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IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

JOAQUIN V. LEON GUERRERO, Plaintiff, vs. LOURDES LEON GUERRERO, in her official capacity as the GOVERNOR OF GUAM, Defendant.	)	Civil Case No. 20-00017 **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiff Joaquin V. Leon Guerrero's ("Plaintiff") entire basis for moving to enjoin Defendant Governor of Guam Lourdes A. Leon Guerrero's ("Governor") road closure traffic flow plan can be reduced to a single argument. Plaintiff maintains that the Governor's plan is illegal because, in his lay opinion, it is not the best way to mitigate the spread of ongoing disease on Guam. In fact, Plaintiff believes that, in order for the "checkpoints" (as he deems them) to be legal, the Government should completely block the roads to prevent all drivers from passing through. Oddly enough, Plaintiff alleges the Governor's plan has no reasonable nexus to infection mitigation, and is thus illegal, because the Governor is not being draconian *enough*: Instead of turning drivers around, arresting them for non-essential travel, or issuing them civil or criminal citations, the Governor applies education and deterrence from non-essential travel by restricting the flow of traffic at four locations. Ironically, Plaintiff claims the Governor violates law and people's civil liberties because the highway stops are not *more* restrictive or oppressive.

While Plaintiff disagrees and opines that the Governor's plan is not an effective method for reducing person-to-person contact and, consequently, the spread of disease, that does not make it illegal. To the contrary, U.S. Supreme Court case law upholding government's ability to curtail citizens' freedom of movement during an epidemic actually validates the Governor's position. More importantly, governing law holds that Plaintiff lacks the right to second-guess the Governor's method, which bears a rational relationship to her efforts to stem the spread of coronavirus on Guam, and safeguard the public's health to prevent loss of life, and which does not plainly and palpably offend the U.S. Constitution.[1]

[1] *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 30, 25 S.Ct., 49 L.Ed. 643 (1905)." *In re Abbott*, --- F.3d --- (2020), No. 20-50264, 2020 WL 1685929 at *7 (5th Cir., Apr. 7, 2020).

Accordingly, Plaintiff's motion should be denied because he is not likely to succeed on the merits. Not only does the above illustrate that the Governor is not acting *ultra vires* or in derogation of the separation of powers doctrine, but her highway stops do not violate the Fourth Amendment either, nor do they offend substantive or procedural due process rights. The motion should also be denied because Plaintiff fails to show he is likely to suffer irreparable harm if preliminary injunction is denied; because the balance of equities leans heavily toward the Governor's continued operation of her road closure traffic flow plan; and because enjoining the plan's operation would have devastating, possibly lethal, effects upon the public's interest in remaining alive and disease-free. The Court should deny Plaintiff's motion.

"Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). In this regard, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority … essential to the safety, [and] health … of the community." *Id.* at 26.

FACTUAL BACKGROUND

COVID-19 is a severe, acute respiratory disease caused by the SARS-CoV-2 virus.[2] Originating from Wuhan, Hubei Province, China in December 2019, the World Health Organization soon thereafter declared COVID-19 as a pandemic on March 11, 2020. *Id.* While the complete clinical portrait of COVID-19 is not fully understood, at a minimum COVID-19

[2] *Coronavirus Disease 2019 (COVID-19), Situation Summary*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html (Apr. 7, 2020) ["CDC *Situation Summary*, Apr. 7, 2020"].

has proven lethal, especially to older people and people with chronic medical conditions (e.g., heart disease, lung disease, and diabetes), who are at higher risk of becoming seriously ill if infected. *Id.* As of April 21 of this year, 776,093 Americans were infected with COVID-19 and 41,758 Americans were killed by it.[3] As of the same date, nearly 2.4 million people worldwide were infected with COVID-19 and it had killed 162,956 people globally.[4]

The Centers for Disease Control (CDC) maintains: "Widespread transmission of COVID-19 could translate into large numbers of people needing medical care at the same time. … Public health and healthcare systems may become overloaded, with elevated rates of hospitalizations and deaths. … Healthcare providers and hospitals may be overwhelmed. At this time, there is no vaccine to protect against COVID-19 and no medications approved to treat it." CDC, *Situation Summary*, Apr. 7, 2020.

