NO. 20-35634

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SLIDEWATERS, LLC,

Plaintiff – Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, and GOVERNOR JAY INSLEE, in his official capacity as Governor of the State of Washington,

Defendant – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT SPOKANE

No. 2:20-cv-00210-TOR
The Honorable Thomas O. Rice, United States District Court Judge

APPELLEES' ANSWERING BRIEF

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I. INTRODUCTION

Amid an historic global pandemic, Appellant Slidewaters appeals the application of lawful, but temporary, emergency measures to control transmission of the COVID-19 virus, which has caused the deaths of more than 425,000 Americans.[1] Slidewaters, a recreational waterpark in Chelan County, Washington, asks this Court to set aside the considered policy judgments of public officials with respect to the pandemic response in favor of the waterpark's own idiosyncratic plans to operate in defiance of public health measures. But as the Supreme Court recently recognized, courts are not public health experts and "should respect the judgment of those with special expertise and responsibility in this area." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam).

When the COVID-19 outbreak hit Washington, Governor Jay Inslee declared a state of emergency. Exercising lawfully delegated authority, and consistent with recommendations of leading experts and public health officials, Governor Inslee issued emergency orders to prevent the continued spread of the virus until it can be controlled through vaccination leading to herd immunity.

[1] U.S. Centers for Disease Control and Prevention, *CDC Covid Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited January 28, 2021).

Washington looks forward to the complete reopening of the state to social and economic activity. To conduct this reopening safely, and to allow as much business activity as possible to take place, Governor Inslee approved a regional, phased reopening plan. The plan draws reasonable lines between types of interpersonal activities that may safely be conducted in different areas of the state, based on clearly defined metrics.

Exercising its own independent delegated authority, the Washington Department of Labor & Industries (L&I) adopted an emergency rule, Wash. Admin. Code § 296-800-14035 (L&I Rule), which prohibits employers from allowing employees to perform work in any business sector closed under the Governor's emergency orders.

Appellant Slidewaters is a waterpark that operates in the summertime only. It filed this lawsuit against Defendant-Appellees Governor Inslee and L&I in June 2020, seeking to invalidate the Governor's emergency proclamation and the L&I Rule under both state and federal law. After its Motion for Temporary Restraining Order was denied by the district court, it re-opened anyway in defiance of state law. Slidewaters then filed a Motion for Preliminary Injunction. The district court consolidated this Motion with a final hearing on the merits, and after thorough review, issued final judgment to Appellees.

On appeal, Slidewaters argues that the district court erred by considering its state law claims and by consolidating the action under Fed. R. Civ. P. 65(a)(2). But Slidewaters did not even raise these procedural issues below. Instead it vigorously pressed its claims to final judgment, and lost. Its procedural arguments are waived or, in the alternative, baseless.

The district court also properly rejected Slidewaters' case on the merits. The waterpark's claims that neither the Governor nor L&I had legal authority to respond to the pandemic emergency are at odds with Washington statutes and state supreme court authority. And Slidewaters' federal constitutional claims fail because it has asserted no right requiring heightened scrutiny, and the challenged laws easily pass rational basis review.

Following the Supreme Court's lead, this Court should respect the reasonable judgments made by Washington State officials and agencies in this extraordinary time. It should affirm the judgment of the district court.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367(a), and 1441(a). This Court has jurisdiction from the district court's final judgment under 28 U.S.C. § 1291. *See* I-ER-19.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly consolidated the action under Fed. R. Civ. P. 65(a)(2).

2. Whether the district court properly exercised supplemental jurisdiction over Appellant's state law claims.

3. Whether Governor Inslee's declaration of an emergency, and L&I's promulgation of Wash. Admin. Code § 296-800-14035, are lawful exercises of Appellees' delegated authority.

4. Whether the temporary prohibition on Appellant's operation of its waterpark was rationally related to the protection of public health during a time of unprecedented international pandemic.

5. Whether the district court correctly denied Appellant's request for injunctive relief.

6. Whether this appeal is moot because Slidewaters is not facing a fine and the legal landscape is expected to change by summer.

IV. STATEMENT OF THE CASE

A. Washington's Response to COVID-19

According to the U.S. Centers for Disease Control and Prevention (CDC), the COVID-19 coronavirus has infected more than 24 million Americans and caused the deaths of over 425,000.[2] The virus spreads primarily through

[2] CDC, *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Jan. 28, 2021).

respiratory droplets, and asymptomatic people can spread the virus without knowing it. III-ER-210–11.

Recognizing the extraordinary danger posed by COVID-19, Governor Inslee declared a state of emergency across the entire state on February 29, 2020. II-ER-123–24. Every other state in the U.S. has issued a similar declaration.[3] Relying on public health experts including the CDC, Governor Inslee determined that the risk from the disease "significantly impacts the life and health of our people, as well as the economy of Washington State, and is a public disaster." II-ER-124. He cited his statutory authority under Chapters 38.08, 38.52, and 43.06 of the Revised Code of Washington. *Id.*

Despite Washington's early and aggressive intervention, by mid-March 2020 the state had the nation's highest absolute number of COVID-19 cases (and the highest or among the highest per capita). III-ER-213. As a result, most Washingtonians were initially required to "stay home" to prevent transmission of the virus. *See, e.g.*, II-ER-167–71. On May 31, 2020, the Governor announced a transition to a four-phase, county-by-county "Safe Start, Stay Healthy" reopening plan (Safe Start Plan). II-ER-191–223. This plan was

[3] *See* Nat'l Gov's Ass'n., *Status of State COVID-19 Emergency Orders*, https://www.nga.org/state-covid-19-emergency-orders/ (last visited Jan. 28, 2021).

updated and modified numerous times based on epidemiological conditions and available evidence. *E.g.*, II-ER-245–51.

At the time the district court issued final judgment in this case, Chelan County was in Modified Phase 1 of the Safe Start Plan, with some outdoor recreation activities permitted. I-ER-9, II-ER-223.[4] In the fall of 2020, swimming pools – including those within waterparks – were allowed to reopen at reduced capacity, but waterpark-like features within such parks were not permitted. II-ER-245–51; *see* Wash. Admin. Code § 246-262-010(58).

To protect public and workplace safety, on May 26, 2020, L&I issued Wash. Admin. Code § 296-800-14035, authorizing penalties for Washington businesses that operate in violation of the Governor's emergency proclamations. *See* IV-ER-26–27. The current operative version of the L&I Rule states, in part, that: "Where a business activity is prohibited by an emergency proclamation an employer shall not allow employees to perform work." Appendix A. As the rule's legal basis, the agency cited its statutory authority to issue workplace health and safety regulations, Wash. Rev. Code § 49.17.010, Wash. Rev. Code § 49.17.040, Wash. Rev. Code § 49.17.050, and Wash. Rev. Code § 49.17.060.

[4] This modified Phase 1 was sometimes referred to as "Phase 1.5," as in Slidewaters' Opening Brief.

IV-ER-26. The emergency issuance of the L&I Rule was authorized by Wash. Rev. Code § 34.05.350, upon L&I's finding that "immediate adoption . . . [was] necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." *Id.* L&I cited the Governor's initial "stay home" proclamation and subsequent amendments (which include the Safe Start Plan) in support of this finding. *Id.* It noted that the reopening plan was "consistent with the recommendations of medical and safety professionals as to how businesses may reopen without increasing the risk of COVID-19 spreading." *Id.*

On January 11, 2021, Governor Inslee launched a transition to the "Healthy Washington – Roadmap to Recovery" (Healthy Washington Plan). *See* Appendix B[5]; *id.* at 2–3. The Healthy Washington Plan is organized by region rather than by individual county. *See* Appendix C at 1.[6] All regions began in Phase 1. *Id.* at 2. Chelan County is in the "North Central" region. *Id.* at 1. In

[5] Wash. Governor Jay Inslee, Office of the Governor, Proclamations, *"Healthy Washington – Roadmap to Recovery"* (Jan. 11, 2021) https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-25.12.pdf.

[6] Wash. Governor Jay Inslee, Office of the Governor, *Healthy Washington Roadmap to Recovery* (Jan. 28, 2021) https://www.governor.wa.gov/sites/default/files/HealthyWashington.pdf.

Phase 1, outdoor gatherings of up to 10 people (limit two households) are permitted. *Id.* at 4. Lower risk outdoor activities are generally permitted subject to these limitations, including hunting, fishing, running, and snow sports. *Id.* In Phase 2 of the plan, gatherings of 15 people (limit two households) will be permitted, along with limited outdoor sports competitions. *Id.*

On January 28, 2021, Governor Inslee announced a modification to the Healthy Washington Plan that makes it easier for regions to move into Phase 2. Appendix D.[7] Based on the new criteria, the Governor announced that the state's two most populous regions would be moving to Phase 2 effective February 1, 2021. *Id.*

To be eligible to move from Phase 1 to Phase 2, a region must meet three out of four metrics: (1) Decreasing trend in the 14-day rate of new COVID-19 cases per 100,000 population; (2) Decreasing trend in the 14-day rate of new COVID-19 hospital admissions per 100,000 population; (3) Average 7-day percent occupancy of ICU staffed beds less than 90 percent; and, (4) 7-day percent positivity of COVID-19 tests less than 10 percent. *Id.*; Appendix C at 2.

[7] Governor Jay Inslee, *Inslee announces metric changes to Healthy Washington – Roadmap to Recovery* (Jan. 28, 2021) https://medium.com/wagovernor/inslee-announces-metric-changes-to-healthy-washington-roadmap-to-recovery-36ddf02c88ca.

Additional phases beyond Phase 2 are expected to be added in the future. *See* Appendix C at 3. As of January 28, 2021, the North Central Region was meeting one of the four metrics to move to Phase 2. Unfortunately, the region had the highest increase in hospital admission rates in the state, at 41 percent. *Id.*

The situation with COVID-19 continues to evolve. Reported cases have peaked as a fall and winter "surge" in cases materialized. CDC director Robert Redfield has stated: "The reality is that December, January and February are going to be rough times," and, "I actually believe they're going to be the most difficult time in the public health history of this nation."[8] In recent weeks the U.S. set records for numbers of COVID-19 deaths, exceeding 22,000 in a single week.[9]

At the same time, progress on availability of COVID-19 vaccines has been swift and promising. According to CDC information as of January 15, 2021, two vaccines (Pfizer and Moderna) were authorized and recommended for general

[8] Steve Gorman & Daniel Trotta, *CDC chief warns Americans face 'rough' winter from COVID-19 surge*, Reuters, Dec. 2, 2020, https://www.reuters.com/article/health%20coronavirus%20usa/cdc%20chief%20warns%20americans-face-rough-winter-from-covid-19-surge-idUSKBN28C20R.

[9] Reuters, *U.S. sets COVID-19 death record for second week, cases surge*, Jan. 11, 2021, https://www.reuters.com/article/health-coronavirus-usa-trends/graphic-us-sets-covid-19-death-record-for-second-week-cases-surge-idUSL1N2JM1NS.

use.[10] Three additional vaccines were in advanced, large-scale clinical trials.[11] Over 26 million vaccine doses have been administered, and over 48 million have been distributed.[12] The nation's leading public infectious disease expert, Dr. Anthony Fauci, recently predicted that virtually anyone who wanted a vaccine would be able to receive one by April 2021.[13] Widespread vaccination should dramatically change the factual landscape, such that restrictions intended to mitigate the spread will likely look very different by the summer of 2021.[14]

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[10] U.S. Centers for Disease Control and Prevention, *Covid-19: Different Covid-19 Vaccines*, Dec. 28, 2020, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html (last visited Jan. 28, 2021).

[11] *Id.*

[12] U.S. Centers for Disease Control and Prevention, *Covid-19 Vaccines*, Jan. 11, 2021, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/index.html (last visited Jan. 28, 2021).

[13] Lisa L. Colangelo and David Reich-Hale, *Fauci says it could be 'open season' by April for those who want to get vaccine*, Newsday, Jan. 4, 2021, https://www.newsday.com/news/health/coronavirus/fauci-speaks-to-newsday-1.50109419.

[14] *See, e.g.*, Washington State Department of Health, Press Release, *Moving to the next phase: Vaccine expansion plan meant to accelerate the pace of vaccinations statewide* (Jan. 18, 2021), (describing plan to vaccination most vulnerable individuals by late winter or early spring of 2021), https://www.doh.wa.gov/Newsroom/Articles/ID/2573/Moving-to-the-next-phase-Vaccine-expansion-plan-meant-to-accelerate-the-pace-of-vaccinations-statewide.

B. Slidewaters and Its Lawsuit

Plaintiff-Appellant Slidewaters is a waterpark in Chelan County, Washington. IV-ER-2. It operates for approximately 100 days a year in the summer between Memorial Day and Labor Day. *Id.* at 3.

On June 4, 2020, Slidewaters filed its Complaint in Chelan County Superior Court. IV-ER-1. At that time, Chelan County was in Modified Phase 1 of the Safe Start Plan. I-ER-9. It is currently in Phase 1 of the Healthy Washington Plan. *See* Appendix C.

The Complaint asserted both state and federal claims. IV-ER-8–13. It alleged that Governor Inslee lacked authority under state law to declare an emergency based on the dangers posed by COVID-19, and that L&I lacked authority to issue an emergency rule based on Governor Inslee's declared emergency. *Id.* 8–10. The Complaint also alleged violations of Slidewaters' substantive due process rights under the Washington and U.S. Constitutions. *Id.* 12–13.

Appellees removed the case to the Eastern District of Washington. III-ER-269–71. Counsel for Appellees immediately informed Slidewaters' counsel of the removal. *See* Declaration of Brendan Selby, Exhibit 1. The parties quickly agreed to a schedule for Slidewaters to file a Motion for Temporary

Restraining Order in federal court, with opportunities for briefing by both parties. *See id.* At no point did Slidewaters ever contest the removal to the district court or ask to certify any question to the Washington Supreme Court. Instead, it consented to the jurisdiction of the federal court by filing its TRO Motion pursuant to the agreed-upon schedule. *See* IV-ER-66–78. The TRO Motion included Slidewaters' request that the district court address issues of state law regarding the authority of the Governor and of L&I. IV-ER-72–74. On June 12, 2020, the district court denied Slidewaters' TRO Motion. *See* I-ER-38–52.

That same day, counsel for Slidewaters announced that the waterpark would open "in defiance of" state law. III-ER-7. Although a Chelan-Douglas Health District inspector initially determined that Slidewaters could operate safely, III-ER-163, the Health District clarified that it "does not have the authority to override the Governor's orders, which do not currently allow the operation of such facilities," III-ER-11. The Health District notified Slidewaters that it would risk legal penalties by reopening. *Id.*, II-ER-26. Ignoring county and state health officials, and state law, Slidewaters reopened on June 20, 2020. III-ER-13–21; Op. Br. at 8.

On June 26, 2020, Defendant Inslee answered Slidewaters' Complaint. III-ER-83–110. Governor Inslee asserted a state law counterclaim against

Slidewaters for violation of the Governor's emergency proclamation. *Id.* at 106–07.

