IN THE SUPREME COURT OF IOWA
Supreme Court No. 20–1510

RILEY DRIVE ENTERTAINMENT I, INC. dba TONIC BAR; RILEY DRIVE ENTERTAINMENT XVI, INC. dba SAINTS PUB + PATIO WAUKEE; CINDERELLA STORY, LLC dba SHOTGUN BETTY'S; KISS MY GRITS, LLC dba THE IRISH; AGB, L.L.C. dba ANNIE'S IRISH PUB; W. WEST INVESTMENTS, L.L.C. dba WELLMAN'S PUB & ROOFTOP,

Plaintiffs–Appellants,

vs.

GOVERNOR KIMBERLY K REYNOLDS, in her official capacity as Governor of the State of Iowa; and IOWA DEPARTMENT OF PUBLIC HEALTH,

Defendants–Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE WILLIAM P. KELLY, JUDGE

APPELLEES' PROOF BRIEF

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ROUTING STATEMENT

This appeal should be transferred to the Iowa Court of Appeals. Despite the unique facts of this case, it can be resolved by applying well-established mootness doctrine and thus presents the application of existing legal principles. *See* Iowa R. App. P. 6.1101(3)(*a*).

FACTUAL BACKGROUND AND PROCEEDINGS

I. THE COVID-19 PANDEMIC AND THE AUGUST 27, 2020 PROCLAMATION OF DISASTER EMERGENCY.

Since March 2020, the State of Iowa, like every other state across the country, has been grappling with an intractable challenge: how to safeguard both the lives and livelihoods of the public during an evolving, global pandemic. Following the first cases of the novel coronavirus (COVID-19) appearing within our nation's borders, "governments across the country have enacted measures to reduce the spread of" COVID-19, which is a "highly contagious, easily transferable, and potentially lethal virus" that "is transmitted mainly from person to person through contact, respiratory droplets, and aerosols." *H's Bar, LLC v. Berg*, No. 20-cv-1134, 2020 WL 6827964, at *2 (S.D. Ill. Nov. 21, 2020). "As the virus has spread, government leaders have taken actions to protect people in their jurisdictions from illness and death. They have done so in constantly changing circumstances, and they have responded to new information about the virus and its effects as it has become available." *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 34 (Or. 2020).

COVID-19 has posed a serious danger to the health and lives of Iowans necessitating appropriate countermeasures. On March 9, 2020—following the first confirmed cases of the novel virus in Iowa—Governor Reynolds

responded to this threat by declaring a state of emergency across the entire state. Governor Reynolds then issued a series of Proclamations of Disaster Emergency, containing hundreds of orders and directives, that have touched every aspect of our lives—from worship to recreation, from suspending elective surgeries to suspending evictions, from closing fitness centers to expanding telehealth—all with the aim of reducing the transmission of COVID-19 and mitigating the harms caused by this novel virus and unprecedented worldwide pandemic.

As the Massachusetts Supreme Court eloquently explained, statistics alone cannot convey the full scale of COVID-19's impact.

> In addition to the medical toll COVID-19 has inflicted, the personal toll resulting from the virus and containment measures has been immeasurable. Behind every infection and every death are those who could not visit loved ones in the hospital due to visitation restrictions, or who could not grieve the loss of loved ones with family and friends in the traditional manner. Family and friends had to isolate from one another, and visiting a loved one in another country became impossible, or nearly so. COVID-19 and the attendant containment measures have also resulted in high unemployment, economic hardship, and shuttered businesses.

Desrosiers v. Governor, 158 N.E.3d 827, 831–82 (Mass. 2020).

Throughout the pandemic, as scientists and public health officials learned more about COVID-19's spread and impact in our communities, the State continuously evaluated and adjusted its approach to attempt to strike a

balance between employing effective countermeasures and avoiding extraordinary economic hardships. And as our habits, weather, and circumstances changed, so too did the spread of the virus. *See* Summary Statistics: Positive Cases, COVID-19 IN IOWA, https://coronavirus.iowa.gov/#CurrentStatus (providing data on the daily positive COVID-19 tests since March of 2020 through the present).[1]

In late August of 2020, Iowa experienced a surge of positive cases, with consecutive days of positive case reports in the thousands for the first time since the pandemic began. *Id.* Indeed, during the last week of August, "Iowa had the highest rate of new cases among all states." *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 220 (Iowa 2020) (Oxley, J., dissenting) (citing Betsy Klein, *Task Force Report Shows Dire Warning to Iowa, the State with the Highest Case Rate this Week*, CNN (Sept. 1, 2020)).

On August 27, in response to the substantial surge and to forestall a degree of spread that would overwhelm our healthcare infrastructure, Governor Reynolds issued a new Proclamation of Disaster Emergency. Section 2(A) of the Proclamation prohibited bars and other alcohol establishments in Black Hawk, Dallas, Johnson, Linn, Polk, and Story

[1] Defendants' proof brief was filed on April 26, 2021.

counties from offering on-premises services, limiting their services to carry-out, drive-through, and delivery. Aug. 27, 2020 Proclamation of Disaster Emergency, § 2(A) [hereinafter "the Proclamation"]; App. at ___.[2] The selected counties all fell within the top ten counties in Iowa for positive cases during the 28 days preceding the issuance of Section 2(A). *See* COVID-19 in Iowa, https://coronavirus.iowa.gov. Additionally, the selected counties included those with large populations or counties contiguous to or part of a large metropolitan area, those with student populations or contiguous to such counties, and those with healthcare systems.[3] The prohibition of on-premises services applied to all establishments that sold alcoholic beverages for consumption except restaurants, which was defined as "[a]n establishment that prepares and serves food, the sale of which results in at least half of the establishment's monthly revenues." *Id.* at § 2(A)(3); App. at ___.

Section 2(A) remained in effect until 5:00 p.m. on September 16, at which time the affected establishments in all counties except Johnson and Story were again permitted to offer on-premises service, provided they

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[2] Courts may take judicial notice of Proclamations of Disaster Emergency. *See Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 835–36 (Iowa 1979). All referenced Proclamations may be found online at https://coronavirus.iowa.gov/pages/proclamations.

[3] Courts may take judicial notice of county populations and demographics. *See State v. Proulx*, 252 N.W.2d 426, 431 (Iowa 1977).

implemented reasonable social distancing and hygiene measures. *See* Sept. 15, 2020 Proclamation of Disaster Emergency, § 2(A); App. at ___. The total prohibition of on-premises services was never again implemented. On November 16, in response to another surge in positive cases, Governor Reynolds ordered restaurants and bars to close at 10:00 p.m. in an effort to reduce prolonged person-to-person spread. *See* Nov. 16, 2020 Proclamation of Disaster Emergency, § 7(A)(1), https://perma.cc/7ypa-Ld46. Plaintiffs did not challenge this limitation and it was lifted on December 16, leaving only the requirements of social distancing, group size, face coverings, and increased hygiene practices on bars and restaurants. *See* Dec. 16, 2020 Proclamation of Disaster Emergency, § 2(A), https://perma.cc/eje9-kmf4. On February 5, 2021, Governor Reynolds lifted all pandemic-related requirements on bars and restaurants. *See* Feb. 5, 2020 Proclamation of Disaster Emergency, https://perma.cc/9nsn-kfsh.

II. PROCEDURAL HISTORY.

On August 28, 2020, several bars in Polk and Dallas counties filed a petition in the Iowa District Court for Polk County seeking to temporarily and permanently enjoin the enforcement of Section 2(A) of the Proclamation. The district court set a hearing on the temporary injunction for September 2. Prior to the hearing, the parties each filed extensive briefing in support of their

positions.[4] Plaintiffs also filed an Amended Petition the morning of the hearing, which added multiple new plaintiffs and a purported constitutional tort claim seeking damages. App. at ___.

On September 4, the district court issued a thorough order denying Plaintiff's temporary injunction request, holding that Plaintiffs were unlikely to succeed on the merits of any of their legal challenges to the Proclamation and that Defendants' interests in reducing the transmission of COVID-19 and protecting the health and lives of all Iowans outweighed Plaintiffs' interests in avoiding revenue loss.