One of the most pernicious attributes of COVID-19 is the relative ease with which it spreads. The virus is transferred by in-person interactions, either "[b]etween people who are in close contact with one another" or "[t]hrough respiratory droplets produced when an infected person coughs, sneezes or talks."[5] "People in places where ongoing community spread of the virus that causes COVID-19 has been reported are at elevated risk of exposure, with the level of risk dependent on the location." CDC *Situation Summary*, Apr. 7, 2020.

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[3] *Coronavirus Disease 2019 (COVID-19), Cases of Coronavirus Disease (COVID-19) in the U.S.*, Centers for Disease Control and Prevention, https://cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (Apr. 21, 2020).

[4] *Countries, Territories or Areas With Reported Laboratory-Confirmed COVID-19 Cases And Deaths*, World Health Organization, http://www.who.int/docs/default-source/coronaviruse/situation-reports/20200421-sitrep-92-covid-19.pdf (Apr. 21, 2020).

[5] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *How Coronavirus Spreads: Person-to-Person Spread*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (Apr. 7, 2020).

The Government of Guam's actions in response to the spread of coronavirus, however, cannot guarantee to inhibit its continued spread throughout the community. Factors of 'human geography' play a crucial role. For example, "[t]here's a strong correlation between the risk of pandemic and human population density."[6] Guam's population density is 759.6 people for every square mile of our island.[7] To date of this writing, COVID-19 has infected 137 Guam residents and killed 5 Guam residents.

On March 13, 2020, the President of the United States declared a national emergency due to the COVID-19 outbreak. 85 Fed. Reg. 15337 (Mar. 18, 2020). On March 14, 2020, Governor of Guam Lourdes A. Leon Guerrero ("Governor") issued Executive Order No. 2020-03, declaring a state of public health emergency for Guam due to COVID-19, invoking Title 10 Guam Code Annotated Section 19401 et seq., and explicitly applying the order "to all of Guam." *Verified Complaint for Declaratory and Injunctive Relief and Attorney's Fees* (No. CV20-00017; Apr. 17, 2020) ["Complaint"], Exhibit 1, ¶¶ 1, 3.

On March 16, 2020, the Governor issued Executive Order No. 2020-04 and, with 3 COVID-19 cases on Guam at this point, began "implementation of community mitigation strategies" through "social distancing" directives of closing all non-essential government offices and services, closing all public and private schools, and prohibiting social gatherings of 50+ people. Complaint, at Exh. 2, ¶¶ 1, 2, 3, 5. The Governor also restricted entry into Guam and subjected all entering travelers to quarantine. Id., at ¶ 6.

[6] Bahar Gholipour, *What 11 Billion People Mean for Disease Outbreaks*, Scientific American, https://www.scientificamerican.com/article/what-11-billion-people-mean-disease-outbreaks.html (Apr. 10, 2020).
[7] U.S. Census Bureau 2010, *Population, Housing Units, Land Area, and Density by Municipality for Guam: 2010*, http://www.census.gov/population/www/cen2010/cph-t/t-8tables/table3a.pdf

The Governor continued to protect the public with Executive Order No. 2020-06, by expanding the social distancing policy to restricting use of public parks and beaches, extending the timeframe for closure of government offices and schools, and banning large social gatherings. Complaint, at Exh. 3, ¶¶ 1-4. On April 5, 2020, with Guam having suffered 4 deaths from COVID-19, the Governor issued Executive Order No. 2020-09, prohibiting all social gatherings between separate households, limiting government and private businesses operations to only those deemed essential, and extending the timeframe of the health emergency. Complaint, at Exh. 4, ¶¶ 1, 2, 4.