Also on June 26, 2020, Slidewaters filed a Motion for Preliminary Injunction ("Motion" or "PI Motion") and a Motion to Expedite consideration of the Motion. *See* I-ER-61, SER-16–24. Appellees opposed the Motion to Expedite. *See* SER-3–15. On July 6, 2020, the district court granted the Motion to Expedite, in part, ruling that Appellees would have until July 10, 2020, to submit a Response to the PI Motion, and that Slidewaters could file a Reply by July 13, 2020. I-ER-61. The district court gave notice at the same time that it was "inclined" to treat the PI Motion as if it were a motion for permanent injunction, under Fed. R. Civ. P. 65(a)(2). *Id.*

In its Reply to the Motion, Slidewaters pressed both its state and federal claims. II-ER-1–11. It did not challenge the Rule 65 consolidation of its claims, even though it was clearly aware of the consolidation because it argued against Appellees' argument that the district court should issue a final ruling on Governor Inslee's counterclaim. II-ER-10–11; *see* III-ER-64. Slidewaters opposed judgment under Rule 65(a)(2) as to that counterclaim only. II-ER-11. Slidewaters stated it would need to conduct discovery with regard to the

counterclaim, II-ER-11, but it did not make the same argument as to its own claims. *See generally* II-ER-1–11.

C. The District Court's Order

The district court denied Slidewaters' Motion on July 14, 2020, in a reasoned decision. I-ER-20–33. The court noted that Slidewaters' legal claims were "largely identical to those raised at the TRO stage of the case." *Id.* at 26. It rejected Slidewaters' arguments that Governor Inslee lacked authority to declare an emergency and that the emergency was not ongoing. *Id.* at 27–29. It held that COVID-19 was a "public disorder" under Washington's emergency authorization statute, Wash. Rev. Code § 43.06.010(12). It also held that the L&I Rule was issued with proper authority. *Id.* at 29. Rejecting Slidewaters' substantive due process claim, the court held that the challenged executive actions were reasonable in light of legitimate public health objectives. *Id.* at 29–32. Having rejected Slidewaters' claims on the merits, the district court did not consider the remaining factors for a permanent injunction. *Id.* at 32. The district court declined to retain jurisdiction over Governor Inslee's counterclaim. *Id.* at 32–33. It accordingly issued final judgment in Defendant-Appellees' favor as to Slidewaters' claims and remanded Governor Inslee's counterclaim to Chelan County Superior Court, which the Governor later voluntarily dismissed.

Id. at 33; Appendix E. Slidewaters did not seek reconsideration of the district court's decision. Instead it filed an immediate notice of appeal. *Id.* at 60.

L&I issued the waterpark a $9,639 fine for re-opening in "defiance" of state law. *See* Op. Br. at 34 n.12. Slidewaters agreed to close the waterpark again, and L&I subsequently agreed to dismiss the fine under the condition that the waterpark would meet with health authorities to clarify reopening requirements. Appendix F. Therefore, Slidewaters is not currently facing a penalty from L&I, contrary to the implication in its Opening Brief, which was filed after a proposed order of dismissal was filed, which it signed. Op. Br. at 33–34.

V. SUMMARY OF THE ARGUMENT

The district court's consolidation of the action under Fed. R. Civ. P. 65(a)(2) was proper. The district court gave the parties notice of its intent to consolidate, and Slidewaters never objected. Therefore, this issue is waived. And Slidewaters has not even attempted to make the required showing of substantial prejudice from consolidation.

The district court's consideration of Slidewaters' state law claims was also proper. Slidewaters never objected to removal of the case to federal court, never asked the district court to remand or abstain as to any state law questions, and affirmatively requested the consideration of its state law claims. Slidewaters

actively briefed and argued those claims to the district court. It only complained to this Court after losing. The removal issue is also waived, and meritless.

Governor Inslee lawfully proclaimed the COVID-19 pandemic to be a statewide emergency as authorized under Wash. Rev. Code § 43.06.010. The pandemic is both a "disaster" and a "public disorder" requiring an emergency response. Judicial review of an emergency declaration is extremely limited under Washington law, and the Governor's emergency authority has been upheld by the Washington Supreme Court on numerous occasions, including during the pandemic.

L&I issued Wash. Admin. Code § 296-800-14035 under its own lawful delegated authority. *See* Wash. Rev. Code §§ 49.17.010, .040, .050, and .060. The agency was permitted to consider the Governor's emergency proclamations as part of its reason for issuing the L&I Rule on an emergency basis. The rule itself was properly authorized by statute.

Slidewaters waived any separation of powers argument by failing to raise it below. And even if not waived, the statutes authorizing the exercise of the challenged emergency actions were a lawful delegation under Washington Supreme Court precedent. *See Barry & Barry, Inc. v. State Dep't of Motor Vehicles*, 500 P.2d 540 (Wash. 1972).

Turning to Slidewaters' federal claims, the right to pursue a calling is not a fundamental right and was not infringed by a temporary prohibition on the operation of a waterpark during a pandemic. *See, e.g.*, *Marilley v. Bonham*, 844 F.3d 841, 854 (9th Cir. 2016) (en banc). Nor has Slidewaters asserted a fundamental right with respect to the use of its property. *See, e.g.*, *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012). The Governor's emergency proclamation and the L&I Rule satisfy rational basis review because they are rationally related to controlling the spread of COVID-19, which is a compelling interest. *See Roman Catholic Diocese*, 141 S. Ct. at 66.

Because Slidewaters did not show actual success on the merits of any of its claims, and because it did not satisfy the other factors required for injunctive relief, the district court properly rejected Slidewaters' claims and issued final judgment for Appellees.

Finally, Slidewaters' appeal is moot because the parties reached an agreement that resulted in L&I dismissing the fine arising from the park's violation of the law in 2020. Given the temporary nature of the restrictions and the progress on vaccines, applicable restrictions are likely to significantly change by Memorial Day of 2021.

VI. STANDARD OF REVIEW

Denial of a permanent injunction is reviewed for abuse of discretion. *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1208 (9th Cir. 2010). Where final judgment is issued, the district court's conclusions of law are reviewed *de novo* and its factual findings for clear error. *Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Rels.*, 730 F.3d 1024, 1031 (9th Cir. 2013). The decision to consolidate an action under Rule 65(a)(2) is reviewed for abuse of discretion. *Michenfelder v. Sumner*, 860 F.2d 328, 336, 337 (9th Cir. 1988); *see D.L. Cromwell Invs., Inc. v. NASD Regul., Inc.*, 279 F.3d 155, 158 (2d Cir. 2002).

VII. ARGUMENT

A. The District Court Did Not Abuse Its Discretion by Consolidating the Preliminary Injunction Hearing with a Final Hearing on the Merits

Federal Rule of Civil Procedure 65(a)(2) provides: "Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with" a hearing on a preliminary injunction. For three reasons, Slidewaters fails to demonstrate that the district court erred by doing so in this case. First, Slidewaters waived any objection to consolidation by failing to raise it below. Second, the district court gave the parties notice that it was considering consolidation, allowing Slidewaters every

opportunity to explain if it wished to pursue discovery before final judgment. Third, instead of objecting Slidewaters chose to limit its briefing to its arguments on the merits, rolling the dice on the outcome.

Fed. R. Civ. P. 56(f)(1) states that after giving notice and a reasonable opportunity to respond, the district court may grant summary judgment to the non-movant. If the court finds that a party fails to support or address an assertion of fact, it may grant summary judgment if the record, including undisputed facts, demonstrates that it is appropriate to do so. Fed. R. Civ. P. 56(e)(3). The district court must state on the record its reasons for granting a motion for summary judgment. Fed. R. Civ. P. 56(a). The Supreme Court recognized that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (citation and internal quotation marks omitted); *see Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 (9th Cir. 1990). A district court may "convert a decision on a preliminary injunction into a final disposition of the merits by granting summary judgment on the basis of the factual record available at the preliminary injunction stage." *Air Line Pilots*, 898 F.2d at 1397 n.4. The district

court should also comply with the notice and hearing requirements of Federal Rule of Civil Procedure 56. *Id.*

The district court has "very broad" discretion to consolidate under Rule 65(a)(2). *Michenfelder*, 860 F.2d at 337. To challenge consolidation, a party must show not only inadequate notice, but also "substantial prejudice in the sense that [it] was not allowed to present material evidence." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 801 (9th Cir. 2019) (quoting *Michenfelder*, 860 F.2d at 337). "[T]he sufficiency of notice must be evaluated in light of whether the plaintiff would have used the additional time productively." *Michenfelder*, 860 F.2d at 337.

Under this standard, Slidewaters' argument fails.

First, Slidewaters waived this issue by failing to object to it below. Courts in other circuits recognize that, if notice is proper, a failure to object to consolidation under Rule 65(a)(2) results in waiver. *See Aponte v. Calderon*, 284 F.3d 184, 190 (1st Cir. 2002) (citing *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 913 (1st Cir. 1989)); *Channel Home Ctrs., Div. of Grace Retail Corp. v. Grossman*, 795 F.2d 291, 298 (3d Cir. 1986) (party waived issue for appeal where it "did not ask the [district] court to grant it leave to take discovery or for additional time"); *see also* Wright & Miller, 11A *Fed. Prac. & Proc.* § 2950 (3d

ed.) ("failure to object to consolidation with the trial stage also may be deemed a waiver of their right to object to the lack of notice or opportunity to prepare"). And this Court typically does not entertain issues not presented to the district court. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010).

Second, the district court fully and carefully complied with Rules 65 and 56, including the notice requirement. On July 6, 2020, it issued an Order clearly and unambiguously stating its intent to treat the Motion as one for a permanent injunction. *See* I-ER-34; *see also* I-ER-21 (stating, accurately, that "On July 6, 2020, the Court gave the parties notice that it intended to consolidate hearing on Plaintiff's Motion for Preliminary Injunction with a hearing on the merits, pursuant to Fed. R. Civ. P. 65(a)(2)."). If Slidewaters had desired to pursue discovery and supplement the record before final judgment, it certainly had the opportunity to say so. The district court noted that Slidewaters had not sought to materially supplement the record in its Motion for Preliminary Injunction despite having the opportunity to do so. *See* I-ER-34. After thorough briefing by all parties, the district court denied Slidewaters' Motion and dismissed its claims in a written decision. *See* Fed. R. Civ. P. 56(a).

Third, Slidewaters has not attempted to show—and cannot show—any prejudice from the consolidation. Despite having notice and an opportunity to object, Slidewaters failed to do so, and proceeded to submit additional briefing in support of its Motion. It only claims prejudice now, on appeal, after it has lost. Slidewaters has not even attempted to describe what additional discovery it would have sought. *See Edmo*, 935 F.3d at 801; *Rosenthal v. Carr*, 614 F.2d 1219, 1220 (9th Cir. 1980) (affirming dismissal after consolidation where plaintiff "pointed to no allegations or evidence which he would have developed at trial that would alter our determination that dismissal was proper"); Op. Br. at 24–25. Therefore, this case is distinguishable from this Court's decision in *Air Line Pilots*. There, the district court had not provided notice of its intent to issue final judgment, and specific factual questions remained that could be illuminated by further discovery. *Air Line Pilots*, 898 F.2d at 1397. Here, by contrast, there was proper notice, no outstanding factual issues were identified, and the only contested issues in the case were questions of law properly resolved by the district court.

Plaintiff had ample opportunity to use its time "productively," to gather any information relevant to the legal issues in the case. *See Michenfelder*, 860 F.2d at 337. Plaintiff filed its Complaint in state court on June 4, 2020. Its Motion

for Temporary Restraining Order was denied on June 12, 2020. It did not file its Motion for Preliminary Injunction until two weeks later, on June 26, 2020. Therefore, Slidewaters had weeks to gather more evidence to put into the record before filing its Motion.[15] As the district court recognized, Slidewaters did not attempt to introduce new evidence, indicating that it did not have, or believe it needed, such evidence.

Of course, if Slidewaters believed it needed time to get more evidence, it could have opposed consolidation or asked for more time. The district court could have granted either request. *See, e.g.*, Fed. R. Civ. P. 56(e)(1), (4) (providing district court discretion to address unresolved factual issues); *cf.* Fed. R. Civ. P. 56(d)(2) (providing discretion to "allow time to obtain affidavits or declarations or to take discovery"). The district court's word choice in its notice to the parties—that it was "inclined" to consolidate—was effectively an invitation for any party that disagreed with the approach to oppose consolidation.

[15] Slidewaters incorrectly claims the district court gave the parties only four days of notice before consolidating the action. *See* Op. Br. at 16. There was no four-day deadline. Slidewaters could have objected to the consolidation at any time prior to filing its Reply in support of its Motion, or in the Reply itself. Nothing prevented Slidewaters from objecting even after filing its Reply and prior to the issuance of final judgment. And nothing suggests that Slidewaters could not have stated an objection even if it did not yet possess the potential results of discovery.

Yet Slidewaters expressed no opposition and instead filed a lengthy reply brief. II-ER-1–13.

Slidewaters is attempting to use the federal rules as both a sword and a shield. When the district court stated its intent to consolidate, Slidewaters had already filed its second motion for preliminary relief within a month, each time on essentially the same record, and it had sought to expedite preliminary injunction proceedings, which Appellees opposed. It was *Slidewaters* that sought to advance the case quickly, arguing that it needed speedy relief in order to reopen before its summer season ended. *See* SER-16–24.

In sum, Slidewaters argues that the district court's consolidation Order was "hasty," even though the Order was issued in accordance with an expedited timeline Slidewaters itself requested. *See* Op. Br. at 23. It argues that the Order was "ambiguous," though the district court stated exactly what it intended to do. *See id.* It argues it was deprived the chance to argue why state law claims should not be heard by the district court, even after filing a motion requesting relief on those claims. *See id.* (Slidewaters continues to press its state law claims in this appeal, *see, e.g.*, Op. Br. at 18.). It impugns the district court by claiming, with no citation to evidence, that the district court's motivation was "to deprive the Appellant of the full opportunity to present its case." *See id.* at 24. And it alleges

prejudice in the failure to take discovery, without giving so much as a hint as to what discovery it would have taken to change the outcome.

The district court's decision to issue final judgment was proper.

B. The District Court Properly Dismissed Slidewaters' State Law Claims

1. The district court properly exercised supplemental jurisdiction

Slidewaters previously argued this issue to this Court in its Motion to Expedite Review, Remand State Claims & Stay Federal Claim Appeal. *See* DktEntry 4. This Court appropriately denied that Motion. DktEntry 9. Appellees incorporate by reference the arguments they made in response to the Motion to Expedite Review. *See* DktEntry 5.

Again, the facts relevant to this issue are: (1) Slidewaters did not challenge removal; (2) Slidewaters continued to file affirmative pleadings seeking relief on its state law claims in federal court; and (3) Slidewaters' state law claims were litigated to finality on the merits. *See* DktEntry 5 at 10–14. There is no legal basis to give Slidewaters a second bite at claims it chose to litigate in federal court. *See id.* at 9–10.

Because Slidewaters did not object to the district court's exercise of supplemental jurisdiction, it may not challenge it for the first time on appeal,

after final judgment. *See Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1171 (9th Cir. 2001).

