property because O.C.G.A. § 51-10-1 provides an adequate post-deprivation remedy); *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 3204, 82 L. Ed. 2d 393 (1984) (even assuming the retention of plaintiffs' personal property is wrongful, no procedural due process violation has occurred "if a meaningful post-deprivation remedy for the loss is available").

G. Plaintiffs fail to state a claim under the Commerce Clause.

The Commerce Clause grants Congress the power "to regulate Commerce with foreign nations, and among the several states, and with Indian Tribes." Art. I, § 8, cl. 3. This grant of power to Congress has been held to create an implicit limitation on the power of the states to regulate interstate commerce. *Lewis v. BT Investment Managers, Inc.*, 447 US 27, 35 (1980). This "negative aspect" of the Commerce Clause has come to be known to as the dormant Commerce Clause, and it is used to review state laws that are alleged to burden out-of-state businesses to protect in-state economic interests in violation of the Commerce Clause. *Bainbridge v. Turner*, 311 F.3d 1104, 1108 (11th Cir. 2002). S*ee also New Energy Co. of Ind. v. Limbach*, 486

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U.S. 269, 273-74 (1988); *Cachia v. Islamorada*, 542 F.3d 839, 842 (11th Cir. 2008). In terms of a § 1983 claim, the Supreme Court has held that the Commerce Clause creates a right to engage in interstate commerce unmolested by unduly restrictive state regulations. *Dennis v. Higgins,* 498 U.S. 439, 448 (1991). This right is vested in individuals participating in interstate commerce. *Id.* at 459-450.

Plaintiffs fail to make a claim under the Commerce Clause. They make conclusory statements that the Orders "are directed specifically at restricting and harming commerce," but in the very next paragraph accuse the Governor of "allowing businesses run in foreign states… to operate with impunity." Compl. ¶ 56-57.[19] Beyond broad allegations that that the Orders impact the ability of Georgians to participate in commerce by restricting travel, the Complaint fails to make a single factual allegation as how the Orders regulate interstate commerce by burdening out-of-state interests. Indeed, Plaintiffs' accusation that the Defendant is "allowing businesses run in foreign states… to operate with impunity" is fatal to their claims under the Commerce Clause-by their own admission, the Plaintiffs acknowledge that Defendant is not regulating out-of-state businesses in a way that protects their in-state businesses.

[19] It appears that the Plaintiffs have conflated the more specific meaning of "commerce" as used in the titling of the Commerce Clause, where it refers to interstate commercial activity, and the more general definition of the word.

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Not only do the Plaintiffs fail to show that the Orders regulate interstate commerce, they fail to allege that any of them are within the class protected by § 1983 application of the Commerce Clause, much less that they have suffered a harm. There are no allegations showing involvement of any individual Plaintiff in interstate commerce, and the sparse factual allegations provided seem to indicate that they are engaged in purely in-state commerce.[20]

Viewed without Plaintiffs' conclusory assertions of harm and illegality, the claim is essentially that the Defendant has regulated people and businesses located in the state of Georgia and refrained from regulating out-of-state businesses. This is plainly the arrangement contemplated by the Commerce Clause, and therefore fails to state a claim.

Should this Court decide to continue in analysis under applicable Commerce Clause jurisprudence, the Plaintiffs must first show whether the law at issue discriminates against interstate commerce on its face, or in its purpose and effect. *See, e.g., Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725, 730 (M.D. Ga. 1992) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). A facially discriminatory law is "virtually *per se* invalid… and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable

[20] Listed occupations include barber, wedding-band leader, martial arts instructor, and owners of pedicab and dance-instruction businesses. (Compl. ¶¶ 27-31).

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nondiscriminatory alternatives." *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 942 (11th Cir. 2013) (internal quotations omitted). But if a state law "regulates even-handedly" and "its effects on interstate commerce are only incidental," the law "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* (citing *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)).

Here, Plaintiffs have not alleged any facts showing the Orders to be facially discriminatory against interstate commerce. They ask the Court to incorporate a large and still growing volume of Executive Orders into their pleadings via judicial notice. They do not cite to a single specific portion of any order that is facially discriminatory against interstate commerce. If there is facially discriminatory language tucked away in one the Executive Orders over which the Plaintiffs have cried foul, the Plaintiffs have failed to plead it with the specificity required to allow Defendant to frame a responsive pleading. They merely conclude broadly that the Orders are discriminatory because they only apply to Georgia citizens. (Compl. ¶ 57). That being said, even a cursory review of the Orders would have shown Plaintiffs that the Orders outlining COVID-19 regulation specifically and repeatedly state that they apply to both residents and visitors of Georgia insofar as they designate classes of individuals to which they apply. *See, e.g.,* Executive Order 07.31.20.02 at 10.