Five days later, on April 10, 2020, as the number of those on Guam infected by COVID-19 increased to 128 people, the Governor issued Executive Order No. 2020-10, ordering in pertinent part:

> COVID-19 RESPONSE EFFORTS ROAD CLOSURES. Pursuant to Section 19502, Article 5, Chapter 19, Title 10 of the Guam Code Annotated, the Public Health Authority shall execute a Road Closure Traffic Flow plan to ensure that certain designated public roadways are reserved for access only by those individuals who are participating in the essential functions and activities authorized since Executive Order No. 2020-04 [re social distancing] through this Order and as further elaborated by public health guidance memoranda. The Adjutant General is authorized to issue active duty orders for the mobilization of such National Guard personnel and equipment to support the Road Closure Traffic Flow plan.

Complaint, at Exh. 5, ¶ 1.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right. [ ] In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting and withholding of the requested relief.' [ ] 'In exercising their sound

discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.' " *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365 (2008) (citations omitted).

"A plaintiff seeking a preliminary injunction must establish that he is [1] likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the pubic interest." *Id.*, at 20 (citations omitted).

DISCUSSION

I. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS OF THE CASE

A. Executive Order No. 2020-10 Is Not *Ultra Vires* And Not A Violation Of The Separation Of Powers Doctrine

Plaintiff takes issue with (1) the Governor's implementation of a road closure traffic flow plan, and (2) the Governor's authorization for the Adjutant General to mobilize National Guard personnel to support the road closure traffic flow plan. Complaint, at 12-13. Although his Complaint is unclear, Plaintiff alleges these acts are both *ultra vires* and a violation of the separation of powers doctrine, which is essentially the same argument. Id. This is because Plaintiff argues that neither the Legislature nor the Organic Act authorizes the Governor to take either action. Regardless, Plaintiff's allegations are without merit.

1. The Emergency Health Powers Act Authorizes The Governor's Road Closure Traffic Flow Plan

Plaintiff claims that the Governor's plan is not authorized by 10 GCA § 19502(d)(2) because (1) drivers are let through the highway stops; and (2) the Governor has not declared a particular village or subsection area of Guam to be a "stricken area." Complaint, at ¶¶ 33, 43-45.

The implication is that drivers should not have to endure the restraint on their right to freedom of movement due to the highway stop because the stop does not satisfy the requirements of § 19502(d)(2) of the Emergency Health Powers Act.

Looking first for the controlling law for this circumstance, the Fifth Circuit Court of Appeals recently ruled on a challenge to the Texas Governor's executive order regarding restrictions on public activity during the current coronavirus pandemic, and held that "the framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago, [is found] in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S.Ct., 49 L.Ed. 643 (1905)." *In re Abbott*, --- F.3d --- (2020), No. 20-50264, 2020 WL 1685929 at *5 (5th Cir., Apr. 7, 2020).

As the *Abbott* court recounted, "In *Jacobson*, the Supreme Court considered a claim that the state's compulsory vaccination law—enacted amidst a growing smallpox epidemic … violated the defendant's Fourteenth Amendment right" and the Court rejected the claim, holding that " 'liberty secured by the Constitution … does not import an absolute right in each person to be, at all times, and in all circumstances, wholly freed from restraint.' [ ] Rather, 'a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id*., quoting *Jacobson*, 197 U.S. 11, 26 ("There are manifold restraints to which every person is necessarily subject for the common good.").

The *Jacobson* Court narrowed judicial review of Constitutional rights claims under the scenario of an epidemic to say review is only available if the government action intended to protect public health "*has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.*" *Jacobson*, 197 U.S. 11, 31; *see Lawton v. Steele*, 152 U.S. 133, 137, 14 S.Ct. 499 (1894) (state police power is justified if public interests generally require such interference and "the means are reasonably

necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.") (emphasis added).