Slidewaters suggests that it was unfair for the district court to consider its state law claims and not Defendant Inslee's state law counterclaim. This ignores that Slidewaters' state law claims had been fully briefed by the parties, after Slidewaters pursued them to finality before the district court, including through expedited review. By contrast, neither party had yet briefed Governor Inslee's counterclaim. The district court had the discretion not to exercise supplemental jurisdiction over remaining state law claims after dismissal of the federal ones.[16] *Foster v. Wilson*, 504 F.3d 1046, 1051 (9th Cir. 2007) (citing 28 U.S.C. § 1367(c)(3)). Moreover, the counterclaim has now been dismissed in state court, so any issue relating to this claim is moot. Appendix E.

The district court properly exercised jurisdiction over Slidewaters' state law claims.

[16] To the extent the district court suggested that it could not exercise supplemental jurisdiction over the counterclaim, this was incorrect. *See, e.g.*, *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 146 n.3 (9th Cir. 1982). But the point is moot because the Governor did not challenge the decision not to retain jurisdiction over the state claim and, rather, dismissed the claim.

2. Governor Inslee acted within his delegated authority

Governor Inslee properly declared an emergency due to the COVID-19 pandemic. Slidewaters acknowledges that the Washington Legislature delegated to the Governor the authority to exercise emergency powers in the event of a "public disorder, disaster, energy emergency, or riot," Wash. Rev. Code § 43.06.010(12). *See* Op. Br. at 18. Contrary to Slidewaters' implication, Op. Br. at 21, this authority is broad. Its exercise is subject to, at most, highly deferential review by courts.

Wash. Rev. Code § 43.06.010(12) gives the Governor authority to declare a state of emergency. Once an emergency has been declared, Wash. Rev. Code § 43.06.220 "specifically authorize[s] the Governor to issue orders with operative effect." *Fischer-McReynolds v. Quasim*, 6 P.3d 30, 37 (Wash. Ct. App. 2000); *Cougar Bus. Owners Ass'n v. State*, 647 P.2d 481, 485–86 (Wash. 1982) (*Cougar*), *abrogated in part on other grounds by Yim v. City of Seattle*, 451 P.3d 694, 700 (Wash. 2019). The Governor may issue orders prohibiting various activities, or waiving or suspending statutory obligations.[17] Wash. Rev. Code § 43.06.220.

[17] Slidewaters incorrectly asserts that the duration of the Governor's emergency orders is limited to 30 days. Op. Br. at 21. That time limitation, from Wash. Rev. Code § 43.06.220(4), only concerns the "waiver or suspension of

The Washington Supreme Court has held that these statutes "evidence a clear intent by the [L]egislature to delegate requisite police power to the governor in times of emergency." *Cougar*, 647 P.2d at 486. Moreover, in a statement of intent from a 2019 amendment to another part of the same statute, the Washington Legislature reaffirmed "that the governor has broad authority to proclaim a state of emergency in any area of the state under [Wash. Rev. Code §] 43.06.010(12), and to exercise emergency powers during the emergency." Comment, Wash. Rev. Code Ann. § 43.06.220. Underscoring this point, a state of emergency is defined elsewhere in the same statute as an emergency proclaimed by the Governor. Wash. Rev. Code § 43.06.200.

Just this month, the Washington Legislature (which is only in session for part of the year starting in January) adopted a concurrent resolution that further ratifies the Governor's authority to respond to COVID-19 using delegated emergency authority. Wash. Senate Concurrent Resolution 8402, 67th Leg. (2021).[18] The Legislature recognized the Governor's emergency authority and extended numerous proclamations that waived or extended statutory obligations

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statutory obligations or limitations" under subsection (2), and not other types of orders.

[18] Available online at: http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Senate%20Passed%20Legislature/8402.PL.pdf?q=20210121215135 (last visited January 21, 2021).

"until the termination of the state of emergency pursuant to [Wash. Rev. Code §] 43.06.210, or until rescinded by gubernatorial or legislative action." *Id.* (Note that other orders, such as the prohibition on business activities like operating a waterpark, did not require extension and were not specifically addressed by the Legislature because they did not waive or suspend statutory obligations (Wash. Rev. Code § 43.06.220(3)).) If the Governor's proclamation of an emergency were not valid, the Legislature would not have extended subsequent proclamations that depended upon it. Therefore, particularly after Resolution No. 8402, there can be no doubt that COVID-19 continues to be an emergency under Chapter 43.06.

In *Cougar*, the Washington Supreme Court explained the reasons for the Legislature's delegation of emergency powers to the Governor. It stated that "[i]n times of natural catastrophe . . . , immediate and decisive action by some component of state government is essential . . . . Since the executive is inherently better able than the [L]egislature to provide this immediate response . . . when public emergencies arise, the center of governmental response is usually the governor's office." *Cougar*, 647 P.2d at 486 (citation and internal quotation marks omitted). Therefore, the Governor's proclamation of emergency is a discretionary act, *In re Recall of Inslee*, 451 P.3d 305, 310 (Wash. 2019), and

"will be upheld if any state of facts either known or which could be reasonably assumed affords support for it," *Cougar*, 647 P.2d at 488. Courts must give the Governor's declaration of emergency every favorable presumption and defer to its judgment unless it is obvious that the declaration is false. *CLEAN v. State*, 928 P.2d 1054, 1068–69 (Wash. 1996), *as amended* (Jan. 13, 1997) (considering a legislative declaration of emergency). Courts will not undertake their own "inquiry as to the facts but must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge." *Id.* at 1066 (quoting *State ex rel. Humiston v. Meyers*, 380 P.2d 735, 739 (1963)).

This is so even though *CLEAN* concerned a legislative, as opposed to an executive, declaration of emergency. The trigger for deference is simply whether the emergency declaration is a proper exercise of the government's police powers. *Wash. State Farm Bureau Fed'n v. Reed*, 115 P.3d 301, 305–06 (Wash. 2005). Thus, the Washington Supreme Court in *Cougar* applied the same standard used to determine the reasonableness of legislation pursuant to inherent police power, to evaluate the exercise of the Governor's emergency authority pursuant to *delegated* police power. *Cougar*, 647 P.2d at 487 (quoting *Petstel, Inc. v. King County*, 459 P.2d 937, 942–43(Wash. 1969)). An executive declaration of emergency merits the same strong deference as a legislative one.

a. The COVID-19 pandemic is a public disorder and disaster affecting life, health, property, or the public peace

Slidewaters incorrectly argues that COVID-19 cannot be the basis of an emergency under Wash. Rev. Code § 43.06.010(12). But the Governor's declaration meets the deferential standard described above.

First, Slidewaters has not shown or even alleged that the present emergency is "obviously false." *CLEAN*, 928 P.2d at 1069. The unique dangers posed by COVID-19 are widely recognized by the nation's leading health officials and experts. *See supra* at 5, 9; III-ER-208–224. As the Washington Supreme Court's Commissioner recognized in rejecting a challenge to the Governor's emergency response to COVID-19, "We are living through the greatest public health crisis to hit the United States, and the world, since the great post-First World War influenza pandemic." Appendix G at 2 [*Miller v. Inslee*, No. 98597-9, slip op. at 2 (Wash. June 4, 2020)]. Nor have Plaintiffs provided any evidence that the Governor's emergency proclamation was made in bad faith or was an attempt at "dissimulation." *See CLEAN*, 928 P.2d at 1066.

Second, the district court was correct that COVID-19 is a "public disorder." In addition to the dictionary definitions on which the Court properly relied, *see* I-ER-12–13, 45–46, *Webster's* dictionary defines "disorder" as "a

condition marked by lack of order, system, regularity, predictability, or dependability" or "a disturbance of the peace of society." *Webster's Third New International Dictionary* 653 (2002). A global pandemic that causes severe economic disruption, personal dislocation, social isolation, and great loss of life, has the potential to cause "public disorder." The Washington Supreme Court has recognized that the Governor may exercise emergency powers to *prevent* harm, not merely to respond to it. *See Cougar*, 647 P.2d at 486. Therefore, under any reasonable definition of "public disorder," the present pandemic qualifies.

Third, COVID-19 is also a "disaster." *Cf. Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) ("we may affirm based on any ground supported by the record"). This is the term Governor Inslee has used in proclamations issued under his emergency authority. *See, e.g.*, Proclamation 20-05. Webster's dictionary defines a disaster in relevant part as "a sudden calamitous event bringing great damage, loss, or destruction."[19] Similarly, the leading definition of "disaster" in the Cambridge Dictionary is "(an event that results in) great harm, damage, or death, or serious difficulty."[20]

[19] *Disaster*, Webster's Online Dictionary (Jan. 12, 2021), https://www.merriam-webster.com/dictionary/disaster.

[20] *Disaster*, Cambridge Online Dictionary (Jan. 19, 2021), https://dictionary.cambridge.org/us/dictionary/english/disaster.

The Washington Supreme Court upheld a broad definition of "disaster" in *Cougar*. The plaintiffs in that case, which concerned the eruption of Mt. St. Helens, sought to define "disaster" as "a specifically definable event causing harm or injury[.]" *Cougar*, 647 P.2d at 486. But the Court rejected this crabbed definition as "unduly narrow" and overly restrictive in light of the clear "legislative intent to empower the governor to respond to emergencies." *Id.* The Court recognized that the "disaster" was not simply the eruption but the entire "reactivation of a dormant volcano." *Id.*

The meaning of "disaster" in the statute is also illuminated by Article VII, Section 12 of the Washington Constitution, which the Legislature referred to the voters as a constitutional amendment that was approved in 2011. Article VII, Section 12 concerns the budget stabilization fund, and it specifically contemplates, at subsection (d)(i), that the Governor may declare "a state of emergency resulting from a catastrophic event that necessitates government action to protect life or public safety." Therefore, such an event clearly qualifies as a "disaster" justifying an emergency declaration. In this case, the facts "known or which could be reasonable assumed" establish that COVID-19 is a catastrophic event that requires government action to protect life or public safety. *See Cougar*, 647 P.2d at 488.

In addition, in the chapter of the state code concerning "Emergency Management," the Legislature defines "catastrophic incident" as "*any* natural or human-caused incident . . . that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, or government functions." Wash. Rev. Code § 38.52.010(2)(a) (emphasis added); *see Fisher Broad.-Seattle TV LLC v. City of Seattle*, 326 P.3d 688, 700 (Wash. 2014) ("The word 'any' has been given broad and inclusive connotations."). In the same chapter, the Legislature defined the phrase "Emergency or disaster" with specific reference to Wash. Rev. Code § 43.06.010:

> "Emergency or disaster" as used in all sections of this chapter [Chapter 38.52] except [Wash. Rev. Code §] 38.52.430 means an event or set of circumstances which: (i) Demands immediate action to preserve public health, protect life, protect public property, or to provide relief to any stricken community overtaken by such occurrences; or (ii) reaches such a dimension or degree of destructiveness as to warrant the governor proclaiming a state of emergency pursuant to [Wash. Rev. Code §] 43.06.010].

Wash. Rev. Code § 38.52.010(9)(a). This broad definition expressly recognizes that the Governor may declare an emergency under Wash. Rev. Code § 43.06.010 based on the criterion of "destructiveness." As applied here, a global pandemic that has cost over 425,000 American lives, and which has required massive public health interventions, possesses the requisite "dimension or

degree of destructiveness." Again, the Legislature vested this decision in the Governor, not in the courts or in particular minorities of citizens.

The Governor's emergency proclamation was proper because COVID-19 is both a public disorder and a disaster requiring government action to protect life and public safety.

b. The existence of local health officers does not limit the Governor's powers

Slidewaters argues that the general authority granted to local health officers preempts the Governor's authority to address a cross-jurisdictional pandemic emergency. Op. Br. at 20–21. This is wrong. Local health officers are specifically tasked with enforcing state health rules. Wash. Rev. Code § 70.05.070. The logic of Slidewaters' argument would mean that, wherever the Legislature provided some degree of local responsibility to respond to a disaster, the Legislature also impliedly removed that type of disaster from the purview of the Governor's authority under Wash. Rev. Code § 43.06.010(12). Slidewaters even goes so far as to claim that neither the Governor nor L&I has any authority "to issue proclamations, orders, or rules related to health concerns in the State of Washington." Op. Br. at 21.

Numerous legislative acts contradict these farfetched assertions. For example, and as relevant here, Wash. Rev. Code § 43.06.220(1)(h) provides the

Governor emergency authority to prohibit "activities as he or she reasonably believes should be prohibited to help preserve and maintain *life*, *health*, property or the public peace" (emphases added). And Wash. Rev. Code, Chapter 49.17, under the authority of which L&I issued Wash. Admin. Code § 296-800-14035, and which Slidewaters cites two pages later in its brief, grants authority to the agency "to create, maintain, continue, and enhance the industrial safety and health program of the state." Wash. Rev. Code § 49.17.010; *see* Op. Br. at 23 (citing Wash. Rev. Code § 49.17.040).

That local officials have an important role to play in preventing and responding to outbreaks of disease does not limit the response, by either the Governor or L&I, to an ongoing public health disaster. If the duties of local health officers were intended to displace the authority of the executive branch in any way, the Legislature would have said so. *Cf. ATU Legis. Council of Wash. State v. State*, 40 P.3d 656, 659–60 (Wash. 2002) (citing the high standard applicable to make a showing of "repeal by implication").

3. L&I's emergency rule was enacted under lawful authority

Slidewaters claims that L&I lacked authority to issue Wash. Admin. Code § 296-800-14035. This argument is based on the incorrect premise that the rule was enacted "based only on the Governor's proclamations," Op. Br. at 24. The

district court properly rejected this argument in its order denying a TRO. I-ER-46–47.

First, Slidewaters abandoned this argument by failing to raise it in its Motion for Preliminary Injunction, which was converted with its acquiescence into a Motion for Permanent Injunction. Plaintiff's PI Motion argued only that L&I's authority was invalid because the Governor's emergency proclamation was; it did not raise or develop the argument Slidewaters now makes on appeal. *Compare* III-ER-117, *with* Op. Br. at 23–25; *John-Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011) (holding that a party waives an argument it fails to develop).

If the Court were to consider this argument, it should uphold the district court's correct determination (at the TRO stage) that "the emergency rule only references [Governor Inslee's] Proclamation as an explanation for why the emergency rule was promulgated pursuant to other authority." I-ER-46; *see* IV-ER-26. The authorities for the emergency rule are Wash. Rev. Code §§ 49.17.010, .040, .050, and .060. IV-ER-26. These authorities require L&I to make and modify "rules and regulations governing safety and health standards for conditions of employment" in conformance with Washington's

Administrative Procedure Act (APA, Chapter 34.05 Wash. Rev. Code). *See* Wash. Rev. Code § 49.17.040.

The Washington APA authorizes emergency rulemaking if the agency for good cause finds "[t]hat immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." Wash. Rev. Code § 34.05.350(1)(a). Wash. Admin. Code § 296-800-14035 was properly issued as an emergency rule upon such finding. IV-ER-26.