Plaintiffs soon thereafter filed an application for interlocutory appeal. While the application was pending, Governor Reynolds lifted the prohibition of on-premises services for Polk and Dallas counties. App. at ___. The supreme court requested additional statements from the parties addressing whether the September 15, 2020 Proclamation rendered the interlocutory appeal moot. After receiving the parties' statements regarding mootness, the Court denied interlocutory appeal.

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[4] Notably, Plaintiffs also offered 51 exhibits for the district court to take notice of, ranging from the Iowa Department of Public Health's online COVID-19 case summary, to a mid-August statement from the Ames Community School District requesting a modified hybrid school plan, to CDC guidance for restaurants and bars from July 2020. *See, e.g.*, Pl. Exs. in Support of Temporary Injunctive Relief 24, 34, 48.

Meanwhile, Defendants filed a motion to dismiss Plaintiffs' Amended Petition in its entirety. Plaintiffs' Amended Petition raised three questions of law for the court: (1) whether section 2(A) comports with certain sections of Iowa Code chapters 29C and 135, (2) whether section 2(A) comports with article I, § 6 of the Iowa Constitution, and (3) whether section 2(A) comports with article I, § 9 of the Iowa Constitution. Defendants argued that the face of the Proclamation demonstrates it complied with Iowa Code chapters 29C and 135, that Plaintiffs could not succeed on an equal protection or substantive due process claim because the Proclamation survives rational basis review, and Plaintiffs could not succeed on their procedural due process claim because no process was constitutionally due. Following the issuance of the September 15 Proclamation, Defendants further argued that Plaintiffs' request for injunctive relief was moot, as there was no longer anything for the court to enjoin.

In response to Defendant's motion to dismiss, Plaintiffs filed a brief that contained just 8 pages of substantive argument. They incorporated by reference the background section of their temporary injunction brief, but no other portion of their temporary injunction materials. Plaintiffs first argued that when ruling on a motion to dismiss, the court must take the Petition's legal conclusions as true and "presuppose" that Defendants violated Plaintiffs'

rights. Pl. Brief in Resistance to Motion to Dismiss, at 5–6. Plaintiffs' remaining arguments were that Defendants failed to cite statutes from other jurisdictions with similar language to Iowa Code chapter 135, *King v. State* is distinguishable, the court should disregard all cases from all other jurisdictions, and our state motto reflects Iowa's "libertarian spirit." *Id.* at 7–9.

Although Plaintiffs acknowledge in their Amended Petition that their constitutional claims are governed by rational basis, Plaintiffs offered *no argument* on the merits of their equal protection claim, despite the law requiring them to "negate every reasonable basis upon which the classification may be sustained." *Bierkamp v. Rogers*, 293 N.W.2d 577, 579–80 (Iowa 1980). Plaintiffs did not even address, let alone successfully negate, *any* of the rationales offered by Defendants to support the Proclamation's distinctions. Moreover, Plaintiffs offered *no argument* regarding whether or what type of process is due, nor did they respond to any of Defendants' cases discussing whether process is due in exigent circumstances. And Plaintiffs similarly offered *no argument* about the proper interpretations of Iowa Code sections 29C.6, 135.140, and 135.144.

The district court granted Defendants' motion and dismissed this case. First, the court determined that Plaintiffs' request for injunctive relief was

moot. Ruling and Order on Defendants' Motion to Dismiss ("Ruling") at 8; App. at ___. The court found that "[t]here is nothing for the Court to enjoin now and the Court's ultimate decision would have no force or effect." *Id.* The court then declined to apply the public importance exception, finding it speculative whether the specific circumstances of this case would again arise and drawing a distinction between federal cases applying the exception to examine free-speech and religious-exercise rights, whereas this case implicates economic interests. *Id.* at 10–11; App. at ___.

With the injunctive claim rendered moot, the court next considered Plaintiffs' damages claim. The court found that it lacked subject matter jurisdiction over the claim because Plaintiffs did not exhaust their remedies under the Iowa Tort Claims Act. *Id.* at 12; *see also Wagner v. State*, 952 N.W.2d 843, 862 (Iowa 2020). Accordingly, the case was dismissible entirely on mootness and subject matter jurisdiction grounds. Ruling, at 12; App. at ___.

The court continued, however, and determined that even if it had jurisdiction and Plaintiffs' claims weren't moot, they must still be dismissed because Plaintiffs failed to state a claim upon which relief can be granted. First, the Proclamation entirely complied with statute, as it contained sufficient facts, COVID-19 falls within the definition of a "public health

disaster," and the prohibition of on-premises services was a reasonable measure necessary to prevent the transmission of infectious disease. *Id.* at 13–17; App. at ___. Second, the Proclamation did not violate Iowa's Equal Protection Clause, as the State has a legitimate interest in protecting the public health during a pandemic and the court could conceive of a rational basis to support the Proclamation's classifications. *Id.* at 18–22; App. at ___. Finally, the Proclamation did not violate Iowa's Due Process Clause, as Plaintiffs "were not entitled to pre-deprivation process based on the impracticality of the emergency situation." *Id.* at 26; App. at ___. Accordingly, none of Plaintiffs' claims are viable and the suit was dismissed.

Plaintiffs appealed, seeking review of the dismissal of their declaratory and injunctive claims but not their damages claim.

ERROR PRESERVATION AND STANDARD OF REVIEW

Defendants generally agree that Plaintiffs have preserved error on the specific issues Defendants identified for review by filing a Resistance to Defendants' motion to dismiss. However, Plaintiffs' brief identifies a litany of "issues" that require resolving in this appeal, despite their Amended Petition only identifying equal protection, due process, and Iowa Code sections 29C.6(1), 135.140(6), and 135.144 as the bases for their suit. These "issues" appear to be either re-packaged versions of their statutory claims or

new legal claims raised for the first time on appeal. *See* Appellant Brief, at 31, 34. Indeed, Plaintiffs certainly did not preserve any issue relating to the proper interpretation of Iowa Code section 29C.2(4), nor any issues regarding "the public's fundamental rights to assemble . . . privacy, and interstate and intrastate travel." *Id.*

And Plaintiffs similarly cannot use this appeal to challenge the validity of other sections of the Proclamation, or any subsequent proclamations, because their Amended Petition exclusively challenged Section 2(A) of the Proclamation. *Compare* Amended Petition, ¶ 25; App. at ___ (identifying Section 2(A) as the "Order of Closure"), *and* ¶¶ 79–107; App. at ___ (identifying "Order of Closure" as the basis for all legal claims), *with* Appellant Brief, at 21 (identifying both Sections 2(A) and 2(B) as the "Order of Closure"), *and* at 29 (arguing that because Section 2(B) continued to be enforced, the September 15, 2020 Proclamation did not moot their suit).

Turning to the standard of review, a motion to dismiss is generally reviewed for correction of errors at law. *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020). However, questions of constitutional interpretation are reviewed de novo. *State v. Sanchez*, 692 N.W.2d 812, 816 (Iowa 2005). Relevant here, when reviewing a motion to dismiss this Court "accepts as true the petitions' well-pleaded factual allegations, but not its legal conclusions."

Shumate v. Drake Univ., 846 N.W.2d 503, 507 (Iowa 2014). Accordingly, contrary to Plaintiffs' repeated assertions, the numerous legal conclusions contained within the Amended Petition are not entitled to any weight, nor must they be presumed true.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND PLAINTIFFS' CLAIMS TO BE MOOT AND CORRECTLY REFUSED TO INVOKE THE PUBLIC IMPORTANCE EXCEPTION.

A. Plaintiffs' Claims Are Moot.

Plaintiffs assert on appeal that "the issues Plaintiffs raised regarding the Proclamation are now moot." Appellants' Brief, at 69. Defendants agree. Plaintiffs seek to enjoin enforcement of a temporary bar closure order issued in August of 2020, which was in effect for less than twenty days and which hasn't been enforceable for over six months. The closure order was rescinded by a Proclamation issued September 15, 2020, and no remaining COVID-related restrictions on Plaintiffs' businesses exist. As the district court succinctly stated: "There is nothing for the Court to enjoin now and the Court's ultimate decision would have no force and effect." Ruling, at 8; App. at ___.