Courts have long held that elected government officials must be allowed to take quick and decisive action to address life-threatening public emergencies. *See United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971) ("Dealing with … an emergency situation requires an immediacy of action that is not possible for judges."). Therefore, when evaluating efforts taken during public emergencies, "the scope of [a court's] review … must be limited to a determination of whether the [executive's] actions were taken in good faith and whether there is some factual basis for [the Governor's] decision that the restrictions he imposed were necessary…." *Id.* This approach reflects the reality that "governing authorities must be granted the proper deference and wide latitude necessary for dealing with … emergenc[ies]." *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996), abrogated on other grounds by *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

"Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." *Jacobson*, 197 U.S. at 28. **Importantly here, the Court held: "It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease."** *Jacobson*, 197 U.S. at 30 (emphasis added).

"The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' [*Jacobson*,] at 31, 25 S.Ct.

358. … **[C]ourts may not second-guess the wisdom or efficacy of the measures."** *In re Abbott*, 2020 WL 1685929 at *7 (emphasis added).[8]

Plaintiff admits that the Emergency Health Powers Act (10 GCA Chap. 19) permits the Governor to control the roads or limit ingress and egress to and from a stricken or threatened public area, to control or limit the movement of persons within the area, and the occupancy of premises therein. Complaint, at 12, ¶ 50. Yet, Plaintiff alleges that "despite the absence of a declaration … that an area is stricken with COVID-19 or threatened with COVID-19, the Governor has implemented checkpoints to dissuade citizens from travelling …." Id., at ¶ 51.

The Emergency Health Powers Act belies Plaintiff's argument that the Governor's Executive Orders are *ultra vires*, because the Legislature enacted that law specifically stating that the Governor could control the movement of persons within a stricken area as reasonable and necessary to respond to the public health emergency. The Governor declared Guam to be a threatened area for coronavirus on March 14 as a threatened area (E.O. No. 2020-03) and on March 16 as a stricken area from coronavirus (E.O. No. 2020-04). Inherent in the Legislature's authorization under the Emergency Health Powers Act is the Governor's ability to identify areas where movement of persons must be abated and which routes will be restricted, or constricted, to mitigate the spread of potentially fatal infectious disease.

Nevertheless, Plaintiff argues that "[t]he checkpoints do seize drivers, but in practice drivers are not barred from travel to non-essential activities. … Thus, the seizures are unreasonable and clearly not "necessary to respond to the public health emergency [per 10 GCA § 19502]." *Motion For Temporary Restraining Order Or In The Alternative A Preliminary Injunction*, CV20-00017, Apr. 22, 2020 ["Motion"], at 5-6.

[8] "In sum, by refusing even to consider *Jacobson*—the controlling Supreme Court precedent that squarely governs judicial review of rights-challenges to emergency public health measures—the district court 'clearly and indisputably erred.' " *In re Abbott*, 20202 WL 1685929 at *8 (citation omitted).

That the Governor utilized the method of slowing traffic flow at four (4) locations, both to educate and warn citizens, and to dissuade non-essential travel to reduce the spread of disease by person-to-person contact, is likewise inherent in 10 GCA § 19502(d)(2) as a reasonable and necessary application of the powers granted by that statute. By implementing her road closure traffic flow plan, whereby Plaintiff alleges drivers are made to wait in line to pass through four separate locations and be warned of the dangers of COVID-19, the Governor is properly controlling or limiting the movement of persons within Guam as a stricken public area, pursuant to her authority under 10 GCA § 19502(d)(2).

As stated, COVID-19 does not remain in any one geographical location, much less remain within any single village or smaller subsection area of Guam, as Plaintiff would have the Court believe. Instead, COVID-19 is highly communicable and spreads by person-to-person contact, which persons could be infectious for up to fourteen (14) days before they even experience symptoms.[9] Furthermore, anyone within six (6) feet of an infected person has a high risk of contracting the disease.[10] Consequently, nearly every village on Guam now hosts multiple persons infected by COVID-19, and there is no localized area on Guam that is significantly any more "stricken" than anywhere else on island. *See* Complaint, at Exh. 6.