Both the Washington Constitution and the Legislature recognize the importance of protecting workers from workplace hazards. *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 475 P.3d 164, 171 (Wash. 2020); *Afoa v. Port of Seattle*, 296 P.3d 800, 806 (Wash. 2013); Wash. Rev. Code §§ 49.17.010, .060. The Washington State Constitution mandates protection of workers. *Bayley Constr. v. Wash. State Dep't of Labor & Indus.*, 450 P.3d 647, 655 (Wash. 2019), *review denied*, 458 P.3d 788 (Wash. 2020); Wash. Const. art. II, § 35. "Article II, section 35 mandates legislative action and constitutes a fundamental right of Washington workers to health and safety protection." *Martinez-Cuevas*, 475 P.3d at 171. The provision "*requires* the legislature to pass appropriate laws for

the protection of workers." *Id.* These principles hold particularly true when the safety regulation at issue was enacted to protect employees against a global pandemic.

Slidewaters fails to offer any argument as to why the L&I Rule is not lawful under these authorities. The rule properly relied in part upon the findings and expertise of other executive branch actors concerning a rapidly evolving global pandemic. And it addresses a subject within the core of L&I's authority and competency: workplace health and safety. The rule was, and is, lawful.

4. Slidewaters' separation of powers argument may not be raised for the first time on appeal

Slidewaters argues that the Governor's Proclamations violate the separation of powers. This issue was not raised below. Slidewaters' briefing to the district court did not mention the phrase "separation of powers."

"Generally, arguments not raised in the district court will not be considered for the first time on appeal." *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014). None of the exceptions to this rule apply here. *See Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015) (citation and internal quotation marks omitted). There is no reason why Slidewaters could not have raised this issue below. *See id.* There has been no relevant change in the law affecting whether the Governor's declaration of an

emergency (the only one of his Proclamations that is directly challenged in this case), or any other Proclamation for that matter, violated the separation of powers. *See id.* And Appellees would be prejudiced if a federal appellate court were to consider in the first instance an issue of state law not briefed or argued below (and not adequately briefed here). *See id.*

Were the Court to consider this issue, Slidewaters is wrong on the facts and the law. Once again it ignores that the Governor and L&I are separate executive actors. Slidewaters never presented any evidence suggesting that L&I did not exercise its own discretion in issuing Wash. Admin. Code § 296-800-14035. *See* Op. Br. at 24. And while Slidewaters is certainly correct that the Legislature has ultimate authority to write laws, the Legislature exercised that authority here, expressly authorizing the Governor to declare an emergency and L&I to issue emergency workplace health and safety regulations. The Washington Supreme Court has upheld the delegation of emergency authority to the executive, including under Wash. Rev. Code §§ 43.06.010 and .220. *See Cougar*, 647 P.2d at 485–86. Slidewaters does not even cite the generous standard applied by Washington courts to evaluate the constitutionality of a legislative delegation. *See Barry & Barry, Inc. v. State Dep't of Motor Vehicles*, 500 P.2d 540, 542–43 (Wash. 1972).

Under the *Barry* standard, the delegations to both the Governor and to L&I are lawful because: (1) the Legislature has provided adequate "standards or guidelines which define in general terms what is to be done" and the agency or officials "to accomplish it," *Barry & Barry, Inc.*, 500 P.2d at 542–43; and (2) the procedures of the Washington APA, which would be applicable to any fine issued under Wash. Admin. Code § 296-800-14035, have been held to provide adequate procedural safeguards, *State v. Crown Zellerbach Corp.*, 602 P.2d 1172, 1175 (1979); *State v. Simmons*, 98 P.3d 789, 792 (Wash. 2004).

Slidewaters' separation of powers argument is waived and has no merit.

C. The District Court Properly Dismissed Slidewaters' Federal Constitutional Claims

Slidewaters appeals the district court's dismissal of its claim that Appellees violated its right to pursue a common calling and its property rights. But the district court was correct.

1. Appellees did not violate Slidewaters' right to pursue a profession

The temporary closure of a waterpark at a time of global pandemic does not infringe upon the right to pursue a profession or calling. This Court has emphasized that "cases recognizing the right [to pursue a profession] 'all deal with a complete prohibition of the right to engage in a calling, and not [a] sort of

brief interruption.'" *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 997 (9th Cir. 2007), *aff'd*, 553 U.S. 591 (2008); *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999); *see also Franceschi v. Yee*, 887 F.3d 927, 938 (9th Cir. 2018) (affirming dismissal of substantive due process claim where state regulation did not "operate as a complete prohibition on" plaintiff's right to engage in chosen profession).

First, Appellees' actions do not implicate the protected liberty interest in pursuing a profession of one's choice. The challenged laws amount, at most, to a temporary "interruption" of Slidewaters' business, not a "complete prohibition." *See Engquist*, 478 F.3d 985. The allegation that the laws affect Slidewaters' 100-day season is insufficient to establish infringement of a fundamental right. *See id.*; *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir. 1994) (temporary ban on amusement game did not unduly interfere with game manufacturers' and operators' right to pursue profession); *see also Guzman v. Shewry*, 552 F.3d 941, 954 (9th Cir. 2009) (temporary suspension of doctor from medical reimbursement program did not implicate liberty interest in pursuing occupation). This is particularly so where, as here, it appears that the business plans to reopen for its 2021 season and no circumstance is yet apparent that would preclude it from doing so.

Second, even if temporary public health restrictions on Slidewaters' business implicated its liberty interest, the restrictions were constitutional. As Slidewaters now recognizes, the right to pursue a calling is not fundamental. Op. Br. at 31; *see, e.g.*, *Marilley v. Bonham*, 844 F.3d 841, 854 (9th Cir. 2016) (en banc) (quoting *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir. 2005)); *Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014). Instead, a restriction on the ability to engage in a profession will be struck down on due process grounds only if it is irrational. *See Litmon*, 768 F.3d at 1242; *Dittman*, 191 F.3d at 1030. Such restrictions are reviewed for "whether the government *could* have had a legitimate reason for acting as it did." *Wedges/Ledges*, 24 F.3d at 66. This is, in effect, the rational basis standard.

The U.S. Supreme Court has recognized that "[s]temming the spread of COVID–19 is unquestionably a compelling interest[.]" *Roman Catholic Diocese*, 141 S. Ct. at 67; *S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 222814, at *10 (9th Cir. Jan. 22, 2021). It stated that judges and justices "are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area." *Roman Catholic Diocese*, 141 S. Ct. at 68. Because "the COVID–19 pandemic remains extraordinarily serious and deadly, . . . [f]ederal courts . . . must afford substantial

deference to state and local authorities about how best to balance competing policy considerations during the pandemic." *Id.* at 73–74 (Kavanaugh, J., concurring); *see S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) ("The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement."); *S. Bay United Pentecostal Church*, 2021 WL 222814, at *14 (citing these authorities to uphold judgments of policymakers in California).

It was not arbitrary or irrational for Appellees to determine that Slidewaters could not engage in large-scale waterpark operations during a global pandemic. The Governor's orders, which were updated as necessary, treated similarly situated businesses comparably. *See, e.g.*, Appendix C at 4. At the time when the district court issued its judgment, the Safe Start Plan provided that large-scale recreational activities like waterparks could reopen at reduced capacity in Phase 3 of that plan. *See* I-ER-9. And under Phase 1 of the new Healthy Washington Plan, outdoor recreation is limited to groups of up to ten people from two households, with that number increasing to fifteen people in Phase 2. *See* Appendix C at 4. These approaches recognize that interpersonal transmission is higher in places where people are in close contact and/or yelling,

shouting, laughing, or exercising. *See, e.g.*, U.S. Centers for Disease Control and Prevention, *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission*, (updated Oct. 5, 2020), https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html (last visited Dec. 30, 2020); *Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020) (emphasizing the importance of social distancing to prevent transmission of COVID-19).

Slidewaters argues that it should have been allowed to "opt-out" of general laws and orders and to craft its own safety plan to respond to the pandemic. *See* Op. Br. at 10–13. But it is axiomatic that individuals or businesses may not exempt themselves from public health laws of general applicability on the theory that they believe they know better. *See, e.g.*, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 37–38 (1905) (warning of the "spectacle" of the "welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population."); *S. Bay United Pentecostal Church*, WL 222814, at *15 ("[E]ven if an individual . . . is willing to accept the risk of contracting the virus by partaking in [prohibited] conduct, the risk is not an individual's risk to take."). Appellees are not required to weigh and evaluate the individual safety plan of

every business that wishes to operate during this pandemic. Under their delegated authority, they may issue general rules to maintain order and safety.

Slidewaters' reliance on the initial, ad hoc, and quickly-reversed decision of a single inspector from the Chelan-Douglas Health Department (CDHD) is also misplaced. The inspector did not have the authority to override state law and did not intend to do so. *See* III-ER-163 (incorrectly stating that the facility had met all COVID-19-related state safety measures); *id.* III-ER-75. The CDHD corrected the error only two days later, a fact that Slidewaters somehow neglects to mention. *See id.* III-ER-11 ("CDHD does not have the authority to override the Governor's orders, which do not currently allow the operation of such facilities."). The inspection has no legal relevance.

Slidewaters does not have clean hands in this case. *See, e.g.*, *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 876 (9th Cir. 2000), *as amended* (Aug. 17, 2000) (party seeking relief in equity must have acted fairly with respect to the controversy); *see* III-ER-12–22. While other businesses seeking to challenge COVID-19 restrictions have respected the law while their legal challenge proceeded, *see, e.g.*, *PCG-SP Venture I LLC v. Newsom*, No. EDCV 20-1138 JGB (KKx), 2020 WL 4344631, at *3 (C.D. Cal. June 23, 2020), Slidewaters openly violated the law *after* its TRO Motion was denied, attempting to secure

a competitive advantage for itself over law-abiding businesses that were complying with public health orders designed to save lives amidst a pandemic that has contributed to the deaths of more than 425,000 Americans. The park's arguments about the equities of the case should be considered in light of this fact.

Finally, Slidewaters did not argue below, and it provides no specific argument to this Court, that Appellees have drawn irrational distinctions between businesses. *See* Op. Br. at 32. Contrary to Slidewaters' implication, the statewide guidance on reopening reflects careful, reasoned line-drawing by politically-accountable officials. *See generally* Appendix C; *Big Tyme Investments, L.L.C. v. Edwards*, No. 20-30526, 2021 WL 118628, at *9 (5th Cir. Jan. 13, 2021) (upholding order closing bar due to the risk of COVID-19 transmission and noting that even "[i]mperfect classifications that are underinclusive or overinclusive pass constitutional muster").

The enforcement of L&I's emergency rule did not infringe Slidewaters' right to pursue a profession, or, in the alternative, any temporary infringement was reasonable in light of legitimate government objectives.

2. Appellees did not violate Slidewaters' property rights

Slidewaters' complaint alleged a violation of substantive due process with respect to a purported "fundamental" right to "use private property." IV-ER-12.

It now recognizes that there is no such fundamental right. *See* Op. Br. at 30–31. This is correct, as it is well established that governmental action that affects only economic interests does not implicate fundamental rights. *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012). "The protection afforded the plaintiff[] by substantive due process only guards against governmental action where the interference with property rights was irrational or arbitrary." *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994), *as amended* (Feb. 9, 1995) (citation and internal quotation marks omitted). Because no fundamental rights are at stake, rational basis review is required. *See Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997). As explained above, the challenged governmental acts have a rational basis. *See supra* at 44–45.

3. The district court properly applied the *Jacobson* standard

Appellees respectfully suggest that this is not the appropriate case to weigh in on the application of the *Jacobson* standard to rights requiring higher scrutiny than rational basis. If, as Slidewaters suggests, the *Jacobson* standard is essentially rational basis review, *see* Op. Br. at 30, then the district court applied the correct standard, because this case does not involve fundamental rights. *Cf. Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring) ("Rational basis review is the test this Court *normally* applies to Fourteenth Amendment

challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right."). There is no need to decide whether, in the midst of a highly contagious pandemic emergency, a lower standard might temporarily apply to some infringements of rights traditionally afforded heightened protection. *See Big Tyme*, 2021 WL 118628, at *7 (affirming district court's application of the *Jacobson* standard and declining to consider whether the standard still applies under heightened scrutiny).

D. The District Court Properly Denied a Permanent Injunction Against Emergency Actions Taken to Protect Public Health

The district court correctly determined that Slidewaters did not meet the requirements for a permanent injunction. Slidewaters needed to show:

> (1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction.

Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Rels., 730 F.3d 1024, 1032 (9th Cir. 2013).

First, as discussed above, Slidewaters' claims fail on the merits.

Second, it has not suffered irreparable injury. While the district court concluded that Slidewaters had made a sufficient showing of irreparable injury

at the TRO stage, it expressly disclaimed such a finding in the order appealed from. *See* I-ER-17. There is no irreparable harm because the Appellees' emergency actions are temporary in nature. Slidewaters has stated that it has a 100-day season in the summer. The summer of 2020 is over. (Moreover, Slidewaters reopened illegally for part of it.) In the interim, two vaccines have already been approved by the federal government for the treatment of COVID-19, and widespread vaccination is anticipated within the next several months. *See supra* at 9–10. While the metrics in the Healthy Washington Plan depend on numerous variables, the rate of transmission is arguably the most important, so there is a substantial likelihood that the emergency restrictions affecting Slidewaters' business will be at least partially lifted by next summer, such that the park will be able to reopen at some capacity. Prior or temporary harms are not a basis for injunctive relief. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Arcamuzi v. Cont'l Air Lines, Inc.*, 819 F.2d 935, 938 (9th Cir. 1987).

Finally, the balance of equities and public interest strongly disfavor issuance of an injunction at this time. On the one hand, Slidewaters is no longer facing a fine from L&I and does not plan to reopen its waterpark until around Memorial Day. *See* Op. Br. at 8. Given that vaccines are now being distributed, by that time, Chelan County may be in an advanced phase of the Healthy

Washington Plan, and Slidewaters could be permitted to reopen. Slidewaters' request for injunctive relief is therefore not currently "fit for decision." *See, e.g.*, *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010) (issue is not "fit for decision" where it depends on "contingent future events that may or may not occur as anticipated, or indeed may not occur at all" (citation and internal quotation marks omitted)). Nor would Slidewaters suffer hardship from withholding judicial consideration of its request for injunctive relief. *See id.* at 1180 (declining to consider claim where "withholding judicial consideration [would] not work a direct and immediate hardship" on plaintiff).

On the other side of the ledger, granting Slidewaters injunctive relief at this stage in the proceedings could severely and needlessly undermine confidence in public health laws at a critical stage in the pandemic. *Cf. S. Bay United Pentecostal Church*, 2021 WL 222814, at *16 ("The district court did not abuse its discretion in concluding that the public interest lay not with enjoining California's restrictions, but rather with the continued protection of the population as a whole . . . ."). A winter "surge" in cases, hospitalizations, and deaths continues, and the danger to the public remains extraordinarily high. *See id.* at *10, *15 (discussing dangers of recent case surge in California); *supra* at 9. Granting unnecessary and premature relief to a waterpark could exacerbate

"pandemic fatigue" among other individuals and businesses subject to different regulations, inviting non-compliance with requirements and costing lives.

Thus, even if Slidewaters could satisfy the other factors for injunctive relief, which it cannot, it would not be in the public interest to issue, in the winter or spring of 2021, an injunction in favor of a waterpark that only operates in the summer. *See Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 (9th Cir. 2019) ("An injunction is an 'extraordinary remedy never awarded as of right.'") (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)); *Winter*, 555 U.S. at 32 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."). Of course, because Slidewaters' claims have no merit whatsoever, the Court need not reach this issue at all.