Indeed, the district court properly found Plaintiffs' request for relief must be dismissed because changed circumstances have clearly rendered this matter moot. "Courts exist to decide cases, not academic questions of law.

For this reason, a court will generally decline to hear a case when, because of changed circumstances, the court's decision will no longer matter. This is known as the doctrine of mootness." *Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015).

"A case is moot if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent." *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983). "A live dispute must ordinarily exist before a court will engage in an interpretation of the law." *Lalla v. Gilroy*, 369 N.W.2d 431, 434 (Iowa 1985). To determine whether a case is moot, the court must consider "whether an opinion would be of force or effect in the underlying controversy." *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 540 (Iowa 1997) (quoting *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991)).

The controversy in this case surrounded the implementation and enforcement of Section 2(A)—namely whether the provision was consistent with statute and Plaintiffs' constitutional rights. This controversy is no longer live due to its rescission: specifically, on September 15, 2020, Governor Reynolds issued a new Proclamation lifting the limitations that are the subject of this lawsuit. Plaintiffs' establishments are no longer subject to the Proclamation, nor to any other mandated public health restrictions.

Thus, the provision at issue no longer constrains Plaintiffs' businesses, there is nothing for this Court to enjoin, and this Court's ultimate decision would have no force or effect.[5] The district court properly held that Plaintiffs' claims for declaratory and injunctive relief are moot and should be affirmed.

The district court's ruling on mootness harmonizes with the chorus of judicial voices from other jurisdictions humming a similar refrain: expiration of COVID-related orders moots any request for injunctive relief. *See, e.g.*, *Pearson v. Pritzker*, No. 20-CV-02888, 2021 WL 1121086, at *5 (N.D. Ill. Mar. 24, 2021) (holding that plaintiffs' action seeking injunctive relief was moot, as the governor's executive orders that closed their businesses were no longer in effect); *Nowlin v. Pritzker*, No. 1:20-CV-1229, 2021 WL 669333, at *3 (C.D. Ill. Feb. 17, 2021) (concluding claims for injunctive relief from COVID-19 orders are moot where restrictions had not been in place for over six months); *Cassell v. Snyders*, 458 F. Supp. 3d 981, 990 (N.D. Ill. 2020)

[5] Plaintiffs offered no argument regarding the dismissal of their damages claim in their brief, thereby waiving the issue on appeal. *Goode v. State*, 920 N.W.2d 520, 524 (Iowa 2018). But even if this Court would reach the issue, dismissal must be affirmed because Plaintiffs did not exhaust their administrative remedies under the Iowa Tort Claims Act. *See Wagner*, 952 N.W.2d at 862. With no damages at stake and nothing to enjoin, this appeal does not present a sufficiently live controversy to justify interpreting the Iowa Constitution. *See Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853, 863 (Iowa 2019) (noting the court's "adhere[nce] to the time-honored doctrine of constitutional avoidance").

(holding claims for declaratory and injunctive relief moot where challenged COVID-order was superseded by new framework); *Spell v. Edwards*, 962 F.3d. 175, 179 (5th Cir. 2020) (holding challenge to governor's COVID-related orders was moot because the orders expired); *Spell v. Edwards*, No. 20-00282, 2020 WL 6588594, at *4–5 (M.D. La. Nov. 10, 2020) (same); *Gish v. Newsom*, No. EDCV-20-755, 2020 WL 6054912, at *3 (C.D. Cal. Oct. 9, 2020) (same); *Altman v. County of Santa Clara*, 464 F. Supp. 3d 1106, 1115–1116 (N.D. Cal. 2020) (same); *World Gym, Inc. v. Baker*, 474 F. Supp. 3d 426, 430–31 (D. Mass. 2020) (holding Governor's rescission of closure orders mooted a request for injunctive relief from those orders).

B. The Public Importance Exception Does Not Apply Because Plaintiffs' Claims Are Not Likely to Recur.

Because this matter is clearly moot, the question on appeal is whether the district court correctly held that none of the exceptions to the mootness doctrine apply. Plaintiffs argue the public importance exception to mootness should revive their stale claims; the district court properly disagreed. This Court has recognized the "public importance exception" to mootness where "matters of public importance are presented *and the problem is likely to recur*." *Homan*, 864 N.W.2d at 330 (citations omitted) (emphasis added). In determining whether to review a moot action under the public importance exception, four factors are at play:

(1) the private or public nature of the issue;
(2) the desirability of an authoritative adjudication to guide public officials in their future conduct;
(3) the likelihood of the recurrence of the issue; and
(4) the likelihood the issue will recur yet evade appellate review.

Id. (citations omitted).

In *Homan*, the Court reviewed the factual underpinnings of several prior cases to determine when an issue is "likely to recur," concluding that an issue is likely to recur in the future if it has occurred in the past with "some regularity." *Id*. at 332. The *Homan* court thus reasoned that the legal issue before it was unlikely to "recur any time soon" because "a computer-aided review of this Court's 175 years of caselaw does not reveal any previous case where we were called upon to interpret" a specific section of the Iowa Constitution. *Id*. Similarly here, a computer-assisted review of this Court's now-180 years of case law reveals no case in which a court was tasked with interpreting the three statutes at issue—sections 29C.6, 135.140, 135.144, or their predecessors. Indeed, Plaintiffs recognize that the Governor's authority to act under these provisions has not been litigated in the past. Appellant Brief, at 33. The Court should therefore conclude that here, as in *Homan*, the legal question of the Governor's authority to act under Iowa Code chapter 29C is unlikely to recur "any time soon." 864 N.W.2d at 332.

In addition to the unlikely recurrence of the legal issues, it has not been—and cannot be—established that the factual circumstances giving rise to Plaintiff's claims will recur, either during the current COVID-19 pandemic or during a future public health disaster emergency. First, while the COVID-19 pandemic is certainly not over, states are increasingly imposing fewer restrictions, not more, particularly as increasing percentages of the population become vaccinated. And this is certainly true in Iowa where Governor Reynolds has rescinded all public health restrictions on businesses. *See* Feb. 5, 2020 Proclamation of Disaster Emergency, https://perma.cc/9nsn-kfsh. As the district court aptly noted:

> It is speculation to guess how the COVID-19 pandemic will evolve and whether factual circumstances giving rise to the Proclamation will recur. . . . Even if Governor Reynolds issues a future order forcing some establishments to close, the Court cannot say with certainty that the legal issues will be framed the same way. The Court cannot know whether a future order would impose restrictions on Polk or Dallas counties, would close Plaintiffs' businesses or those similarly situated, or would contain language Plaintiffs find objectionable or deficient.

Ruling at 8–9; App at. ___. *See also Spell*, 962 F.3d at 179 (noting the "trend . . . to reopen the state, not to close it down" and that while "no one knows what the future of COVID-19 holds," it is "speculative, at best, that the Governor might reimpose the [challenged] restriction or a similar one.").

On appeal, Plaintiffs assert that Section 2(A) will "undoubtedly

reoccur," yet they offer nothing to support this claim other than citing an October 2020 statement from Dr. Anthony Fauci, which predicted that deaths from COVID-19 would rise in the fall and winter of 2020. Appellants' Brief, at 35. While cases did in fact rise in the fall and winter of 2020—both in Iowa and across the country—the relevant factor in this Court's analysis is that Governor Reynolds rescinded the closure orders for the affected counties in September of 2020 and that *despite* higher case counts during the fall and winter of 2020, such restrictions were not reimposed. Thus not only does the one authority upon which Plaintiffs rely fail to support their claim Section 2(A) will likely be reimposed, it establishes just the opposite.