While Plaintiff's opinion is that the Governor's method is not the most effective, he cannot say that her action "has no real or substantial relation to those objects [of protecting public health], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. That is the standard.[11] Given this, Plaintiff, like

[9] *Symptoms*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (Apr. 9, 2020).
[10] *Social Distancing, Quarantine, and Isolation*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (Apr. 23, 2020).
[11] *Jacobson* remains good law. *See Kansas v. Hendricks*, 521 U.S. 346, 356 (1997); *In re Abbott*, 2020 WL 1685929 at *8 ("*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.") (original emphasis).

the "courts[,] may not second-guess the wisdom or efficacy of the measures." *In re Abbott*, 2020 WL 1685929 at *7; *see Jacobson*, 197 U.S. at 30 ("It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease.").

2. The Emergency Health Powers Act Authorizes The Governor To Seek Assistance From The National Guard Without Invoking The Posse Comitatus Clause Of The Organic Act

Plaintiff complains that the Governor did not invoke the Posse Comitatus clause of the Organic Act to mobilize the National Guard to support her road closure traffic flow plan, and so Plaintiff alleges her use of the Guard is an *ultra vires* act and a violation of the separation of powers doctrine. Complaint, at 12-13. Plaintiff's claim is meritless because the Emergency Health Powers Act authorizes the Governor, having declared a public health emergency, to "mobilize all or any part of the organized militia into service; an executive order directing the organized militia to report for active duty shall state the purpose for which it is mobilized and the objectives to be accomplished" 10 GCA § 19403(a)(4). The Governor acted in conformity with this statute. Complaint, at Exh. 5, E.O. No. 2020-10, p. 1, ¶ 1. In light of the Emergency Health Powers Act, it was not necessary for the Governor to invoke the Posse Comitatus clause of the Organic Act, especially because the Organic Act directs elsewhere with regard to epidemic that, "[s]ubject to the laws of Guam, the Governor shall … promulgate quarantine and sanitary regulations for the protection of Guam against the importation and spread of disease." 48 U.S.C. § 1421g.

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3. The Governor's Inherent Police Powers During An Epidemic Authorize Her Actions Even If Not Specifically Outlined By The Legislature Beforehand

Plaintiff insists that, because 10 GCA § 19502(d)(2) does not specifically authorize the Governor's chosen method for controlling or limiting movement of persons within Guam as a "stricken area", the Governor lacks all authority for her road closure traffic flow plan. Plaintiff is gravely mistaken. The Legislature does not overtly prohibit the Governor's actions and, indeed, the Organic Act commands that, "[s]ubject to the laws of Guam, the Governor shall … promulgate quarantine and sanitary regulations for the protection against the importation and spread of disease." 48 U.S.C. § 1421g. Thus, even if the Governor's plan is not completely congruent with the intent of 10 GCA § 19502(d)(2), this does not mean her actions are not rooted in other legal authority.

Moreover, and especially without any explicit prohibition by the Legislature for them, the Governor's actions are grounded in her inherent police power specific to addressing a public health emergency caused by virulent epidemic. The police power is fundamental because it enables society to respond appropriately and effectively to unique social circumstances, and thereby maintain order and safety. *See, e.g., Mugler v. Kansas*, 123 U.S. 623, 666 (1887) ("the police power extends at least to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights"). By necessity, then, the police power is a broad and flexible power. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32 (1954); *Euclid v. Amber Realty Co.*, 272 U.S. 365, 387, 392 (1926).

The U.S. Supreme Court has perennially recognized the authority of the states to restrain the freedom of movement of individuals and to restrict individual liberties to preserve the public

health when necessary. *See, e.g., Compagnie Francaise de Navigation a Vapeur v. State Board of Health,* 186 U.S 380 (1902) (upholding a state's right to restrain the freedom of movement of healthy individuals in relation to a locality infested with contagious disease); *Lawton v. Steele,* 152 U.S. 133 (1894); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944) (noting that "[t]he right to practice religion freely does not include liberty to expose the community … to communicable disease").