E. This Appeal is Moot

Slidewaters' appeal is moot because the park reached a settlement with L&I to avoid a fine, and because the prospect of widespread vaccination means that Slidewaters will likely be able to reopen in the summer of 2021.

A case is moot "'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). "The basic question in determining mootness is whether there

is a present controversy as to which effective relief can be granted." *Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012) (finding case moot because "no effective relief remains available"). "[I]f the parties settle the matter, a live controversy obviously no longer exists." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1253 n.6 (9th Cir. 2007) (quoting Erwin Chemerinsky, Federal Jurisdiction 125-26 (4th ed. 2003)); *see NASD Dispute Resol., Inc. v. Jud. Council of the State of Cal.*, 488 F.3d 1065, 1069 (9th Cir. 2007); *Ringsby Truck Lines, Inc. v. W. Conf. of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982). The same generally holds true if there is a relevant change in law. *See Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019).

No effective relief can be granted from this appeal because Slidewaters, an outdoor waterpark, does not plan to reopen for several months, and the park voluntarily settled its appeal of its fine from the summer of 2020. *See* Appendix F. First, Slidewaters agreed to settle the matter of the penalty assessed by L&I, by agreeing to meet with health officials before reopening the waterpark. Appendix F. Its voluntary settlement moots the only concrete adverse effect from the emergency proclamation or L&I Rule that it faced, or is likely to face. Second, Slidewaters will not seek to reopen its waterpark until late

May 2021 at the earliest. While it is possible that some restrictions on waterpark activity could remain in place this summer, the nature of any restriction is likely to be significantly different than last summer or at present. The most likely result of widespread vaccination[21], which could occur as soon as April, is that counties will be able to move to less restrictive phases of the Healthy Washington Plan. The possibility that the vaccination process might be far less effective than expected, such that Slidewaters could not open at all, is "too remote and too speculative a consideration to save this case from mootness." *Ctr. For Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007); *cf. Roman Catholic Diocese*, 141 S. Ct. at 68 (challenge to COVID-19-related restriction was not moot because applicants remained "under a constant threat" that the law could affect them, a circumstance not present here). There is no present controversy between the parties. Therefore, the Court should dismiss the appeal for mootness.

[21] Vaccination need not be universal to produce a significant change in the metrics associated with reopening *See* Appendix C. Such metrics are focused on positive test rates and the effect of the virus on vulnerable populations, as evidenced, for example, by hospitalization rates. Many people have already contracted COVID-19, and if enough additional people are vaccinated so that the rate of transmission slows, causing the other metrics to significantly improve, this should lead to further reopening under the Healthy Washington Plan. *See id.*

VIII. CONCLUSION

The Appellees respectfully request the Court to AFFIRM the judgment of the district court.

RESPECTFULLY SUBMITTED this 29th day of January, 2021.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule of Appellate Procedure 28-2.6, Appellees by and through their undersigned counsel, hereby state that they are unaware of any related cases to the instant appeal that are currently pending in this Court.

s/ Brendan Selby
BRENDAN SELBY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(f) and Federal Rules of Appellate Procedure 32(a)(5) and (6), and Ninth Circuit Rule of Appellate Procedure 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 11,718 words, excluding the items exempted.

s/ Brendan Selby
BRENDAN SELBY
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I electronically filed a true and correct copy of the foregoing document on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 29th day of January 2021, at Olympia, Washington.

s/ Leena R. Vanderwood
LEENA R. VANDERWOOD
Legal Assistant

APPENDIX

Chapter 296-800 WAC
Safety & Health Core Rules
(Form Number F414-059-000)

Last Updated 1/12/2021

This book contains the Safety & Health Core Rules, as adopted under the Washington Industrial Safety and Health Act of 1973 (Chapter 49.17 RCW).

The rules in this book are effective January, 2021. A brief promulgation history, set within brackets at the end of each section, gives statutory authority, administrative order of promulgation, and date of adoption of filing.

TO RECEIVE E-MAIL UPDATES:

- Sign up at https://public.govdelivery.com/accounts/WADLI/subscriber/new?topic_id=WADLI_19

TO PRINT YOUR OWN PAPER COPY OR TO VIEW THE RULE ONLINE:

- Go to https://www.lni.wa.gov/safety-health/safety-rules/rules-by-chapter/?chapter=800/

DOSH CONTACT INFORMATION:

- **Physical address:**
  7273 Linderson Way
  Tumwater, WA 98501-5414
  (Located off I-5 Exit 101 south of Tumwater.)
- **Mailing address:**
  DOSH Standards and Information
  PO Box 44810
  Olympia, WA 98504-4810
- Telephone: 1-800-423-7233
- For all L&I Contact information, visit https://www.lni.wa.gov/agency/contact/

Also available on the L&I Safety & Health website:

- DOSH Core Rules
- Other General Workplace Safety & Health Rules
- Industry and Task-Specific Rules
- Proposed Rules and Hearings
- Newly Adopted Rules and New Rule Information
- DOSH Directives (DD's)
- See http://www.lni.wa.gov/Safety-Health/

Note: This rulebook includes the emergency rule 296-800-14035, "2019 Novel coronavirus prohibited business activities and compliance with conditions for operations" effective 1/12/2021 through 5/12/2021

Appendix A

Chapter 296-800 WAC
Safety and Health Core Rules

WAC.....Page

(vii) Identification of hazardous gases, chemicals, or materials used on-the-job and instruction about the safe use and emergency action to take after accidental exposure.

(b) A safety and health committee (WAC 296-800-130)

WAC 296-800-14020 Develop, supervise, implement, and enforce safety and health training programs that are effective in practice.

(1) You must develop, supervise, implement, and enforce training programs to improve the skill, awareness, and competency of all your employees in the field of occupational safety and health.

(2) You must make sure training includes on-the-job instruction to employees prior to their job assignment about hazards such as:

(a) Safe use of powered materials-handling equipment such as forklifts, backhoes, etc.

(b) Safe use of machine tool operations.

(c) Use of toxic materials.

(d) Operation of utility systems.

WAC 296-800-14025 Make sure your accident prevention program is effective in practice.

You must establish, supervise, and enforce your accident prevention program in a manner that is effective in practice.

WAC 296-800-14035 2019 Novel coronavirus prohibited business activities and compliance with conditions for operations (effective 1/12/2021 through 5/12/2021)

(1) Where a business activity is prohibited by an emergency proclamation an employer shall not allow employees to perform work.

(2) Employers must comply with all conditions for operation required by emergency proclamation issued under RCW 43.06.220, including "Healthy Washington - Roadmap to Recovery" reopening requirements for all business and any industry specific requirements.

(3) An "emergency proclamation" means a proclamation that is in effect, including proclamation amendments and conditions, and issued under RCW 43.06.220 and is in effect at the time the emergency rule was adopted.

STATE OF WASHINGTON
OFFICE OF GOVERNOR JAY INSLEE

PROCLAMATION BY THE GOVERNOR
AMENDING PROCLAMATIONS 20-05 and 20-25, et seq.

20-25.12

"HEALTHY WASHINGTON – ROADMAP TO RECOVERY"

WHEREAS, on February 29, 2020, I issued Proclamation 20-05, proclaiming a State of Emergency for all counties throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States and confirmed person-to-person spread of COVID-19 in Washington State; and

WHEREAS, as a result of the continued worldwide spread of COVID-19, its significant progression in Washington State, and the high risk it poses to our most vulnerable populations, I have subsequently issued several amendatory proclamations, exercising my emergency powers under RCW 43.06.220 by prohibiting certain activities and waiving and suspending specified laws and regulations; and

WHEREAS, I issued Proclamations 20-25, et seq., first entitled "Stay Home – Stay Healthy," in which I initially prohibited all people in Washington State from leaving their homes except under certain circumstances, which I later amended to "Safe Start – Stay Healthy – County-By-County Phased Reopening," gradually relaxing those limitations based on county-by-county phasing, and on November 16, 2020 again amended 20-25, et seq., to "Stay Safe – Stay Healthy – Rollback of County-By-County Phased Reopening Responding to a COVID-19 Outbreak Surge," in response to a large surge of new cases of COVID-19, increased hospitalizations and ongoing COVID-19 related deaths in Washington State; and

WHEREAS, on July 2, 2020, due to the increased COVID-19 infection rates across the state, I ordered a freeze on all counties moving forward to a subsequent phase and on July 24, 2020, the Secretary of Health issued *Order of the Secretary of Health 20-03.1*, found here, which, among other things, requires (with exceptions) the use of face coverings throughout the state; and

WHEREAS, there is evidence that the virus is spread through very small droplets called aerosols that are expelled from our mouths when we breathe, talk, sing, vocalize, cough, or sneeze, that these aerosols linger in air, and that a significant risk factor for spreading the virus is prolonged, close contact with an infected person indoors, especially in poorly ventilated spaces; and

WHEREAS, we know that several factors increase the risk for person-to-person COVID-19 transmission; such factors include (1) the more that people and groups interact, (2) the longer those

interactions last, (3) the closer the contact between individuals, and (4) the denser the occupancy for indoor facilities; and

WHEREAS, despite an increase in infections, hospitalizations, and deaths this fall and winter, Washington State has avoided overwhelming the state's health care systems throughout this pandemic through rigorous safety and prevention measures, such as physical distancing and masking, as well as social and economic prohibitions; and

WHEREAS, a new and more contagious coronavirus variant, first identified in the United Kingdom and confirmed to now be in at least seven U.S. states and 33 countries, and a second new and more contagious coronavirus, first identified in South Africa, threaten to further strain our health care systems and therefore demand even more vigilance in our prevention measures; and

WHEREAS, now that two vaccines have been approved for use in the United States and efforts to vaccinate the most vulnerable populations are underway, it is appropriate to create a new roadmap to recovery that establishes the goal of safely easing some restrictions while also maintaining crucial hospital capacity, ensuring care for Washingtonians who need it, paving the way for economic recovery, and maintaining flexibility to quickly pivot to increase restrictions if needed; and

WHEREAS, achieving the goal that our health care systems are not overwhelmed during this pandemic is better and more appropriately served by shifting from a county-by-county approach to a regional approach that is substantially similar to existing emergency medical services regions; and

WHEREAS, the worldwide COVID-19 pandemic and its progression in Washington State continue to threaten the life and health of our people as well as the economy of Washington State, and remain a public disaster affecting life, health, property or the public peace; and

WHEREAS, the Washington State Department of Health continues to maintain a Public Health Incident Management Team in coordination with the State Emergency Operations Center and other supporting state agencies to manage the public health aspects of the incident; and

WHEREAS, the Washington State Military Department Emergency Management Division, through the State Emergency Operations Center, continues coordinating resources across state government to support the Department of Health and local health officials in alleviating the impacts to people, property, and infrastructure, and continues coordinating with the Department of Health in assessing the impacts and long-term effects of the incident on Washington State and its people; and

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim and order that a State of Emergency continues to exist in all counties of Washington State, that Proclamation 20-05, as amended, remains in effect, and that, to help preserve and maintain life, health, property or the public peace pursuant to RCW 43.06.220(1)(h), Proclamation 20-25, et seq., remains in full force and effect, but is hereby amended to be renamed "Healthy Washington – Roadmap To

Recovery." This *Healthy Washington – Roadmap To Recovery*, found here, extends all of the prohibitions described in Proclamations 20-25, et seq., except as amended herein.

FURTHERMORE, for purposes of the prohibitions contained in the *Healthy Washington – Roadmap To Recovery*, every county is part of a region, and all regions begin in Phase 1 as of the effective date of this order. Any activities not specifically addressed in the *Healthy Washington – Roadmap To Recovery* plan are subject to previously issued guidance related to that activity as it applies to the region's current or subsequent phase.

ADDITIONALLY, in furtherance of these prohibitions and for general awareness:

1. *Order of the Secretary of Health 20-03.1*, issued on July 24, 2020, is incorporated by reference, and may be amended as is necessary; and, all such amendments are also incorporated by reference.
2. Employers must comply with all conditions for operation required by the state Department of Labor & Industries, including interpretive guidance, regulations and rules such as WAC 296-800-14035, and Department of Labor & Industries-administered statutes.
3. Everyone is required to cooperate with public health authorities in the investigation of cases, suspected cases, outbreaks, and suspected outbreaks of COVID-19 and with the implementation of infection control measures pursuant to State Board of Health rule in WAC 246-101-425.
4. All mandatory guidelines for businesses and activities, which remain in effect except as modified by this Proclamation and the *Order of the Secretary of Health 20-03.1*, may be found at the Governor's Office website, *COVID-19 Resources and Information*, and at *COVID-19 Reopening Guidance for Businesses and Workers*.

I again direct that the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented throughout state government. State agencies and departments are directed to continue utilizing state resources and doing everything reasonably possible to support implementation of the *Washington State Comprehensive Emergency Management Plan* and to assist affected political subdivisions in an effort to respond to and recover from the COVID-19 pandemic.

I continue to order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak. Additionally, I continue to direct the Department of Health, the Washington State Military Department Emergency Management Division, and other agencies to identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments.

Violators of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5). Further, if people fail to comply with the required social distancing and other protective measures while

Appendix B

engaging in this phased reopening, I may be forced to reinstate the prohibitions established in earlier proclamations.

This order is effective immediately. Unless extended or amended, upon expiration or termination of this amendatory proclamation the provisions of Proclamation 20-25, et seq., will continue to be in effect until the state of emergency, issued on February 29, 2020, pursuant to Proclamation 20-05, is rescinded.