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In light of this plainly non-discriminatory regulation, Plaintiffs must show that any incidental burden on interstate commerce is "clearly excessive" in relation to the putative local benefits. Plaintiffs actually allege burden on interstate commerce only insofar as they purport the Orders force "economic isolation" on Georgians, thereby preventing them from engaging in interstate commerce. With regard to impacts upon their own businesses, Plaintiffs provide nothing beyond vague assertions of economic harm. Questions of standing aside,[21] Plaintiffs assert that this unspecified burden, if quantified, would clearly outweigh Georgia's interest in slowing the spread of COVID-19, a highly contagious new virus that has infected over a million Georgians, killing over eighteen-thousand of them.[22] Nationally, COVID has claimed the lives of well over a half-million Americans.[23] The Supreme Court of the United States referred to stemming the impact of COVID-19 as being "unquestionably a compelling interest" when claimed by New York in justifying similar restrictions via executive order. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206, 141 S. Ct. 63, 67 (2020) (per curiam). The Plaintiffs simply cannot show that any incidental burden of the

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[21] Plaintiffs have alleged business interests that are purely in-state in nature, and they fail to allege with any specificity a harm caused to them by this purported burden on interstate commerce.

[22] Georgia Coronavirus Map and Case Count, https://www.nytimes.com/ interactive/2020/us/georgia-coronavirus-cases.html (last visited March 31, 2021).

[23] Coronavirus in the U.S.: Latest Map and Case Count, https://www.nytimes.com/ interactive/2020/us/coronavirus-us-cases.html. (last visited March 31, 2021).

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Executive Orders on interstate commerce is clearly excessive as compared to this compelling government interest.

It is plain that the Plaintiffs are attempting to shoehorn their dissatisfaction with the Defendant into the Commerce Clause, even though their claimed injuries and the regulation they cite as causing them are entirely in-state in nature. As pled, Plaintiffs are far from meeting their burden to plead a claim under the Commerce Clause, and their claims should be dismissed.

H. Governor Kemp is entitled to qualified immunity from Plaintiffs' § 1983 claims for damages.

Government officials performing discretionary functions generally are shielded from liability for civil damages under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998). The test for qualified immunity is two-pronged: (1) was the government official acting within the scope of his discretionary authority; and (2) did the official's conduct violate "clearly established law." *Maggio v. Sipple*, 211 F. 3d 1346, 1350 (11th Cir. 2000). "Once the defendant establishes that []he was acting within h[is] discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate." *Lee v. Ferraro*, 284 F. 3d 1188, 1194 (11th Cir. 2002). To carry that burden, the plaintiff must show that the constitutional right asserted was clearly established at the time the alleged violation occurred. *See, e.g.,*

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Hope v. Pelzer, 536 U.S. 730, 739 (2002); *Kraft v. Adams*, 248 Ga. App. 141, 144 (2001). Although a "clearly established" right does not necessarily require a case directly on point, *see Hope*, 536 U.S. at 741, the Supreme Court has "repeatedly told courts … not to define clearly established law at a high level of generality." *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015) (citing *al-Kidd*, 563 U.S. at 742). Liability attaches only if "the contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *United States v. Lanier*, 520 U.S. 259, 270 (1997); *see also Kraft*, 248 Ga. App. at 144 ("Th[e] requirement that plaintiff show a clearly established right is a strenuous one. . . The shield of qualified immunity extends to all government actors but the plainly incompetent or those who knowingly violate the law.").

Here, the complaint makes clear that defendant Kemp was acting within his duties as Governor of the State of Georgia when issuing the challenged executive orders. Thus, he was acting within the scope of his discretionary authority. *See Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004) (in determining whether government employee acted within his discretionary authority, the question is whether he was performing a legitimate job-related function through means that were within his power to utilize). The burden is on Plaintiffs to show that qualified immunity is not appropriate. Plaintiffs cannot make this showing because, as shown above, they have not asserted any plausible constitutional violation by Governor

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Kemp. But even if they had, qualified immunity applies unless Plaintiffs can point to existing circuit precedent, or precedent of the United States Supreme Court or the Supreme Court of Georgia, that involves sufficiently similar facts which squarely govern Defendant's conduct and provide fair warning that issuance of the executive orders at issue amounted to a violation of the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments. *See Marsh v. Butler Cty*., 268 F.3d 1014, 1033 n. 10 (11th Cir. 2001) (The relevant courts which can clearly establish the law for qualified immunity purposes are the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the Georgia Supreme Court.). This Plaintiffs cannot do.