"The right to travel within the United States is of course also constitutionally protected. But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole." *Zemel v. Rusk*, 381 U.S. 1, 15 (1965). "Even liberty itself … is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law." *Crowley v. Christensen*, 137 U.S. 86, 89 (1890).

Even if the Governor's efforts to mitigate disease spread were deemed not to fit squarely within the language of 10 GCA § 19502(d)(2), the U.S. Supreme Court would uphold her actions as reasonable and necessary, in light of its prior holdings regarding local governments' duties to combat public health threats through exercise of the police power.

B. The Governor's Road Closure Traffic Flow Plan Does Not Violate Plaintiff's Fourth Amendment Rights

Rather than citing cases regarding checkpoints to offer his two-part test, Plaintiff cited cases regarding border and airport searches of individual defendants under criminal suspicion. Motion, at 4. Plaintiff enunciates the incorrect Fourth Amendment test for the "checkpoints," as

he alleges them. Regarding checkpoints, the U.S. Supreme Court actually holds: "It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment." *City of Indianapolis v. Edmond*, 531 U.S. 32, 40, 121 S.Ct. 447 (2000). The *Edmond* Court further held:

> The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. [ ] While such suspicion is not an "irreducible" component of reasonableness, [ ] we have recognized only limited circumstances in which the usual rule does not apply. For example, we have upheld certain regimes of suspicionless search where the program was designed to serve "special needs, beyond the normal need for law enforcement." … In none of these cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.

Edmond, 53 U.S. at 37-38.

It is undisputed in the case at bar that, when drivers were momentarily stopped by government actors (National Guard members), they were not investigated for criminal activity, nor was the investigation of criminal activity either an overt or pretextual purpose for the stop. As to the type of stop alleged in the instant case, where government is not investigating criminal activity and drivers risk no civil or criminal penalties, the U.S. Supreme Court holds:

> The checkpoint stop here differs significantly from that in *Edmond*. The stop's primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. ¶ *Edmond's* language, as well as its context, makes clear that the constitutionality of this latter, information-seeking kind of stop was not then before the Court. …
>
> Neither do we believe … that the Fourth Amendment would have us apply … automatic unconstitutionality to brief, information-seeking highway stops of the kind now before us. … **[S]pecial law enforcement concerns will sometimes justify highway stops without individualized suspicion**. … [T]he context here (seeking information from the public) is one which, by definition, the concept of individualized suspicion has little role to play. **Like certain other forms of**

> **police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.**
>
> For another thing, information-seeking highway stops are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens will often react positively when the police simply ask for their help as "responsible citizens" ….
>
> Further, the law ordinarily permits police to seek the voluntary cooperation of members of the public …. **"Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, or by putting questions to him if the person is willing to listen."** *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed. 229 (1983).

Illinois v. Lidster 540 U.S. 419, 423-425, 124 S.Ct. 885 (2004) (emphasis added).

The Governor's road closure traffic flow plan is virtually identical to the crime information-seeking stop analyzed by the Court in *Lidster* for the purpose of Fourth Amendment analysis. First, the Governor's highway stops are not borne out of individualized criminal suspicion; indisputably, suspicion has no role at all. Further, the government actors (National Guard members) merely approach each stopped driver briefly to inquire about their purpose for travel, educate and warn them of the dangers of COVID-19 and the importance of social distancing, and then let them proceed as intended, according to Plaintiff.

The *Lidster* Court goes on to address whether this type of highway stop passes for reasonableness from a constitutional perspective:

> These considerations, taken together, convince us that an *Edmond*-type presumptive rule of unconstitutionality does not apply here. That does not mean the stop is automatically, or even presumptively, constitutional. It simply means that **we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances**. And as this Court said in *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), **in judging reasonableness, we look to "the gravity of the public concerns served by the**

> **seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty**."

Lidster, 540 U.S. at 426-427 (emphasis added).