Signed and sealed with the official seal of the state of Washington on this 11th day of January, A.D., Two Thousand and Twenty-One at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

Healthy Washington

Roadmap to Recovery

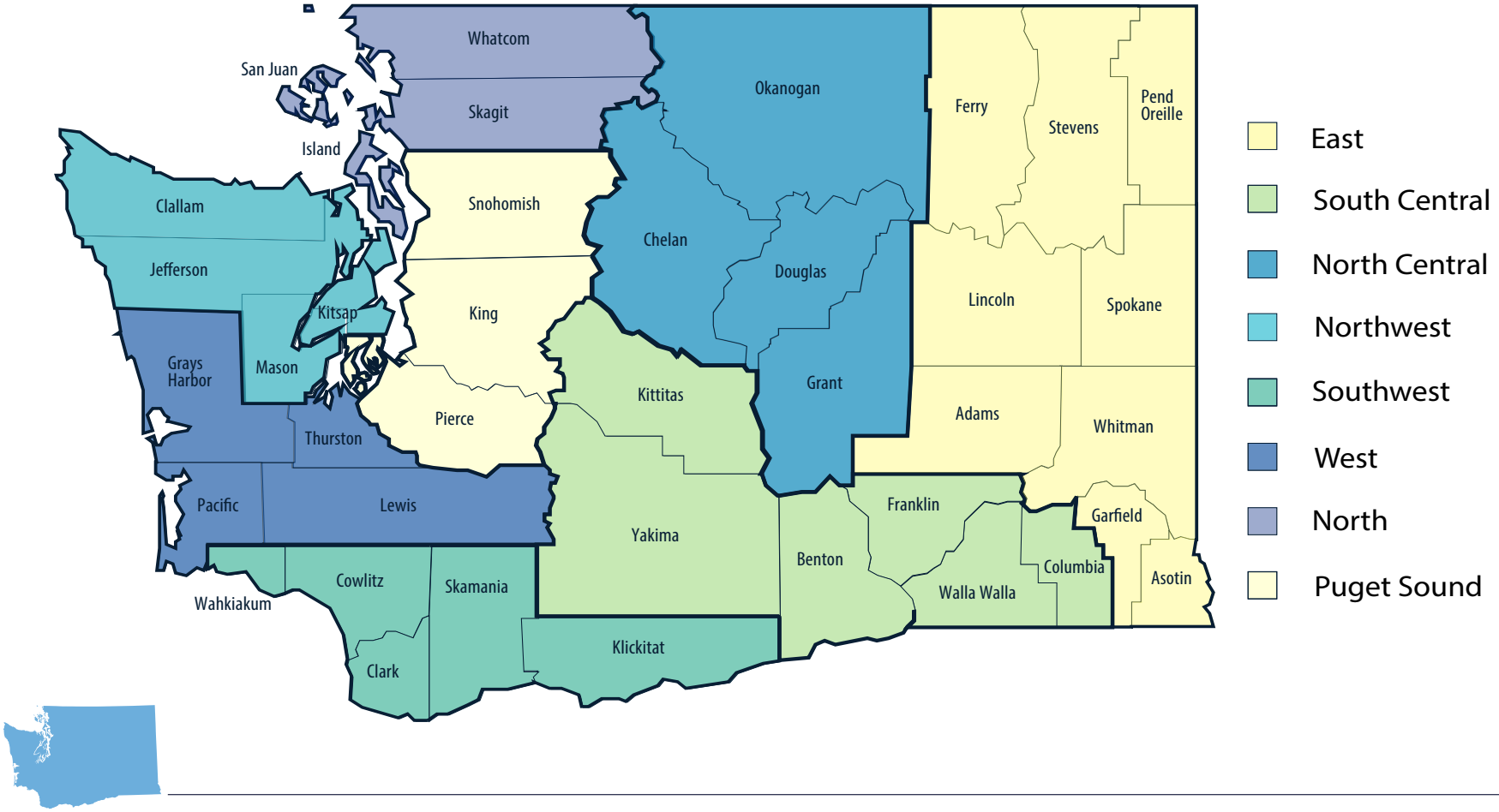
ISSUED BY THE OFFICE OF THE GOVERNOR | January 28, 2021

Appendix C

Healthy Washington - Roadmap to Recovery

Regional Approach

Effective January 11, 2021, the State of Washington is launching Healthy Washington – Roadmap to Recovery which will use a regional approach for its upcoming phased recovery plan. These regions are largely based on the Emergency Medical Services (EMS) regions used for evaluating healthcare services given the concern for COVID-19's potential impact on the healthcare system. There will be eight regions in Washington that fall along county lines. Most regions in Washington have four or more counties. These regions are designed based on the available health care services in the area which has a strong connection to the metrics we will be using for COVID-19 hospitalizations, case data, and general mobility of individuals.



Appendix C

Metrics

Starting on January 11, the regions outlined above will begin in Phase 1 of the Healthy Washington plan. The Washington State Department of Health (DOH) will notify the local health jurisdictions (LHJs) within a region once they have met the criteria to move into Phase 2.

Every other Friday, DOH will update the Healthy Washington – Roadmap to Recovery dashboard with the latest data and region phase designations. A region may move into a new phase (forward or backward) if their metrics meet the criteria using the most recent complete data. This move will take effect the Monday after the dashboard is updated.

In the Roadmap to Recovery, there are four metrics in total – two metrics that measure community disease levels (i.e., trends in case rates, test positivity) and two that measure health system capacity (i.e., trends in COVID-19 hospital admission rates , ICU occupancy).

Three of the four metrics must be met in order to move forward from Phase 1 to Phase 2.

- Decreasing trend in 14-day rate of new COVID-19 cases per 100K population;
- Decreasing trend in 14-day rate of new COVID-19 hospital admissions per 100K population;
- Average 7-day percent occupancy of ICU staffed beds less than 90%; and,
- 7-day percent positivity of COVID-19 tests less than 10%

In order to remain in Phase 2, a region must continue meeting at least three of these four metrics.

- Decreasing or flat trend in 14-day rate of new COVID-19 cases per 100K population;
- Decreasing or flat trend in 14-day rate of new COVID-19 hospital admissions per 100K population;
- Average 7-day percent occupancy of ICU staffed beds less than 90%; and,
- 7-day percent positivity of COVID-19 tests less than 10%

If a region in Phase 2 regresses and no longer meets any three or more of the metrics, the region – including all the counties within – will move back to Phase 1 on the following Monday.

In sum, a region that meets three or four of the Phase 2 metrics will remain in phase 2. A region that meets zero, or only one or two of the Phase 2 metrics will move back to phase 1.

Additional details about metrics data sources, calculations, and reporting appear in Appendix 1.

While every effort has been made to advance clear and simple metrics, DOH and the LHJs within the regions reserve the right to move a region backward (e.g., from Phase 2 to Phase 1) outside of these planned metrics in situations where rapid COVID-19 spread requires more immediate action.

Appendix C

Phases

The State of Washington will begin the Healthy Washington – Roadmap to Recovery plan with only two phases while it continues to assess the evolving pandemic. Additional phases may be added in the future as the impact of continued vaccine distribution and other changes in COVID-19 response require.

Below are metrics and placement (as of January 28). Updated metrics will be available here through DOH.

Increasing or High | Flattening | Decreasing or Low

	Puget Sound	East	North	North Central	Northwest	South Central	Southwest	West
Phase as of 02/01/2021	Phase 2	Phase 1	Phase 1	Phase 1	Phase 1	Phase 1	Phase 1	Phase 2
Trend in 14-day rate of new COVID-19 cases per 100K population (1) (4) • 12/20/20–1/2/21 vs. 1/3/21–1/16/21	+4%	+22%	+69%	-2%	+20%	-1%	+13%	+15%
Trend in 14-day rate of new COVID-19 hospital admissions per 100K population (2) (4) • 12/27/20–1/9/21 vs. 1/10/21–1/23/21	-16%	-16%	+16%	+41%	+16%	-29%	+17%	-10%
Average 7-day percent occupancy of ICU staffed beds (2) (5) • 1/17/21–1/23/21	84%	76%	58%	84%	71%	87%	66%	82%
7-day percent positive of COVID-19 tests (1) (3) (6) • 1/3/21–1/9/21	9%	18%	9%	14%	9%	22%	21%	9%

(1) Data source: Washington Disease Reporting System
(2) Data source: WA HEALTH
(3) Data source: WA Department of Health negative labs dataset
(4) Decrease is -10% or more; flat is between 0% to less than -10%; and increase is more than 0%
(5) Low is less than 90%, high is 90% or more
(6) Low is less than 10%, high is 10% or more

Appendix C

Healthy Washington - Roadmap to Recovery

Activities	Phase 1	Phase 2
Social and At-Home Gathering Size — Indoor	Prohibited	Max of 5 people from outside your household, limit 2 households
Social and At-Home Gathering Size — Outdoor	Max of 10 people from outside your household, limit 2 households	Max of 15 people from outside your household, limit 2 households
Worship Services	Indoor maximum 25% capacity	Indoor maximum 25% capacity
Retail Stores (includes farmers' markets, grocery and convenience stores, pharmacies)	Maximum 25% of capacity, encourage curbside pick-up	Maximum 25% of capacity, encourage curbside pick-up
Professional Services	Remote work strongly encouraged, 25% capacity otherwise.	Remote work strongly encouraged, 25% capacity otherwise.
Personal Services	Indoor maximum 25% capacity.	Indoor maximum 25% capacity.
Eating and Drinking Establishments (establishments only serving individuals 21+ and no food remain closed)	Indoor dining prohibited. Outdoor or open-air dining, end alcohol service/delivery at11PM, max 6 per table, limit 2 households per table	Indoor dining available 25% capacity, end alcohol service/delivery at 11PM. Outdoor or open-air dining available, max 6 per table, limit 2 households per table
Weddings and Funerals	Ceremonies are limited to a total of no more than 30 people. Indoor receptions, wakes, or similar gatherings in conjunction with such ceremonies are prohibited.	Ceremonies and indoor receptions, wakes, or similar gatherings in conjunction with such ceremonies are permitted and must follow the appropriate venue requirements. If food or drinks are served, eating and drinking requirements apply. Dancing is prohibited.
Indoor Recreation and Fitness Establishments (includes gyms, fitness organizations, indoor recreational sports, indoor pools, indoor K-12 sports, indoor sports, indoor personal training, indoor dance, no-contact martial arts, gymnastics, climbing)	Low risk and moderate risk sports permitted for practice and training only in stable groups of no more than 5 athletes. Appointment based fitness/training; less than 1 hour sessions, no more than 1 customer/athlete per room or per 500/sq. ft. for large facilities.	Low and moderate risk sports competitions permitted (no tournaments). High risk sports permitted for practice and training. Fitness and training and indoor sports maximum 25% capacity.
Outdoor Sports and Fitness Establishments (outdoor fitness organizations, outdoor recreational sports, outdoor pools, outdoor parks and hiking trails, outdoor campsites, outdoor K-12 sports, outdoor sports, outdoor personal training, outdoor dance, outdoor motorsports)	Low and moderate risk sports permitted for practice and training only (no tournaments). Outdoor guided activities, hunting, fishing, motorsports, parks, camping, hiking, biking, running, snow sports, permitted.	Low, moderate, and high-risk sports competitions allowed (no tournaments), maximum 200 including spectators.
Indoor Entertainment Establishments (includes aquariums, indoor theaters, indoor arenas, indoor concert halls, indoor gardens, indoor museums, indoor bowling, indoor trampoline f acilities, indoor cardrooms, indoor entertainment activities of any kind, indoor event spaces)	Private rentals/tours for individual households of no more than 6 people permitted. General admission prohibited.	Maximum 25% capacity or 200 people, whichever is less. If food or drinks are served, eating and drinking requirements apply.
Outdoor Entertainment Establishments (includes zoos, outdoor gardens, outdoor aquariums, outdoor theaters, outdoor stadiums, outdoor event spaces, outdoor arenas, outdoor concert venues, rodeos)	Ticketed events only: Groups of 10, limit 2 households, timed ticketing required.	Groups of 15, limit 2 households per group, maximum 200 including spectators for events.

NOTE: Live entertainment is no longer prohibited but must follow guidance above for the appropriate venue. Long-term Care facilities, professional and collegiate sports remain governed by their current guidance/proclamations separate from this plan. Not every business activity is listed. For a complete list of guidance for business activties, click here.

Appendix C

Appendix One

Trend in 14-day rate of new COVID-19 cases per 100K population:

The Trend in 14-day rate of new COVID-19 cases per 100K population metric describes whether virus transmission is increasing, decreasing, or staying the same (referred to here as "flattening"). A case is defined as an individual with a molecular or antigen test that is positive for COVID-19. Cases are assigned to the date a specimen was collected for testing, called the specimen collection date.

This metric is calculated by dividing the number of cases with a specimen collection date in a 14-day period by the population in the region and multiplying by 100,000. The percent change is calculated by subtracting the rate during the preceding time period from the rate during the most recent time period, dividing by the rate in the preceding time period, and multiplying by 100. The direction of the trend is defined by thresholds. The thresholds for this metric are:

- Decrease: -10% or more
- Flat: between 0% to less than -10%
- Increase: More than 0%

Data from WDRS are used for this metric. Metrics are calculated using the most recent complete data for two Sunday–Saturday weeks.

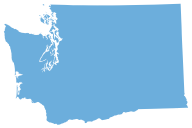
Trend in 14-day rate of new COVID-19 hospital admissions per 100K population:

The Trend in 14-day rate of new COVID-19 hospital admissions per 100K population metric describes the impact on healthcare systems and whether the number of hospital admissions is increasing, decreasing, or flattening. A hospital admission is defined as an individual with confirmed COVID-19 infection who was admitted to the hospital. A hospital admission is assigned to the region of the hospital, not the region in which the individual lives. About 90% or more of Washington residents with COVID-19 in November 2020 were determined to reside in the same region as the hospital.

This metric is calculated by dividing the number of COVID-19 hospital admissions with an admission date in a 14-day period by the population in the region and multiplying by 100,000. The percent change is calculated by subtracting the rate during the preceding time period from the rate during the most recent time period, dividing by the rate in the preceding time period, and multiplying by 100. The direction of the trend is defined by thresholds. The thresholds for this metric are:

- Decrease: -10% or more
- Flat: between 0% to less than -10%
- Increase: More than 0%

Data from WA HEALTH are used for this metric. Metrics are calculated using the most recent complete data for two Sunday–Saturday weeks.



Appendix C

Average 7-day percent occupancy of ICU staffed beds:

The Average 7-day percent occupancy of ICU staffed beds metric describes the capacity of the healthcare system to respond to the pandemic by indicating how many beds are currently occupied by critically ill patients and thus not available to treat additional patients who may need critical care. ICU occupancy is defined as the number of staffed adult ICU beds occupied in acute care hospitals. ICU occupancy includes all patients in the ICU, not only patients with COVID-19.

This metric is calculated by dividing the number of staffed adult ICU beds occupied each day by the total number of staffed adult ICU beds available and multiplying by 100. A 7-day average is calculated by averaging the percent over the most recent 7 days. The thresholds for this metric are:

- Low: Less than 90%
- High: 90% or more

Data from WA HEALTH are used for this metric. Metrics are calculated using the most recent complete data for a single Sunday–Saturday week.

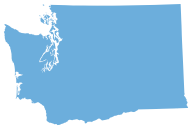
7-day percent positivity of COVID-19 tests :

The 7-day percent positive of COVID-19 tests metric describes how widespread infections are and if sufficient testing is occurring. A test is defined as a molecular test, including PCR, performed on an individual who has not previously tested positive for COVID-19 by molecular testing. Tests are assigned to the specimen collection date. Antigen and antibody tests are not included in this metric.

This metric is calculated by dividing the number of positive COVID-19 tests by the total number of tests performed in a 7-day period and multiplying by 100. The thresholds for this metric are:

- Low: Less than 10%
- High: 10% or more

Data from WDRS and the DOH negative lab dataset are used for this metric. Metrics are calculated using the most recent complete data for a single Sunday–Saturday week.



Appendix C

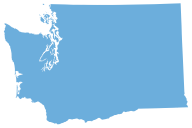
Every other week on Friday, a color-coded status will be determined for each of the four indicators, charted in a table, and mapped accordingly. To determine the status, the most recent complete data will be used.