Governor Kemp's executive orders arise out of an effort to protect the residents of the State of Georgia from a global pandemic. The context and circumstances in which the orders were issued is largely unprecedented. There is no clearly established law to which Plaintiffs can point that could have provided the requisite fair warning to Governor Kemp that issuance of the orders would violate constitutional rights as alleged by Plaintiffs. And because applicable law did not provide Governor Kemp with fair warning that the orders violated Plaintiffs' rights, if they in fact do so, he is entitled to qualified immunity.

IV. Plaintiffs are not entitled to injunctive or declaratory relief.

In addition to money damages, Plaintiffs request "immediate emergency injunctive and declaratory relief, holding Defendant's

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interpretation of Georgia law and their [sic] issuance of COVID Orders (in whole or in part) to be unconstitutional" as well as "other such additional relief… including declaratory and injunctive relief." (Compl. pp. 22-23). Plaintiffs are entitled to none of this relief.

A. Plaintiffs Thacker and Scroggs' claims for relief are moot.

"Injunctive relief by its nature must be prospective. "'If the thing sought to be enjoined in fact takes place, the grant or denial of the injunction becomes moot. A case is moot when its resolution would amount to the determination of an abstract question not arising upon existing facts or rights.'" *Crawford v. Ocwen Loan Servicing, LLC,* 343 Ga. App. 47, 48 (Ga. Ct. App.), *quoting Clark v. Deal,* 298 Ga. 893, 894 (2) (2016). The changed circumstances of a plaintiff may moot a case if the basis of the action is no longer in effect. *See, e.g. Babies Right Start v. Ga. Dep't of Pub. Health,* 293 Ga. 553, 555 (2013) (finding that a case seeking injunctive relief was mooted where the disqualification from a government program at issue expired); *Arizonans for Official English v. Arizona¸* 520 U.S. 43, 71-72 (1997) (claim was mooted when a party left public employment).

Plaintiffs Scroggs and Thacker are joined as plaintiffs based on allegations that Governor Kemp's actions prevented them from visiting specific family members, who are now deceased. Insofar as these two plaintiffs seek injunctive relief, their claim for injunctive relief is moot. Any

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injunction of the Executive Orders cannot remedy or address the specific harm alleged by these two plaintiffs.[24]

B. **Plaintiffs are not entitled to declaratory relief**.

As argued above, Plaintiffs cannot demonstrate that Governor Kemp acted illegally or unconstitutionally, and thus, are not entitled to any declaration.

Additionally, if an action for declaratory judgment raises issues that are moot, the Declaratory Judgment Act "is not applicable, and the action must be dismissed as decisively as would be any other action presenting the same non-justiciable issues." *Dean v. City of Jesup*, 249 Ga. App. 623, 624 (2001). Where the matter complained of has already been resolved, "there is no justiciable controversy, and a declaratory judgment action cannot lie for a probable future contingency." *Barksdale v. Dekalb County*, 254 Ga. App. 7, 7-8 (2002).

Under the Georgia Constitution, no declaratory judgment (or injunction) may issue for any Executive Order issued prior to January 1, 2021. Ga. Const. art. I, sect. II, para. V(b)(1). The currently operative Executive Orders (03.31.21.01 and 03.31.21.03), issued March 31, 2021, loosen a number of complained-of restrictions. Moreover, as we move forward with the vaccination process, it is reasonable to presume that even more

[24] Mootness would not preclude claims by these plaintiffs for damages. But, as argued above, these plaintiffs have nonetheless failed to state a claim, regardless of the relief sought.

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restrictions will be lifted and the state of emergency will come to an end in the not too distant future. Plaintiffs' claims, if there even are any that can be recognized, will soon be mooted out, if such has not occurred already.

C. Plaintiffs' federal claims for injunctive relief are barred by the doctrine announced in *Ex Parte Young*.

Under the legal fiction created by *Ex Parte Young*, a plaintiff may obtain injunctive relief against state officials in their official capacities—but not against the State or State agencies directly—and even then only to the extent that he can show a violation of the applicable substantive law. 209 U.S. 123 (1908). *Young* creates no substantive rights; it merely provides a process by which rights may be enforced. As demonstrated by the rest of Governor Kemp's briefing, Plaintiffs here cannot make the required showing on the facts presented, and thus, are not entitled to equitable relief.