In sum, Plaintiffs' highly speculative, wholly unsupported, contradicted-by-their-own-facts statement that "these contested mandates and prohibitions . . . will undoubtedly reoccur" is shaky scaffolding which cannot support the conclusion required by this Court that the factual issues are "likely to recur." *Homan*, 864 N.W.2d at 330; *see also Nowlin*, 2021 WL 669333, at *3 (holding that claims for injunctive relief from COVID orders were moot where plaintiffs "have not pointed the Court to any facts suggesting that the Governor will impose similar restrictions anytime in the near future"); *Herndon v. Little*, No. 1:20-CV-00205-DCN, 2021 WL 66657, at *4–5 (D. Idaho Jan. 7, 2021) (concluding plaintiffs' claims that COVID-19 restrictions

would be reimposed were "compellingly contradicted" by fact that Governor had not reinstated restrictions for over six months despite increases in COVID cases and deaths); *Tigges v. Northam*, 473 F. Supp. 3d 559, 570 (E.D. Va. 2020) (explaining business-owner plaintiff "cannot invoke the exception to mootness doctrine because he has failed to show any reasonable expectation that he will be subject to the same action again, [as he] offers little more than speculation that officials might reinstate restrictions"); *Bannister v. Ige*, No. 20-00305, 2020 WL 5031994, at *3 (D. Haw. Aug. 25, 2020) (declining to apply mootness exception where plaintiff "has neither argued nor demonstrated that there is a reasonable expectation he will be subjected to" the challenged order again).[6]

[6] The United States Supreme Court's recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* is distinguishable. *See* 141 S. Ct. 63, 68 (2020). In *Roman Catholic*, the Supreme Court temporarily enjoined Governor Cuomo's executive order imposing attendance restrictions on houses of worship based on an area's color-coded risk classification. *Id.* While the case was pending, Governor Cuomo reclassified the area in question to a lower risk color, thus removing the challenged restrictions on plaintiffs (but not rescinding the entire executive order). *Id.* The Court held the case was not moot because the plaintiffs "remain under a constant threat" that Governor could reclassify the area again, as he had been "regularly" doing. *Id.* And given the daily or weekly worship services and the delay in seeking judicial relief, the Court reasoned that the Plaintiffs should not bear the risk of further potential irreparable harm caused by infringing on their free exercise of religion. But here, there is no similar threat of reinstitution—the restrictions were rescinded completely—and Plaintiffs would suffer economic harm, rather than an irreparable infringement on First Amendment religious liberties.

Second, Plaintiffs also failed to establish that it is likely there will be another pandemic in the future, which would also result in establishment closures under similar circumstances; again, the fact that a pandemic resulting in gubernatorial orders temporarily closing certain establishments has never before occurred in this state supports a concluding that this confluence of facts is unlikely to recur with any "regularity." *Homan*, 864 N.W.2d at 332. Even Plaintiffs acknowledge that the issues they raise in this litigation are unlikely to be before the Court again "for a number of years," effectively conceding these issues are unlikely to "recur any time soon." Appellants' Brief at 36; *Homan*, 864 N.W.2d at 332.

The COVID-19 pandemic and the government response were unique in our nation and our state's history: every state in the country was under a disaster declaration simultaneously and the public health and economic crises were "beyond anything experienced in nearly a century." CONG. RSCH. SERV., R46270, GLOBAL ECONOMIC EFFECTS OF COVID-19 1 (last updated Mar. 10, 2021). Even if another pandemic were to occur in the future, resulting in a statewide public health disaster emergency, and even if a Proclamation were issued in that future pandemic ordering some establishments to close to avoid disease transmission, any subsequent legal issues are "likely to be framed somewhat differently." *Homan*, 864 N.W.2d at 332 (declining to apply

the exception in part because the parties' arguments were based on specific appropriations language that was eliminated, and it would thus be "difficult to draw lessons from a decision on the merits").

The district court's conclusion that the public importance exception should not be invoked where the likelihood of the recurrence of the legal and factual issues is purely speculative is one which has been mirrored and echoed by courts across the country faced with this identical issue. *See, e.g.*, *Pearson*, 2021 WL 1121086, at *5 (declining to apply exception to mootness doctrine where plaintiffs failed to make a "reasonable showing that they will again be subject to an allegedly illegal Executive Order"); *Somerset Court, LLC, v. Burgum*, 956 N.W.2d 392, 394–95 (N.D. 2021) (holding plaintiffs impacted by business closure orders failed to adequately challenge district court conclusion that the superseding of the orders mooted the case); *Spell*, 962 F.3d at 179 (holding exception to mootness not applicable where the likelihood the orders would be reimposed is "speculative at best"); *Spell*, 2020 WL 6588594, at *4–5 (holding issues were unlikely to recur in light of "trend in the Governor's proclamations . . . to *reduce* restrictions on gatherings, rather than to increase them"); *World Gym*, 2020 WL 4274557, at *2 (holding that although a resurgence of COVID-cases and restrictions "remains possible . . . it cannot be said that there is a 'demonstrated probability' that one will occur and, if one does

occur, that the Governor will execute the same orders").

Finally, in asserting this Court should recognize an exception to mootness, Plaintiffs curiously state the "issues Plaintiffs have raised are undeniably of public importance," but then go on to discuss issues which were never in fact raised by Plaintiffs below. Plaintiffs for the first time on appeal argue the Governor's Proclamations infringe on "the public's fundamental rights to assemble," "privacy," and "interstate and intrastate travel" and that the public is "entitled to know whether some or all of the Proclamations" violated these provisions. Appellants' Brief, at 31. The fatal flaw in this position is Plaintiffs have not previously alleged that Section 2(A) violates their constitutional rights to assemble, to privacy, or to travel, and therefore those issues are not before this Court and would not be addressed even if the Court were to reach the merits of Plaintiffs' claims. *See* Amended Petition, Counts I–V; App. at ___.

Additionally, the remedies requested by Plaintiffs were limited to those directly impacting Plaintiffs' own businesses and economic interests. *See* Amended Petition, Common Request for Relief; App. at ___. As the district court aptly noted, while this case holds "great private significance" and "deals with the economic rights of private establishments," the actual claims asserted and remedies sought by Plaintiffs cut against finding a public interest at play.

Ruling, at 8,11; App. at ___. Indeed, the disconnect between the alleged public interest arguments asserted on appeal and the actual issues pled by Plaintiffs below undercut their assertions on the applicability of the mootness exception.

Importantly, a court "certainly should not go out of [its] way to answer a purely moot question because of its possible political significance. [Courts] regularly decline to address constitutional questions unless their answers are necessary to dispose of the case." *Wengert*, 474 N.W.2d at 578. In *Wengert*, taxpayers filed suit challenging the legality of Governor Branstad's item vetoes and sought injunctive and declaratory relief. *Id.* at 577. Governor Branstad appeared in the case and consented to an injunction preventing him from effectuating the vetoes, although he disputed that the vetoes were illegal. *Id.* The district court then dismissed the case over the taxpayers' objections, holding that the controversy had been resolved and thus any declaration regarding the legality of the veto was unnecessary. *Id.*

This Court affirmed the dismissal, explaining "[o]ur lawgiving function is carefully designed to be an appendage to our task of resolving disputes. When a dispute ends, the lawgiving function ordinarily vanishes because it is axiomatic that we do not ordinarily answer academic or moot questions." *Id.* at 578. Here, Plaintiffs allege their "requested declaratory judgment 'would terminate the uncertainty or controversy giving rise to the proceeding.'"

Appellant Brief, at 44 (quoting Iowa R. Civ. P. 1.1105). Yet, *Wengert* confirms that a case is properly dismissed when there is nothing left to enjoin and a decision on the merits "would serve only to state officially who was right and who was wrong." 474 N.W.2d at 578.

In light of the lack of a justiciable controversy before the Court, and the considerable uncertainty regarding whether these legal and factual issues will recur, the Court should hold that Plaintiffs' claims moot and the public importance exception inapplicable.

C. The Voluntary Cessation Exception Does Not Save Plaintiffs' Claims.

Plaintiffs final attempt to rescue their suit is to argue a doctrine which this Court has never recognized: the voluntary cessation doctrine. However, as the district court properly found, "Iowa law does not recognize" the voluntary cessation doctrine "as an exception distinct from the public interest exception." Ruling, at 10; App. at ___. Thus, for all the reasons argued above, Plaintiffs' argument on this front should be rejected.