Case Rates 14-day trend	
Decline (-10% or more)	
Flat (0% change to -10%)	
Any Increase	

Hospital Admission Rates 14-day trend	
Decline (-10% or more)	
Flat (0% change to -10%)	
Any Increase	

ICU Occupancy	
Above 90%	
Below 90%	

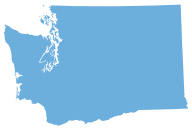
Percent Positivity	
Above 10%	
Below 10%	



Appendix C

Appendix Two

EMS Region	Counties
Puget Sound	King, Pierce, Snohomish
East	Adams, Asotin, Ferry, Garfield, Lincoln, Pend Oreille, Spokane, Stevens, Whitman
North	Island, San Juan, Skagit, Whatcom
North Central	Chelan, Douglas, Grant, Okanogan
Northwest	Clallam, Jefferson, Kitsap, Mason
South Central	Benton, Columbia, Franklin, Kittitas, Walla Walla, Yakima
Southwest	Clark, Cowlitz, Klickitat, Skamania, Wahkiakum
West	Grays Harbor, Lewis, Pacific, Thurston



Appendix C

Inslee announces metric changes to Healthy Washington — Roadmap to Recovery

Regions will now only be required to meet three of the metrics, not all four, to progress to Phase 2

WA Governor's Office Follow
Jan 28 · 3 min read

Gov. Jay Inslee today announced several changes to the state's Healthy Washington — Roadmap to Recovery. The governor first announced the regional, phased reopening plan Jan. 6.

The plan will be changed in two ways; first, the evaluation criteria for regions to move from Phase 1 to Phase 2, and the timeframe in which regions can progress.

> *"We are getting closer to finding our way out of this mess, but we aren't there yet,"* ***Inslee said during a press conference Thursday.*** *"We have sacrificed too much to let our frustrations get the best of us now when the finish line is in sight, however distant that may seem in our field of vision."*

The changes come after further conversations with public health partners and the state's increasing vaccination rates.

Appendix D

Phase 2

In accordance with the roadmap, several regions will be eligible to enter Phase 2 beginning Monday. The progression is contingent on whether their metrics continue their positive trends.

Regions moving to Phase 2 effective Monday are:

- **West** (Grays Harbor, Pacific, Thurston, Lewis)
- **Puget Sound** (Snohomish, King, Pierce)

> *"The fact that these two regions are moving into Phase 2 is encouraging news,"* ***said Umair A. Shah, MD, MPH, secretary of health****. "As we continue our community efforts, we hope more such progress will be made. Ultimately our goal remains ensuring the health and safety of all of Washington."*

Metrics

Under the new plan, regions will only be required to meet three of the four public health metrics to progress to Phase 2. The original roadmap required regions to meet all four.

Healthy Washington Metrics by Region

Increasing or High | Flattening | Decreasing or Low

	Puget Sound	East	North	North Central	Northwest	South Central	Southwest	West
Phase as of 02/01/2021	Phase 2	Phase 1	Phase 1	Phase 1	Phase 1	Phase 1	Phase 1	Phase 2
Trend in 14-day rate of new COVID-19 cases per 100K population (1) (4) • 12/20/20–1/2/21 vs. 1/3/21–1/16/21	+4%	+22%	+69%	-2%	+20%	-1%	+13%	+15%
Trend in 14-day rate of new COVID-19 hospital admissions per 100K population (2) (4) • 12/27/20–1/9/21 vs. 1/10/21–1/23/21	-16%	-16%	+16%	+41%	+16%	-29%	+17%	-10%
Average 7-day percent occupancy of ICU staffed beds (2) (5)	84%	76%	58%	84%	71%	87%	66%	82%

Appendix D

• 1/17/21–1/23/21	84%	76%	58%	84%	71%	87%	66%	82%
7-day percent positive of COVID-19 tests (1) (3) (6) • 1/3/21–1/9/21	9%	18%	9%	14%	9%	22%	21%	9%

(1) Data source: Washington Disease Reporting System
(2) Data source: WA HEALTH
(3) Data source: WA Department of Health negative labs dataset
(4) Decrease is -10% or more; flat is between 0% to less than -10%; and increase is more than 0%
(5) Low is less than 90%, high is 90% or more
(6) Low is less than 10%, high is 10% or more

The four metrics remain the same. They are:

1. **Trend in case rate**: Trend in 14-day rate of new COVID-19 cases per 100K population;
2. **Trend in hospital admissions rate**: Trend in 14-day rate of new COVID-19 hospital admissions per 100K population;
3. **Percent ICU occupancy**: Average 7-day percent occupancy of ICU staffed beds; and
4. **Percent positivity**: 7-day percent positive of COVID-19 tests.

The metrics provide an overview of current COVID-19 trends and health care system readiness in

each region, ensuring that health care systems will efficiently and equitably respond to potential future outbreaks.

The requirement to maintain three metrics to remain in Phase 2 remains unchanged. If any region fails to meet any two metrics, they will still regress to Phase 1.

Timeframe

The governor also announced that the Department of Health's timeline for region's evaluation will change. Beginning next week, regions metrics will be evaluated every two weeks instead of every week.

Read the full Healthy Washington — Roadmap to Recovery plan here.

Appendix D

☐ EXPEDITE
☒ No hearing set
☐ Hearing is set
Date: _____
Time: _____
Judge: Hon. Travis C. Brandt

STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

SLIDEWATERS, LLC, Plaintiff, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES; and GOVERNOR JAY INSLEE, in his official capacity, Defendants.	NO. 20-2-00389-04 MOTION FOR VOLUNTARY DISMISSAL PURSUANT TO CR 41(a)(1) and (c) **CLERK'S ACTION REQUIRED**

I. RELIEF REQUESTED

Pursuant to CR 41(a)(1) and (c), Defendants Washington State Department of Labor & Industries and Governor Jay Inslee respectfully move for voluntary dismissal of the Governor's counterclaim.

II. FACTUAL BACKGROUND

This case was filed in this Court by Plaintiff against Defendants on June 4, 2020. On June 8, 2020, it was removed by Defendants to the U.S. District Court for the Eastern District of Washington. On June 26, 2020, Defendants answered Plaintiff's Complaint, and Governor Inslee asserted a state law counterclaim against Plaintiff. *See* Declaration of Zachary Pekelis Jones (Jones Decl.), Ex. A. On July 14, 2020, the federal district court entered final judgment for Defendants on

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Appendix E

Plaintiff's claims, dismissing Plaintiff's Complaint with prejudice. *See* Jones Decl., Exs. B and C. The federal court ordered that the case was "hereby REMANDED to Chelan County Superior Court for all further proceedings concerning Defendants' state law counterclaim (former Chelan County Superior Court No. 20-2-00389-04)." *See* Jones Decl., Ex. B. The federal court directed that a certified copy of its July 14 order be mailed to the Clerk of this Court. *Id.* Plaintiff has not filed a responsive pleading to Defendant Inslee's counterclaim. Jones Decl. ¶ 5.

III. STATEMENT OF ISSUE

Whether to dismiss the Defendant Inslee's counterclaim pursuant to CR 41(a) and (c).

IV. EVIDENCE RELIED UPON

This motion is based upon the accompanying Declaration of Zachary Pekelis Jones, the exhibits thereto, and the pleadings and records of this Court.

V. ARGUMENT

CR 41(a) provides that dismissal of an action is mandatory when undertaken voluntarily by a plaintiff "at any time before plaintiff rests at the conclusion of plaintiff's opening case." CR 41(a)(1)(B). CR 41(c) provides: "The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim." Specifically, "A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing."

The Governor has not made his opening case with respect to his counterclaim against Plaintiff. Plaintiff has not filed a responsive pleading to the counterclaim. Therefore, dismissal of the claim—and the remainder of this state court action—is mandatory under CR 41. (Dismissal will not affect Plaintiff's right to appeal its own claims in federal court.) Under CR 41(a)(4), the dismissal should be without prejudice.

VI. CONCLUSION

For the reasons stated above, Defendants respectfully request this Court to dismiss the Governor's remaining state law counterclaim. A proposed order is attached.

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Appendix E

DATED this 17th day of July, 2020.

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Attorney General

ZACHARY PEKELIS JONES, WSBA #44557
BRENDAN SELBY, WSBA #55325
Assistant Attorneys General
ANASTASIA SANDSTROM, WSBA #24163
ELLIOT S. FURST, WSBA #12026
Senior Counsels
JEFFREY T. EVEN, WSBA #20367
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emma.grunberg@atg.wa.gov
Attorneys for Defendants

Appendix E

DECLARATION OF SERVICE

I declare that I caused a copy of this document to be served on all parties or their counsel of record via electronic mail on the date below as follows:

Sydney Phillips
Robert Bouvatte
Freedom Foundation
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Olympia, WA 98507
(360) 956-3482
SPhillips@freedomfoundation.com
RBouvatte@freedomfoundation.com
Attorneys for Plaintiff

DATED this 17th day of July 2020, at Seattle, Washington.

ZACHARY PEKELIS JONES, WSBA #44557
Assistant Attorney General

Appendix E

$ FEE PAID 30.00

FILED
AUG 19 2020
Kim Morrison
Chelan County Clerk

☐ EXPEDITE
☒ No hearing set
☐ Hearing is set
Date: _____
Time: _____
Judge: Hon. Travis C. Brandt

STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

SLIDEWATERS, LLC,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES; and GOVERNOR JAY INSLEE, in his official capacity,

Defendants.

NO. 20-2-00389-04

ORDER GRANTING DEFENDANTS' VOLUNTARY DISMISSAL PURSUANT TO CR 41(a)(1) and (c)

CLERK'S ACTION REQUIRED

This Court has considered Defendants' Motion for Voluntary Dismissal, the Declaration of Zachary Pekelis Jones (together with attached exhibits A–C), Defendants' proposed order, and the records and pleadings already on file. It is, therefore,

ORDERED that Defendants' Motion for Voluntary Dismissal is GRANTED. Defendant Inslee's counterclaim in this matter is DISMISSED without prejudice and without cost to any party.

This 19th day of August, 2020.

Hon. Travis C. Brandt
Chelan County Superior Court Judge

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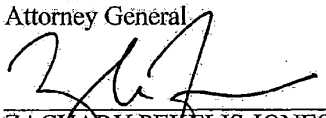
Appendix E

Presented By:

ROBERT W. FERGUSON
Attorney General



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jeffrey.even@atg.wa.gov
paul.weideman@atg.wa.gov
emma.grunberg@atg.wa.gov
Attorneys for Defendants

Appendix E

DECLARATION OF SERVICE

I declare that I caused a copy of this document to be served on all parties or their counsel of record via electronic mail on the date below as follows:

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SPhillips@freedomfoundation.com
RBouvatte@freedomfoundation.com
Attorneys for Plaintiff

DATED this 17th day of July 2020, at Seattle, Washington.

ZACHARY PEKELIS JONES, WSBA #44557
Assistant Attorney General

Appendix E

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In the Matter of Slidewaters, LLC Robert Bordner, Owner Burke Bordner, Owner Applicants.	NO. M2020-688 STIPULATED MOTION TO DISMISS

STIPULATION

The parties hereby stipulate and agree that this adjudicative proceeding commenced by Robert and Burke Bordner, Owners, should be dismissed with prejudice, without an award of fees or costs to any party pursuant to the attached settlement agreement.

DATED this 24 day of November 2020.

ROBERT W. FERGUSON
Attorney General

Lisa D. Kelley, WSBA No. 21240
Assistant Attorney General
360-586-7879
Attorneys for State of Washington
Department of Health

FREEDOM FOUNDATION

Sydney Phillips, WSBA #54295
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Appendix F

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In the Matter of Slidewaters, LLC Robert Bordner, Owner Burke Brodner, Owner Applicants.	NO. M2020-688 SETTLEMENT AGREEMENT AND PROPOSED ORDER

I. STIPULATION

The Department of Health (the "Department"), represented by ROBERT W. FERGUSON, Attorney General and LISA DAELEY KELLEY, Assistant Attorney General, and Respondents, ROBERT BORDNER and BURKE BORDNER (together, the "Bordners"), doing business as Slidewaters, LLC ("Slidewaters"), represented by SYDNEY PHILLIPS and ROBERT BOUVATTE of the Freedom Foundation, hereby submit this Settlement Agreement (Agreement) to the Department of Health Adjudicative Service Unit as a full and final settlement of the above-referenced appeal, and request that the Presiding Officer enter an order dismissing the appeal.

II. BACKGROUND

On July 10, 2020, the Department of Health issued an Initial Order directing Slidewaters to stop operating any general use spa, general use wading pool, general use spray pool, and recreational water contact facility regulated under WAC 246-262, including any water slides, pool, lazy river, spa, or aqua zoo, in violation of Proclamation 20-25.6, the Safe Start Washington

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Appendix F

Phased Reopening County-by-County Plan, and the Phase 1 Miniature Golf, Putt Putt Golf, and Staffed Water Recreation Facilities (Public and Private) COV1D-19.

III. REOPENING REQUIREMENTS

On July 29, 2020, Slidewaters filed a timely request for adjudicative proceeding and denied the allegations contained in the Department's Initial Order. The Adjudicative Service Unit has jurisdiction to issue this Order. The parties agree that this order will resolve the issues related to the Department's Initial Order, on the terms set forth herein.

IV. NON-ADMISSIONS

The Department of Health's entry into this Agreement in no way constitutes an admission that its Order was unlawful or invalid, nor an admission that the Department could not present evidence establishing a *prima facie* case in an adjudicative proceeding in support of its Initial Order.

Respondent's signing of this Agreement in no way constitutes an admission of a violation of any law, standard, or regulation administered or enforced by the Department of Health. Nothing in this Agreement may be used against either party except for the enforcement of this Agreement's terms and provisions, and neither this Agreement, nor the resolution of the pending proceedings, shall have preclusive effect as to any issue between the parties hereto.

V. NOTICE

The Initial Order serves as notice to Slidewaters that the Department considers operation in violation of the Governor's orders unlawful and that should the orders remain in effect upon their reopening date in 2021 the Department may, in the exercise of its enforcement discretion, suspend Slidewaters' permits and assess a penalty without issuing a Notice of Correction.

VI. MEET AND CONFER

The parties agree that in advance of the 2021 season, prior to reopening, program staff with decision-making authority at DOH and CDHD will meet with Slidewaters to discuss and clarify requirements for Slidewaters to reopen in compliance with applicable regulations, should requirements remain substantially similar to those in effect as of the date of this agreement and

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Appendix F

should the parties agree that such a meeting is required. Should there be a change of circumstances, including, but not limited to modification or lifting of the applicable Governor's emergency orders in place as of the date of this agreement which remove requirements for Slidewaters to reopen, such a meeting may not be necessary. The parties agree to discuss in good faith whether such a meeting is required in advance of Slidewaters' reopening.

VII. PROPOSED ORDER OF DISMISSAL

The parties agree that the Presiding Officer may issue an order dismissing Slidewaters' appeal of the Department's Initial Order issued July 10, 2020.

TODD PHILLIPS, Director
Office Of Envirnmental Health & Safety

11/19/2020
DATE

ROBERT BORDNER, Owner
Slidewaters

11-19-2020
DATE

BURKE BORDNER, Owner
Slidewaters

11-19-20
DATE

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Appendix F

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ZACH MILLER, JEFFREY NELSON, MICHAEL JELLISON, and ALICIA MUNRO,

Petitioners,

v.

JAY INSLEE, GOVERNOR OF THE STATE OF WASHINGTON,

Respondent.