Moreover, the *Young* exception to immunity applies only where the plaintiff is "seeking *prospective* equitable relief to end *continuing* violations of federal law." *Summit Med. Assocs, P.C. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999) (emphasis in original). As with the claims declaratory relief, Plaintiffs' claims are in the process of being mooted out by a series of modifications to the Executive Orders based on the currently evolving circumstances of the pandemic. Plaintiffs are shooting at a moving target, not specific continuing violations.

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D. **Plaintiffs are not entitled to injunctive relief**.

Injunctions, particularly permanent, mandatory injunctions, are to be granted cautiously and only in clear and urgent cases, where the evidence shows that plaintiff would suffer irreparable harm. O.C.G.A. § 9-5-8; *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 510 (2001); *City of Duluth v. Riverbrooke Props.*, 233 Ga. App. 46, 55 (1998) (finding that the plaintiff failed to show by the preponderance of the evidence that it was entitled to mandatory injunctive relief). Courts should not intervene to "allay mere apprehensions of injury, but only where injury in imminent." *Strange v. Hous. Auth. of Summerville*, 268 Ga. App. 403, 407 (2004) (finding that the record contained no evidence showing that the plaintiff is entitled to injunctive relief). The moving party has the burden to establish that it has a legal right to such relief; otherwise, it is appropriate to dismiss the claim on a motion to dismiss. *Robinson v. Landings Ass'n*, 264 Ga. 24, 25 (1994).

A party may obtain equitable relief upon establishing the following: (1) it has established the merits of its underlying claim; (2) it will suffer immediate and irreparable injury that has no adequate remedy at law if the injunction is denied; (3) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; and (4) granting the injunction will not disserve the public interest. *Mitchell v. DeKalb Cty. Bank*, 139 Ga. App. 562 (1976); *SRB Inv. Servs., LLP v.*

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Branch Banking Tr. Co., 289 Ga. 1, 5 (2011).[25] Plaintiffs cannot carry their burden for any element, much less all.

1. *Plaintiffs are not entitled to relief on the merits.*

Much of this brief involves demonstrating why Plaintiffs cannot prevail on the merits. Without such, this Court cannot issue an injunction.

2. *Plaintiffs will not suffer immediate and irreparable injury if the injunction is denied.*

Many of Plaintiffs' purported injuries are too vaguely described to qualify as immediate and irreparable. Others are in the past, and thus, cannot be remedied by an injunction. (*See* Compl., ¶¶ 4, 5, 10). Additionally, due to the evolving nature of the Executive Orders, some of the alleged injuries are no longer in place. Plaintiffs cannot make this showing.

3. *The balancing of the interests weighs in favor of Governor Kemp and granting the injunction would disserve the public interest.*

In addition to simply not stating claims on the merits, this is the core of why Plaintiffs cannot succeed. As Plaintiffs acknowledge in the Complaint, Governor Kemp has declared a State of Emergency and the General Assembly has concurred. (Compl., ¶¶ 38-40). This was not some random power grab, but a response to a deadly global pandemic. As noted above, this disease has infected over a million Georgians, killing over

[25] Under federal law, the elements are virtually identical. *eBay, Inc., v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

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eighteen-thousand of them.[26] Nationally, COVID has claimed the lives of well over a half-million Americans.[27] The Supreme Court of the United States referred to stemming the impact of COVID-19 as being "unquestionably a compelling interest" when claimed by New York in justifying similar restrictions via executive order. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206, 141 S. Ct. 63, 67 (2020) (per curiam). The equities weigh in favor of keeping Georgians safe.

CONCLUSION

For the foregoing reasons, Defendant Governor Brian Kemp submits that his motion to dismiss should be granted.

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[26] Georgia Coronavirus Map and Case Count, https://www.nytimes.com/interactive/2020/us/georgia-coronavirus-cases.html (last visited March 31, 2021).

[27] Coronavirus in the U.S.: Latest Map and Case Count, https://www.nytimes.com/ interactive/2020/us/coronavirus-us-cases.html. (last visited March 31, 2021).

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Respectfully submitted this 8th day of April, 2021.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **DEFENDANT'S BRIEF IN SUPPORT OF HIS MOTION TO DISMISS** by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed to the following:

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