Furthermore, courts that *have* considered the voluntary cessation exception in the context of COVID-related gubernatorial orders have found that government action is entitled to a presumption of good faith and policy changes are not subject to the same review as cessation of the conduct of private actors. *See, e.g.*, *Cummings v. Desantis*, No. 2:20-CV-351, 2020 WL

4815816, at *3 (M.D. Fla. Aug. 19, 2020); *Gish*, 2020 WL 6054912, at *3. In any event, it is clear that Governor Reynolds's rescission of Section 2(A) was a result of changes in circumstances and approach, as opposed to actions undertaken to obtain a litigation advantage. The district court thus correctly rejected the voluntary cessation doctrine.

Plaintiffs' claims are moot. No exception to applies. The district court's dismissal this case must therefore be affirmed.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT NONE OF PLAINTIFFS' CLAIMS ARE VIABLE.

As set forth at length above, this case is moot. The Court thus could—and should—stop here and affirm the district court's dismissal without further analysis. However, even if an exception to mootness applies, dismissal must nevertheless be affirmed because the district court correctly found that none of Plaintiffs' claims are viable.

A. The District Court Correctly Held that Section 2(A) Was Validly Issued Pursuant to Iowa Code Chapters 29C and 135.

It is the public policy of the State of Iowa that "to provide for the common defense and to protect the public peace, health and safety, and to preserve the lives and property of the people of this state," the Governor shall have certain "emergency powers" in the event of a disaster. Iowa Code § 29C.1. The legislature vested the Governor with the power to, *inter alia*,

suspend certain regulatory statutes; commandeer private property; evacuate "all or part of the population" from any threatened area within the state; suspend the sale or dispensation of alcohol; and "[c]ontrol ingress and egress to and from a disaster area, the movement of persons within the disaster area, and the occupancy of premises in such area." *Id.* § 29C.6.

Additionally, in the event of a public health disaster emergency, the legislature further vested "the department [of public health], in conjunction with the Governor" the power to, *inter alia*, order mandatory vaccination, close public and private schools, "isolate or quarantine individuals or groups of individuals," and take "reasonable measures as necessary to prevent the transmission of infectious disease and to ensure that all cases of communicable disease are properly identified, controlled, and treated." *Id.* § 135.144.

Plaintiffs allege Section 2(A) was issued in violation of this scheme, specifically claiming (1) it contained insufficient facts, contrary to Iowa Code section 29C.6(1); (2) COVID-19 is not a "public health disaster emergency" as defined by Iowa Code section 135.140(6); and (3) Section 2(A) was not a "reasonable measure" necessary to prevent the transmission of COVID-19, and thus exceeded the authority provided by Iowa Code section 135.144(3). Each claim will be discussed in turn.

1. *The Proclamation Contained Sufficient Facts.*

First, for a proclamation to be validly issued under Iowa Code section 29C.6, it must (1) be in writing, (2) indicate the area affected, (3) state the facts upon which it is based, (4) be signed by the Governor, and (5) be filed with the Secretary of State. *Id.* § 29C.6(1).

Here, the Proclamation clearly contains the facts upon which it was based, including seven sections of factual recitations, describing an outbreak of "thousands of cases of Novel Coronavirus 2019 (COVID-19) in multiple countries, causing illness and death;" the fact that a federal national public health emergency has been declared; that the outbreak in Iowa has necessitated a public health disaster declaration in order to "provide additional needed resources and measures to respond to this disaster;" and that "the continued spread of COVID-19 in the state of Iowa, especially in Black Hawk, Dallas, Johnson, Linn, Polk, and Story counties warrants taking additional reasonable measures to reduce the transmission of COVID-19." *See* Proclamation; App. at ___.

Moreover, the Proclamation incorporates the March 17, 2020 Proclamation, which further provided that multiple cases of COVID-19 have been confirmed in Iowa; community spread was occurring in Iowa; and that "COVID-19 can spread person-to-person and poses a possibility of causing

severe illness in certain populations and disability and/or death to certain Iowans." March 17, 2020 Proclamation of Disaster Emergency; App. at ___.

Plaintiffs' sole argument on this claim is founded on a 1979 Attorney General Opinion, which discussed whether a proclamation contained sufficient facts to justify declaring an emergency in response to a suspected fuel shortage. *See* 1979 Iowa Op. Atty. Gen. 439 (Iowa A.G.), 1979 WL 21043. The Opinion concluded that a proclamation must allege facts that go beyond the mere *possibility* of a threat to the public safety, and instead "establish that a catastrophe *has occurred* or *is imminently threatened*." *Id.* at 2 (emphasis added). Here, the Proclamation unquestionably establishes that a public health emergency is not only imminent, but has occurred. The Proclamation establishes that an outbreak of the novel coronavirus has occurred worldwide, that a federal national emergency has been declared, and that spread in six counties in particular warranted additional action. Unlike the proclamation at issue in the Attorney General opinion, when it was unclear whether the emergency would ever materialize or whether it even fell within the definition of a "man-made catastrophe," the Proclamation clearly sets out facts demonstrating a public health disaster emergency. And Plaintiffs cannot possibly argue that the coronavirus pandemic has not actually occurred in their counties.

Because the Proclamation is consistent with both the plain language of Iowa Code section 29C.6(1) and the 1979 Attorney General Opinion, the district court did not err in concluding Plaintiffs' claim is not viable and must be dismissed.

2. *The COVID-19 Pandemic Constituted a Public Health Disaster.*

Plaintiff further alleges that Section 2(A) was issued contrary to Iowa Code section 135.140(6), which sets forth the definition of a "public health disaster emergency." Iowa Code section 135.140(6) provides that a public health disaster can exist when there is an "appearance of a novel or previously controlled or eradicated infectious agent" and such infectious agent "poses a high probability of . . . a large number of deaths . . . or serious or long-term disabilities in the affected population." Iowa Code §§ 135.140(6)(*a*); (6)(*b*)(1); (6)(*b*)(2). The COVID-19 pandemic meets this definition.

In less than six months—between March of 2020 and the issuance of Section 2(A)—over one thousand Iowans lost their lives to COVID-19. Plaintiffs' callous assertion throughout this litigation that the coronavirus pandemic is not a public health disaster because during that short period "*only* 1,082" Iowans—neighbors, family members, friends, and coworkers—died is unworthy of any sincere consideration. *See* Pl. Brief in Support of Petition for Temporary Injunctive Relief, at 12. COVID-19 is a novel infectious agent

that not only posed a high probability of, but indeed resulted in, a large number of deaths.[7] The COVID-19 pandemic is a public crisis of the highest magnitude and Governor Reynolds was well within the bounds of Iowa Code section 135.140(6) to declare a public health disaster emergency and activate Iowa's emergency procedures.

3. *The Proclamation Was a Reasonable Measure Necessary to Prevent the Transmission of Infectious Disease.*

Finally, Plaintiffs allege that Section 2(A) exceeds Governor Reynolds's scope of authority provided in Iowa Code section 135.144(3). Governor Reynolds and the Department of Public Health are authorized to "[t]ake reasonable measures as necessary to prevent the transmission of infectious disease and to ensure that all cases of communicable disease are properly identified, controlled and treated." Iowa Code § 135.144(3). The

[7] States with identical or substantially similar statutory language to Iowa Code section 135.140(6) all concluded that COVID-19 falls within the definition of a public health emergency. *See, e.g.*, Alabama: Ala. Code § 31-9-3(4), Mar. 13, 2020 Proclamation, https://perma.cc/z8qr-4zxs; Delaware: Del. Code tit. 20, § 3132(11), Mar. 12, 2020 Declaration of State of Emergency, https://perma.cc/8hpc-clh5; Georgia: Ga. Code § 31-12-1.1(2), Mar. 14, 2020 Declaration of Public Health State of Emergency, https://perma.cc/u5a2-h4lb; Illinois: 20 Ill. Comp. Stat. 3305/4, Mar. 9, 2020 Gubernatorial Disaster Proclamation, https://perma.cc/4822-hwnr; Louisiana: La. Stat. § 29:762(12), Proclamation No. 25 JBE 2020, https://perma.cc/y8tt-k742; Oklahoma: Okla. Stat. tit. 63, § 6104(2), Executive Order 2020-07, https://perma.cc/3wkj-5yyk; Oregon: Or. Rev. Stat. § 433.442(4), Executive Order 20-03, https://perma.cc/er63-spuw; Wyoming: Wyo. Stat. Ann. § 35-4-115(a)(i), Executive Order 2020-2, https://perma.cc/yl4c-sg88.

district court did not err in concluding that Section 2(A) fell within the Governor's emergency powers, as the substantial surge in positive cases rendered it necessary to implement additional countermeasures, and closing bars in a targeted fashion is a reasonable measure designed to prevent person-to-person transmission of COVID-19.