No. 98597-9

RULING DISMISSING ORIGINAL ACTION AGAINST STATE OFFICER

Zach Miller, Jeffrey Nelson, Michael Jellison, and Alicia Munro (collectively petitioners), invoking this court's original jurisdiction under article IV, section 4 of the Washington Constitution and RCW 7.16.160, jointly filed a petition directly in this court seeking issuance of a writ of mandamus compelling Governor Jay Inslee to rescind a series of proclamations he issued in response to the COVID-19 pandemic that has gripped Washington, the United States, and much of the globe for the past several months. Although petitioners deserve empathy for the struggles they and their businesses currently face in relation to this public health emergency, they ask this court to do what it cannot: control the governor's discretionary actions. Their original action therefore must be dismissed, as explained below.

The following is not seriously in dispute. COVID-19 is a virulent strain of coronavirus that is easily transmitted between humans. Its rate of mortality is many times higher than common strains of influenza. It was initially believed that the first case of COVID-19 to reach the shores of the United States occurred in Washington in late 2019 or early 2020. The first recorded death in the United States occurred in Washington in late February 2020. Soon thereafter, another major outbreak started in New York. The disease then spread exponentially across the United States. As of this writing, COVID-19 has infected more than 1,700,000 people in the United States and more than 21,000 people in Washington. It has killed more than 105,000 people in the United States and more than 1,100 people in Washington. The death toll continues to climb, with some states seeing a decline in rates of infection and death and others seeing an increase in both categories. The medical and scientific communities are racing to develop an effective vaccine. We are living through the greatest public health crisis to hit the United States, and the world, since the great post-First World War influenza pandemic. The economic effects have been profound, bringing to mind the devastation of the Great Depression. This crisis affects all of us to some degree.

People will endlessly debate the speed and efficacy of local, state, and federal responses to this calamity. There can be no dispute, however, that Governor Inslee acted in his official capacity pursuant to RCW 43.06.220. On February 29, 2020, he issued Proclamation 20-05, declaring a state of emergency for all counties of the state. More than a dozen proclamations followed throughout March, prohibiting certain activities and suspending a number of laws and regulations.

On March 23, 2020, the governor issued the first of the proclamations at issue here, Proclamation 20-25. The governor noted that there were currently at least 2,221 COVID-19 cases in Washington and at least 110 deaths associated with the disease and that progression of the disease had the potential to overwhelm Washington's hospitals

unless steps were taken to substantially slow its spread. Accordingly, the governor issued what he termed the "Stay Home–Stay Healthy Order." The order prohibited Washingtonians from leaving their places of residence except to conduct or participate in essential activities and/or engage in essential businesses. The order further prohibited private and public multiperson gatherings for a variety of purposes, including "faith-based" activities. Proclamation 20-25 at 4. And the order prohibited all nonessential businesses in the state "from conducting all activities and operations except minimum basic operations." *Id*. The proclamation went into effect on March 25, 2020, and was to remain in effect until April 8, 2020, unless extended.

On April 2, 2020, the governor issued Proclamation 20-25.1. The governor noted that the number of confirmed COVID-19 cases and deaths in Washington had more than doubled, to at least 5,984 cases and 247 related deaths. Reasoning that it was necessary "to protect the health and safety of all Washingtonians," the governor extended the Stay Home–Stay Healthy Order, including the prohibition on faith-based multiperson gatherings and non-essential businesses, to May 4, 2020, unless extended.

On April 27, 2020, Governor Inslee issued Proclamation 20-25.2, noting that there were currently at least 13,521 confirmed COVID-19 cases and at least 749 related deaths in Washington. Apart from exceptions for certain outdoor activities not at issue here, the proclamation maintained the extension of the stay home order to May 4, 2020.

On May 4, 2020, the governor issued the last of the proclamations challenged in this action, Proclamation 20-25.3. The governor observed that as of May 2, 2020, Washington had 15,185 COVID-19 cases and 834 associated deaths but that there was also data indicating the state had passed the peak of the virus's spread through Washington's population. The governor further noted that medical experts attributed this improving trend "to the mandatory social distancing practices and prohibitions we have put in place." Proclamation 20-25.3 at 2. Based on the available science and data,

the governor instituted a multi-phase reopening plan, dubbed "Safe Start Washington," with all counties then in "Phase I." *Id*. at 3. The governor authorized drive-through religious services and resumption of certain low-risk business activities, such as lawn care, pet walking, car washes, and curb-side retail. The Stay Home–Stay Healthy Order otherwise remained in effect until 11:59 p.m. on May 31, 2020.

On May 31, 2020, the governor issued Proclamation 20-25.4, which announced a transition from Stay Home–Stay Healthy to "Safe Start–Stay Healthy," a county-by-county reopening plan. Otherwise, restrictions on nonessential businesses remain in effect in Phase I counties. Proclamation 20-25.4 will remain in effect until 11:59 p.m. on July 1, 2020. In making this proclamation, the governor observed that currently there were 21,349 COVID-19 cases and 1,118 related deaths.

Since Proclamation 20-25.3 went into effect, an increasing number of counties have progressed to Phase 2 of the Safe Start Washington plan, allowing a wider resumption of business and religious activities. Fitness training businesses may operate under Phase 2, subject to detailed operational guidelines. *See* https://www.governor.wa.gov/sites/default/files/COVID19Phase2FitnessGuidelines.pdf. (visited June 3, 2020). As of the date of this ruling, several counties remain in Phase I, including Snohomish and Chelan Counties.

On May 26, 2020, petitioners filed the instant original action in this court. The petition is supported by declarations signed by each petitioner. Mr. Nelson, Mr. Miller, and Mr. Jellison indicate they are residents of Snohomish County. Ms. Munro indicates she is a resident of Chelan County. All petitioners allege they own and operate fitness and physical training gyms and related businesses. Petitioners further allege their businesses have been severely affected by their closure in accordance with the challenged proclamations. Mr. Jellison in particular asserts that the situation has been most stressful. None of the petitioners allege in their declarations that their rights to

worship or engage in other religious activities have been violated. Apart from complaining that their businesses were forced to close without a hearing, none of the petitioners have asserted that their right of assembly has been affected. Petitioners' factual allegations will be presumed true for purposes of this ruling.

Petitioners seek issuance of a writ of mandamus directing Governor Inslee to rescind Proclamations 20-25, 20-25.1, 20-25.2, and 20-25.3. Petitioners further ask this court to determine the constitutionality of RCW 38.08.030 and several subsections of RCW 43.06.220(1). On June 2, 2020, the court received confirmation of service on the governor and notice of appearance by attorneys general representing the governor. Now before me is whether to refer the petition to the court for further consideration, refer it to an appropriate superior court, or dismiss it outright. RAP 16.2(d).[1]

A writ of mandamus is an extraordinary remedy that allows this court to direct a coordinate, equal branch of Washington's government to take specific actions, notwithstanding constitutional doctrine of the separation of powers. *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). The availability of mandamus is strictly limited because under separation of powers principles this court ordinarily "will not usurp the authority of the coordinate branches of government." *Id*. at 410. Consistent with these separation of powers principles, mandamus is available only when the law plainly requires a government official to take a particular action. *Freeman v. Gregoire*, 171 Wn.2d 316, 323, 256 P.3d 264 (2011). Stated another way, mandamus is an appropriate remedy only where the law defines the duty to be performed by the official with such precision that there is no room for discretion or judgment. *Walker*, 124 Wn.2d at 407. On the other hand, if the law does not require a government official to take a specific action, this court cannot order such action by way of a writ of mandamus. *See*

[1] As will become apparent below, the petition is so plainly devoid of merit that it is unnecessary to require the governor's answer. RAP 17.4(c)(1).

State ex rel. Taylor v. Lawler, 2 Wn.2d 488, 490, 98 P.2d 658 (1940) (this court's jurisdiction under Article IV, section 4 of the Washington Constitution does not authorize issuance of a writ of mandamus generally controlling or directing the actions of state officers). Thus, a writ of mandamus may not be employed to control an official's discretionary acts. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010).

Besides showing that a state official has a clear duty to act, those seeking a writ of mandamus under RCW 7.16.160 must show they have no "plain, speedy, and adequate remedy in the ordinary course of law" and that they are "beneficially interested." RCW 7.16.170. Petitioners must prove all three of these elements to justify mandamus." *Eugster v. City of Spokane*, 118 Wn. App. 383, 403, 76 P.3d 741 (2003).

These petitioners ask this court to issue a writ commanding Governor Inslee to rescind Proclamations 20-25, 20-25.1, 20-25.2, and 20-25.3. More generally, petitioners ask the court to compel the governor to (1) end house arrests, (2) restore habeas corpus, (3) restore religious liberty and the free practice thereof in Washington State, (4) restore the right of assembly, and (5) end discrimination between essential and nonessential businesses in Washington. None of this is possible by way of a writ of mandamus when the law does not impose a clear mandatory duty to act.

Barely a week ago, the United States Supreme Court denied an application to enjoin an executive order issued by the governor of California limiting attendance at places of worship. *South Bay United Pentecostal Church, et al. v. Newson*, 590 U.S. ___ (2000), 2020 WL 2813056. Concurring in the order denying relief, Chief Justice Roberts persuasively acknowledged the role of state government in responding to public health emergencies:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts

> "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974).

South Bay United Pentacostal Church, 2020 WL 2813056 at *1.

Consistent with this principle, "[t]he proclamation of an emergency and the Governor's issuance of executive orders" to address that emergency "are by statute committed to the sole discretion of the Governor." *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 476, 647 P.2d 481 (1982). Thus the governor may "proclaim a state of emergency" in response to a disaster that threatens "life, health, property, or the public peace." RCW 43.06.010(12). Such a proclamation activates "the powers granted the governor during a state of emergency." *Id.* Those powers include the authority to prohibit "[a]ny number of persons … from assembling," RCW 43.06.220(1)(b), "to waive or suspend" "any statute, order, rule, or regulation [that] would in any way prevent, hinder, or delay necessary action in coping with the emergency," RCW 43.06.220(2)(g), to "order the state militia … to assist local officials to restore order," RCW 43.06.270, and more. These statutory provisions reflect the legislature's intent to delegate necessary police powers to the governor in response to state-wide emergencies. *Cougar Bus. Owners Ass'n*, 97 Wn.2d at 474. Accordingly, the governor's discretionary acts in response to a state-wide emergency are not subject to control by way of a writ of mandamus. *SEIU Healthcare 775NW*, 168 Wn.2d at 600.

Governor Inslee exercised his discretion under these emergency powers when he issued Proclamation 20-25, declaring a statewide emergency, and many times since in a series of related proclamations, including the four proclamations petitioners demand this court force the governor to withdraw. Petitioners necessarily acknowledge this as they relate the history of the COVID-19 outbreak in Washington and the governor's discretionary actions in response. Petitioners then assert that the governor "has

abolished the constitutional state of Washington, and has erected in its place an unacceptable tyranny in violation of his oath of office and in breach of the duty owed to Petitioners." Petition at 22. All but ignoring the increasing cost in human lives caused by the pandemic, petitioners struggle to describe a particular nondiscretionary duty owed to them, apart from expressing their disagreements with the emergency measures the governor chose to institute by means of proclamations authorized by statute.

Petitioners broadly assert that chapter 38.08.030 RCW, which authorizes the governor to declare limited martial law, including trial by military tribunal and the suspension of the writ of habeas corpus, is unconstitutional. They relatedly demand issuance of a writ directing the governor to restore the writ of habeas corpus. But the governor did not declare martial law under that statute. The governor's proclamations merely cite chapter 38.08 RCW generally with respect to activation of the militia, including the National Guard, for purposes of rendering assistance in dealing with the outbreak. The writ of habeas corpus has not been suspended with respect to petitioners or anyone else in Washington. This argument is frivolous.

Petitioners further demand issuance of a writ directing the governor to end house arrests. More specifically, petitioners ask this court to direct the governor to rescind the phrase, "prohibiting all people in Washington State from leaving their homes" from all of his proclamations. Petition at 31. But petitioners ignore provisions allowing individuals to leave their homes to shop for or obtain essential provisions and engage in a limited range of recreational and other activities. A proclamation that leaves persons free to a walk in the park or visit the grocery store while engaged in social distancing is not tantamount to house arrest. This argument, too, is frivolous.

Petitioners also request issuance of a writ directing the governor to restore religious liberty and the free practice thereof. But none of the petitioners assert an actual deprivation of religious liberty. In fact none of petitioners' declarations contain the

word "religion" or synonymous terms. Petitioners' claims revolve almost entirely around their business interests. Although I do not consider this claim frivolous in the general sense, it will not be considered further due to the lack of factual allegations personal to petitioners. Furthermore, it bears repeating that the United States Supreme Court recently rejected a challenge to COVID-19 related restrictions on religious gatherings in California. *South Bay United Pentecostal Church*, 590 U.S. ___ (2020), 2020 WL 2813056.

Petitioners additionally demand that this court issue a writ directing the governor to restore the right of assembly. That is an interesting request in light of the thousands of protesters currently exercising their right of assembly in the streets of Seattle concerning civil rights issues unrelated to this case. As with their religious freedom claim, petitioners here do not allege an actual interference with their right to assemble, as protected by the First Amendment and analogous provisions of the Washington Constitution.[2] Rather, petitioners seek to restore their business operations. Their freedom of assembly argument amounts to little more than "naked castings" into the constitutional waters insufficient for judicial consideration. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

Petitioners finally demand that this court issue a writ ordering the governor to end "discrimination" between essential and nonessential businesses. Whether the classification of businesses as essential or nonessential is discriminatory in the constitutional sense may be an interesting academic question, but posing that question here amply illustrates why mandamus will not lie. The governor's decision to list certain businesses as essential and others as not is an almost perfect example of a discretionary

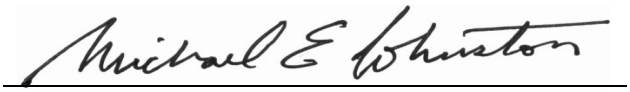
[2] In relation to this claim, and the assertion of house arrest, it is worth noting that at least one of the petitioners, their counsel, and a group of supporters assembled on the steps of the Temple of Justice in Olympia to announce to news media the filing of this action. *See* https://komonews.com/news/coronavirus/three-gym-owners-file-lawsuit-to-rescind-inslees-stay-home-order (May 21, 2020).

act by the executive branch of Washington's government. Petitioners ask this court to control that discretion. That is impossible. As discussed, this court cannot dictate to the governor how he must exercise his discretion. *See Walker*, 124 Wn.2d at 410 ("We will not usurp the authority of the coordinate branches of government.").

Finally, petitioners ask this court to determine the constitutionality of the statutes under which the governor has acted. Essentially, petitioners are asking for declaratory relief. Again, this is not an appropriate form of relief by way of a petition for a writ of mandamus in this court. *See id*. at 411 (Washington Supreme Court does not have original jurisdiction in declaratory judgment action).

While one cannot help but empathize with petitioners' struggles in relation to this state-wide public health emergency, they seek relief by way of the wrong vehicle in the wrong forum. In sum, this petition for writ of mandamus is so completely devoid of merit that the best use of judicial resources at this juncture is to summarily dismiss it under RAP 16.2(d).

The original action against state officer is dismissed.



COMMISSIONER

June 4, 2020