There are numerous justifications for closing bars, but not restaurants, in order to quell the spread of COVID-19, including (1) "the primary purpose of individuals going to bars is to socialize while the primary purpose of individuals going to a restaurant is to eat a meal;" (2) "bars typically play loud music, forcing patrons to congregate and speak loudly to be heard;" (3) "alcohol also lowers inhibitions and judgment;" (4) "bar patrons generally fall within a younger age group that is more likely to be asymptomatic, increasing the likelihood that they could spread the virus;" (5) "in contrast to bars, patrons of restaurants and bars that serve food tend to sit at tables in groups and do not move freely around the restaurant;" and (6) "White House guidance highlights the public health danger of bars as opposed to restaurants." *See 910 E Main LLC v. Edwards*, 481 F. Supp. 3d 607, 625 (W.D. La. 2020), *aff'd* 958 F.3d 456 (5th Cir. 2021).

Moreover, Dr. Fauci, the Director of the National Institute of Allergy and Infectious Diseases, testified during the summer of 2020 that

"congregation at a bar, inside, is bad news. We really got to stop that right now." *Covid-19: Update on Progress Toward Safely Getting Back to Work and Back to School Hearing Before the H. Comm. On Health, Education, Labor & Pensions*, 116th Cong. (June 30, 2020) (statement of Dr. Anthony Fauci, Director, National Institute of Allergy and Infectious Diseases), https://www.help.senate.gov/hearings/covid-19-update-on-progress-toward-safely-getting-back-to-work-and-back-to-school (video at 2:36:46–2:37:03). And in response to the surge, even the White House Coronavirus Task Force recommended that Iowa bars, but not restaurants, "must be closed." Betsy Klein, *Task Force Report Shows Dire Warnings to Iowa, the State with the Highest Case Rate this Week*, CNN (Sept. 1, 2020), https://perma.cc/n2uf-fz5g. Accordingly, there were numerous, substantial bases for Governor Reynolds to conclude that Section 2(A) was a reasonable measure that would mitigate the transmission of COVID-19.

On the issue of statutory interpretation, *Casey v. Lamont* is instructive. In *Casey*, the Connecticut Supreme Court considered whether the statutory authorization for the Governor to "take such steps as are reasonably necessary in light of the emergency to protect the health, safety, and welfare of the people of the state . . ." included the ability close bars. No. SC 20494, 2021 WL 1181937, at *8 (Conn. Mar. 29, 2021) (quoting Conn. Gen. Stat. § 28-

9(b)(7)). The court readily found that the executive orders prohibiting on-premises services for bars and restaurants "fell within Governor Lamont's authority under § 28-9(b)(7)," as the prohibition was reasonable and the orders were "related to the public health, safety, and welfare of the people of this state." *Id.*

Moreover, the court found that the provision requires the Governor's actions to be tailored to "the *particular* serious disaster," and does not provide carte blanche authority to impose just any restrictions on individuals. *Id.* at 12. For instance, the governor could not prohibit "restaurants from selling unhealthy foods during the COVID-19 pandemic," but is instead authorized to implement measures that are "reasonably necessary to address the current pandemic." *Id.* Here, Section 2(A) is clearly not an attempt to invoke executive authority to impose extraneous requirements on businesses unrelated to COVID-19. Just as in *Casey*, the prohibition of on-premises services is a reasonable measure designed to prevent the person-to-person spread of COVID-19 and falls within the scope of section 135.144(3).

As a final matter, Plaintiffs argue on appeal that Section 2(A) is not a "reasonable measure" because it only applied to certain counties within the state, and they allege no gubernatorial authority exists for imposing county-specific countermeasures. Plaintiffs raised this argument during their

temporary injunction brief, but it is not listed in their Amended Petition nor did they mention it in their Resistance to Motion to Dismiss. Nevertheless, this argument is baseless.

Governor Reynolds declared a state of emergency across the entire state, which includes Polk and Dallas counties. Accordingly, Polk and Dallas counties are affected areas and the Governor is empowered to impose countermeasures to limit the spread within affected areas. As well, the plain language of section 135.144(3) authorizes the Governor to take reasonable measures as necessary to accomplish two things: (1) "prevent the transmission of infectious disease," and (2) "ensure that all cases of communicable disease are properly identified, controlled, and treated." Iowa Code § 135.144(3). Plaintiffs' strained reading of "all cases" would only allow the Governor to implement measures that would prevent *each and every* transmission of COVID-19, which, in practice, would mean either ordering a complete lockdown of the entire state or nothing at all. Plaintiffs' reading is therefore contrary to the statute's plain language, patently unworkable, and promotes a far greater intrusion of personal liberties.

Plaintiffs also overlook that Governor Reynolds's emergency powers are not limited to section 135.144(3), but also include the authority to, *inter alia*,

> [d]irect the evacuation of all or part of the population form any stricken or threatened area within the state if the governor deems this action necessary for the prevention of life or other disaster mitigation, response, or recovery; . . .
>
> [c]ontrol ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises in such area; . . . [and]
>
> [s]uspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles.

Id. §§ 29C.6(13); 29C.6(15)); 29C.6(16)).

In *Friends of Danny DeVito v. Wolf*, the Pennsylvania Supreme Court interpreted two identical Pennsylvania provisions and considered whether they granted the authority to close some, but not all, businesses in response to the COVID-19 pandemic. 227 A.3d 872, 889 (Pa. 2020), *cert. denied.* 141 S. Ct. 239 (2020). The court first considered the Pennsylvania Governor's authority to "[c]ontrol ingress and egress to and from the disaster area, the movement of persons within the area and occupancy of premises therein." *Id.* (quoting 35 Pa.C.S. § 7301(*f*)(7)) (alteration in original). The court found the provision encompassed the ability to close businesses in counties where COVID-19 cases have been reported. *Id.*

The court then looked to another emergency power, the ability to "direct and compel the evacuation of all or part of the population from any stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or

recovery." *Id.* at 890 (quoting 35 Pa.C.S. § 7301(*f*)(3)). The court explained that "[w]hile the Governor took far less extreme measures with the closure of certain businesses, to the extent Petitioners are suggesting that the Governor lacked the authority to do so, this statutory authorization of a much more drastic measure disproves the point." *Id.*

So too here. Section 2(A) is not only a reasonable measure necessary to prevent the transmission of COVID-19, but also falls within the Governor's emergency management powers provided by Iowa Code section 29C.6. Because the Governor is authorized to implement reasonable measures throughout a disaster area, the district court did not err in concluding Plaintiffs' claim is futile and must be dismissed.

B. Section 2(A) Is Rationally Related to a Legitimate State Interest and Does Not Run Afoul of Iowa's Equal Protection Clause.

Next considering Plaintiffs' constitutional claims, Plaintiffs assert that Section 2(A) "deprives Plaintiffs of their right to equal protection under the Iowa Constitution" because there is "no rational basis for the Order of Closure's treatment of Plaintiffs in a manner disparate to its treatment of other similarly situated establishments in Dallas and Polk County" and other counties in Iowa. Amended Petition, ¶¶ 84, 87; App. at ___. Plaintiffs

therefore acknowledge their equal protection claim is governed by rational basis review.

As a threshold matter, Plaintiffs take issue with resolving their rational basis challenge to Section 2(A) on a motion to dismiss, alleging *King v. State* is distinguishable. *See King v. State*, 818 N.W.2d 1, 28 (Iowa 2012). But *King* is not only indistinguishable with respect to the principles governing rational basis challenges, it is also not the only case resolving rational basis challenges through a motion to dismiss. *See Sanchez*, 692 N.W.2d at 816–21 (affirming dismissal of suit alleging disparate denial of driver's licenses to illegal aliens violated the United States and Iowa Constitutions, holding the challenged provision did not run afoul of equal protection or due process principles). Because the State does not have to produce any evidence, "unless the well-pleaded facts (if true) would show that [the challenged action] is not rationally related to a legitimate state goal, there is no reason for the case to proceed further." *King*, 818 N.W.2d at 28. The district court therefore did not err in resolving this question of law through a motion to dismiss.

Turning to the merits, "Iowa's equal protection clause 'is essentially a direction that all persons similarly situated should be treated alike.'" *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 31 (Iowa 2019) (quoting *Varnum v. Brien*, 763 N.W.2d 862, 878–79 (Iowa 2009)). Iowa courts

"generally consider the federal and state equal protection clauses to be 'identical in scope, import, and purpose.'" *State v. Doe*, 927 N.W.2d 656, 661 (Iowa 2019) (quoting *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016)). Accordingly, federal equal protection precedent is "a guiding principle in [the court's] analysis of the rational basis test under the Iowa Constitution." *Residential & Agric. Advisory Comm.*, 888 N.W.2d at 50.

Rational basis review is a deferential standard that requires Plaintiff to bear "the heavy burden of showing the statute unconstitutional and . . . negate every reasonable basis upon which the classification may be sustained." *AFSCME Iowa Council 61*, 928 N.W.2d at 16 (quoting *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 46 (Iowa 2012)). Indeed, this Court has repeatedly instructed that "courts have only a limited role in rational basis review." *Id.*

> [A] classification neither involving fundamental rights nor proceeding along suspect lines is *accorded a strong presumption of validity*. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories *need not actually articulate at any time the purpose or rationale supporting its classification*. Instead, a classification must be upheld against equal protection challenge if there is any *reasonably conceivable state of facts* that could provide a rational basis for the classification.

Id. (quoting *Baker v. City of Iowa City*, 867 N.W.2d 44, 51 (Iowa 2015) (emphasis added) (quotations omitted).

Applying the traditional rational basis test, states are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255, 260 (Iowa 2007). "Rational distinctions may be made with substantially less than mathematical exactitude." *Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dep't of Pub. Welfare*, 742 F.2d 442, 447–48 (8th Cir. 1984) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). "Rational relationship review is highly deferential," *Karsjens v. Piper*, 845 F.3d 394, 409 (8th Cir. 2017), and a law advances legitimate governmental interests "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Not only does Plaintiffs' claim fall under the most deferential form of review, but it also challenges state action "in an arena where the state's governing authority is at its strongest." *Belle Garden Estate, LLC, et al. v. Northam*, No. 7:21-cv-00135, 2021 WL 1156855, at *6 (W.D. Va. Mar. 26, 2021). "Protection of the public health has long been recognized as a valid end of the police power. Dating back to the colonial era, states have regularly

passed laws to prevent the public from disease." *Id*. To be sure, police power is not absolute and courts must still measure state actions against Iowa's constitutional precedents. "But though [the state's] actions are subject to constitutional scrutiny, the fact that the state is exercising one of its broadest powers is surely relevant here." *Id.*

Section 2(A) is rationally related to the legitimate government purpose of reducing the spread of COVID-19. The Governor could reasonably conclude that reducing the spread of COVID-19 required taking additional measures in select counties that presented significant risks or heightened state interests at a time when Iowa led the nation in rates of new COVID-19 cases. Indeed, the Governor could reasonably conclude the risk of community spread is higher in counties with larger populations and young adult student populations. And the Governor could reasonably conclude that counties with or adjacent to those with essential infrastructure like schools and large healthcare systems required additional, temporary countermeasures to prevent a degree of community spread that would hinder those vital workforces.

As set forth in Section II.C.3 above, there are numerous reasonable bases for the Governor to conclude that bars posed a distinct and considerable risk of increasing the spread of COVID-19, and she was therefore justified in temporarily restricting their operations to off-premises services. Indeed, a

number of other courts considering this issue have similarly concluded that there is a rational, justifiable basis to distinguish between bars and restaurants when crafting measures designed to limit the spread of COVID-19.

For example, in *Big Tyme Investments L.L.C. v. Edwards*, the United States Court of Appeals for the Fifth Circuit rejected an equal protection challenge to Governor Edwards's executive order prohibiting on-premises services for bars but allowing dine-in services at restaurants to continue. 985 F.3d 456, 461 (5th Cir. 2021).[8] Applying traditional rational basis review, the court found Louisiana's proffered explanation that "venues whose primary purpose and revenue are driven by alcohol sales rather than food sales are more likely to increase the spread of COVID-19" to be "sufficiently 'plausible' and not 'irrational.'" *Id.* at 469 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

The court went on to explain that the executive order did not run afoul of equal protection principles because "some 'bars' may nevertheless continue to operate under [restaurant] permits." *Id.* Rather, "[a] classification does not

[8] Notably, the Fifth Circuit declined to dismiss the appeal as moot, despite the specific provision expiring while on appeal, because executive orders existing at the time of appellate review continued to distinguish between bars and restaurants, and thus the foundation of the controversy persisted. *Big Tyme Invests.*, 985 F.3d at 465. Here, conversely, at the time of submission there are no limitations on any businesses, let alone distinctions between bars and restaurants.

fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* at 470 (quoting *Veritext Corp. v. Bonin,* 901 F.3d 287, 291 (5th Cir. 2018)). *See also TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 835 (W.D. Tenn. 2020) (denying establishment owners' request for TRO and reasoning "the distinction made between certain restaurants and those like Plaintiffs, which only gross less than 50% of their sales from food sales, and those which receive over 50% of their gross revenue from food sales, has a 'real or substantial relation' to preventing the spread of COVID-19"); *Kelley O'Neils Inc. v. Ige*, No. 20-00449-LEK-RT, 2021 WL 767851, at *8–9 (D. Haw. Feb. 26, 2021) (denying bar owners' request for preliminary injunction, holding that the distinction between bars and restaurants was rationally related to the legitimate state interest of protecting public health).

Of significance in this suit—where the State chose to temporarily restrict on-premises service for bars but not restaurants in six counties rather than across the entire state—is the government's ability to take a staggered or phased approach to addressing this pandemic. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). It is consistent with equal protection principles for the State

to "deal with a problem one step a time, addressing that part of the problem which seems most serious . . . or it may select but one phase of a field of business activity for regulation while neglecting the others." *Minn. Ass'n of Health Care Facilities, Inc.*, 742 F.2d at 448. Here, in light of the substantial surge, Defendants could rationally believe that limiting the ability to congregate and socialize at bars within the selected counties would quell the spread of COVID-19. *See Gallagher v. City of Clayton*, 669 F.3d 1013, 1020 (8th Cir. 2012) (explaining the court need not determine whether the government's stated interest is actually achieved by the law, because if the government reasonably could believe it to be true the law survives rational basis review).

Finally, Plaintiffs take issue with the district court referencing Dr. Pedati's affidavit when ruling on the equal protection claim. But the court did not improperly rely on the affidavit to make a factual finding. Under rational basis review, state action will be upheld if the court can itself conceive of any basis to support a classification. *AFSCME Iowa Council 61*, 928 N.W.2d at 16. That the district court had an easier time conceiving of a basis to support the classification because it was aware of, and seemingly found plausible, Dr. Pedati's prior explanation of the Proclamation does not render the judgment invalid.

To survive a motion to dismiss, Plaintiffs "must negate *every reasonable basis* upon which classification may be sustained." *NextEra Energy Res. LLC*, 815 N.W.2d at 46 (emphasis added); *Sanchez*, 692 N.W.2d at 819 (affirming grant of motion to dismiss when plaintiffs "failed to carry their burden of negating all reasonable bases that could justify the challenged statute"). Once there are "plausible reasons" for the state action, the court's "inquiry is at an end." *FCC v. Beach Comms.*, 508 U.S. 307, 314 (1993) (quoting *United States R.R. Ret. Bd. v. Fritz*, 499 U.S. 166, 179 (1980)). Here, Defendants' rationales for temporarily limiting Plaintiffs' business operations are decidedly plausible. Because Section 2(A) is rationally related to a legitimate state goal, there is no reason for this claim to proceed further and it must be dismissed.

C. Plaintiffs' Due Process Claims Fail as a Matter of Law Because Process Was Not Constitutionally Due and Section 2(A) Survives Rational Basis Review.

1. *Procedural Due Process.*

Plaintiffs further allege that Section 2(A) was unconstitutional because it was issued without providing Plaintiffs prior notice and an opportunity to be heard. However, Plaintiffs' procedural due process claim is not viable because Iowa law is clear that notice and an opportunity to be heard is not

required when responding to an emergency, particularly public health emergencies.

Procedural due process "is not a technical conception with a fixed content unrelated to time, place[,] and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). It is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Significantly, "[i]n the event of emergencies, [the Iowa Supreme Court] regards the law as well established that summary administrative action is appropriate." *Lewis v. Jaeger*, 818 N.W.2d 165, 182 (Iowa 2012); *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981) (explaining "summary administrative action may be justified in emergency situations."). In other words, there is an "emergency situation exception to the normal rule that due process requires a hearing prior to deprivation." *Hodel*, 452 U.S. at 264.

Almost eighty years ago, the Iowa Supreme Court explained the constitutional balance tips in favor of protecting the public during emergencies:

> [T]he weight of authority, as well as reason and necessity, prescribe that in cases involving the public health, where prompt and efficient action is necessary, the state or its officers should not be subjected to the inevitable delays incident to a complete hearing before action may be taken. The enforcement of

> quarantine regulations *to avoid the risk of an epidemic* is a situation in point . . . .

State v. Strayer, 299 N.W. 912, 917 (Iowa 1941) (emphasis added). And ninety years ago, the Court also explained that when confronting infectious diseases, "[s]ummary action . . . is *essential*," because "[o]therwise the government cannot be effective enough to protect its inhabitants against tuberculosis or other plagues." *Loftus v. Dep't of Agric.*, 232 N.W. 412, 417 (Iowa 1930) (emphasis added).

Further, as several other courts have held, the emergency exception applies specifically to swiftly implemented business closure orders or restrictions during the pandemic, because "COVID-19 is, without a doubt, an unprecedented emergency." *910 E Main*, 481 F. Supp. 3d at 622;[9] *see also, e.g.*, *Village of Orland Park v. Pritzker*, No. 20-cv-03528, 2020 WL 4430577, at *8–10 (N.D. Ill. Aug. 1, 2020) ("[H]olding individualized pre-deprivation hearings for each affected person and business would overwhelm the administrative system and cripple the state's ability to act quickly and

[9] Cases involving the federal due process clause are persuasive as to Plaintiff's claims under the Iowa Constitution, especially as Plaintiffs have not offered any justification for treating the Iowa clause differently, *see Lewis*, 818 N.W.2d at 180, and Plaintiffs themselves rely on federal caselaw. Because the substantial surge in positive COVID-19 cases presented a public health emergency requiring swift response, no process was constitutionally due and Plaintiffs' procedural due process claim therefore fails as a matter of law.

decisively to contain a rapidly spreading disease . . . . Pre-deprivation hearings would almost certainly render the state's response to the COVID-19 pandemic ineffective, causing immense harm to thousands of Illinois residents."); *Benner v. Wolf*, 461 F. Supp. 3d 154, 162 (M.D. Pa. 2020) ("[T]he nature of the COVID-19 emergency justifies the lack of pre-deprivation process."); *Mich. Rest. & Lodging Ass'n v. Gordon*, No. 1:20-cv-1104, 2020 WL 7053230, at *2–3 (W.D. Mich. Dec. 2, 2020) (concluding the emergency exception applies to an order prohibiting indoor, in-person services at bars and restaurants); *AJE Enter. LLC v. Justice*, No. 1:20-cv-229, 2020 WL 6940381, at *6 (N.D. W. Va. Oct. 27, 2020) (concluding that when the governor acted in response to the pandemic, a "closure without individual hearings does not offend due process"); *Savage v. Mills*, 478 F. Supp. 3d 16, 29 (D. Me. 2020) ("Plaintiffs are not entitled to any sort of pre-deprivation process when it comes to a generalized . . . policy imposed during this type of public health emergency.").

Alternatively, this Court may conclude that Plaintiffs' claim fails because state actions that apply generally, rather than to a particular individual, are not subject to notice and hearing requirements. For generally applicable government actions, "generality provides a safeguard that is a substitute for procedural protections." *Ind. Land Co. v. City of Greenwood*,

378 F.3d 705, 710 (7th Cir. 2004). "The Supreme Court has long recognized that an individual's due process rights are not violated by a law of general applicability . . . ." *Murphy v. Lamont*, No. 3:20-CV-0694, 2020 WL 4435167, at *11 (D. Conn. Aug. 3, 2020). Thus, when a proclamation is generally applicable "and was not a decision targeting Plaintiff's business individually, Plaintiff's constitutional right to procedural due process was not violated." *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896, at *10 (S.D. Ohio Apr. 21, 2020); *see also Kelley O'Neils*, 2021 WL 767851, at *6 ("The City's Orders and the State's Proclamations affect large areas and are not directed at one or few individuals, and therefore do not give rise to the constitutional requirements of individual hearing and notice."); *Our Wicked Lady LLC v. Cuomo*, No. 21-cv-0165, 2021 WL 915033, at *5 (S.D.N.Y. Mar. 9, 2021) ("The challenged orders are legislative in nature because they apply prospectively to all restaurants and fitness centers in the City. As a result, the orders are not subject to the notice and hearing requirements that apply to adjudicative functions of government.").

Because Section 2(A) is a generally applicable provision, no process was constitutionally due and Plaintiffs' due process claim is not viable.

2. *Substantive Due Process*.

Finally, Plaintiffs allege that Section 2(A) violates their substantive due process rights under the Iowa Constitution. *See* Amended Petition, ¶ 92; App. at ___. Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Sanchez*, 692 N.W.2d at 819 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). The analysis begins with identifying the nature of the interest implicated. *Id.* "If the liberty interest at issue is fundamental, strict scrutiny applies. . . . Otherwise, the challenged statute need only satisfy the rational-basis test." *Id.* at 819–20.

The Court has previously found that when governmental action does not violate the equal protection clause under rational basis review, it similarly does not violate substantive due process. *Id.* at 820 ("[U]nder substantive due process analysis, as with equal protection analysis, the statute need only meet the rational-basis test. For the reasons discussed in the equal protection analysis, the statute clearly meets that test.").

Here, Plaintiffs concede that their equal protection claim is governed by rational basis review. Yet despite their Amended Petition identifying a substantive due process claim in Count III, Plaintiffs do not address the merits of this issue at all in their brief, thereby waiving the issue on appeal. *Goode*,

920 N.W.2d 520 at 524. Of course, even if the issue was preserved for appeal, Section 2(A) does not run afoul of substantive due process for the same reasons it does not violate equal protection. *Cf. Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting) ("[C]ourts should be very deferential to the States' line-drawing in opening businesses and allowing certain activities during the pandemic. For example, courts should be extremely deferential to the States when considering a substantive due process claim by a secular business that it is being treated worse than another business."). Accordingly, the district court did not err in concluding that Section 2(A) survives rational basis review and Plaintiffs' substantive due process claim was properly dismissed.

CONCLUSION

Because circumstances have rendered this lawsuit moot and Section 2(A) was issued in accordance with all statutory and constitutional requirements, dismissal must be affirmed.

REQUEST FOR NONORAL SUBMISSION

Defendants believe this appeal can be resolved without oral argument by applying well-established mootness principles. If the Court nevertheless grants oral argument, Defendants request to be heard.

CERTIFICATE OF SERVICE

I, Tessa M. Register, certify that on the 26th day of April, 2021, I did serve the Appellees Proof Brief on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(*d*) and (1)(*g*)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 font, and contains 11,313 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(*g*)(1).

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