In that case, the Court found "[t]he relevant public concern was grave. Police were investigating a crime that had resulted in a human death" and that police were merely asking drivers if they had seen anything. *Id*., at 427. In the instant case, the public concern is even more grave, because its purpose is to warn citizens of life-threatening disease and to dissuade them from travelling Guam's roads for non-essential reasons in order to reduce the overall rate of person-to-person contact and, consequently, reduce the probability of more pervasive infection.

Further regarding reasonableness, the *Lidster* Court held:

> Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line …. Contact with the police lasted only a few seconds. Cf. *Martinez-Fuerte, supra,* at 547, 96 S.Ct. 3074 (upholding stops of three to five minutes); [ ] Police contact consisted simply of a request for information and the distribution of a flyer. [ ] Viewed subjectively, the contact provided little reason for anxiety or alarm. The police stopped all vehicles systematically. And there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops. ¶ For these reasons we conclude that the checkpoint stop was constitutional.

Lidster, 540 U.S. at 427-428 (citations omitted).

Again, the individual circumstances of the Governor's highway stops are no different and pass constitutional muster. The stops require a relatively brief wait in line. Contact with National Guard members lasts less than the five-minute stop upheld in *Martinez-Fuerte*; and the contact consists only of a single question regarding purpose of travel, a short educational warning, and distribution of a flyer (according to Plaintiff). Similarly here, the contact provides little reason for anxiety or alarm, all vehicles are stopped systematically, and there is no allegation of discriminatory or unlawful treatment of drivers. The U.S. Supreme Court would

find the execution of the Governor's road closure traffic flow plan to be constitutional and not in violation of the Fourth Amendment. *See also United States v. Moore*, 952 F.3d 186, 192 (4th Cir. 2020) (upholding an administrative driver's license "checkpoint [that] was minimally intrusive" and "clearly visible[;] … operated pursuant to a 'systematic procedure that strictly' … reduced the potential for arbitrary treatment[;] … [and] did not detain drivers 'longer than was reasonably necessary to accomplish the purpose of [the stop].' ").

C. The Governor's Road Closure Traffic Flow Plan Does Not Violate Plaintiff's Due Process Rights

Plaintiff's due process claim is highly dubious and unlikely to be adjudicated favorably. First, Plaintiff asserts both substantive and procedural due process claims due to alleged violation of his Fourth Amendment Right. Complaint, at 15-16, ¶¶ 71-78 ("Plaintiff has been denied both procedural and substantive due process because Plaintiff may not go about his business without being subjected to an unreasonable seizure.") Unfortunately for Plaintiff, the law does not permit Plaintiff to assert a separate substantive due process claim for a Fourth Amendment violation. *Graham v. Connor*, 490 U.S. 386 (1989); *see also United States v. Lanier*, 520 U.S. 259, 272, fn. 7 (1997) ("if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process").

Neither does Executive Order No. 2020-10 violate substantive due process by denying a fundamental right to travel within Guam. Indeed, it allows for substantial amount of travel for citizens engaged in essential activities. This allowance strikes the balance between reducing travel, which reduces human interactions, and enabling residents to engage in the essential functions of life. *See Bykofsky v. Borough of Middletown*, 401 F.Supp. 1242, 1256 (M.D. Pa. 1975), *aff'd* 535 F.2d 1245 (3d Cir. 1976) (holding that a curfew for minors served a legitimate

government interest and had "numerous exceptions that allow minors to be on the streets during the curfew hours when they have a specific, important, legitimate purpose for being there" and thus was constitutional). Indeed, if no drivers are being turned away from the road closure points, as Plaintiff alleges, then there is no infringement on the right to travel at all.

With his substantive due process claim left unavailing, the inquiry turns to whether Plaintiff has a procedural due process right in this context and, if so, whether it was violated. First, Plaintiff does not propose what form of procedural due process is minimally necessary, and it is difficult to imagine what form would be required, if any, in this context. One's entitlement to procedural due process cannot be determined in a static environment, because due process is "not a technical conception with a fixed content unrelated to time, place and circumstance." *Gilbert v. Hoover*, 520 U.S. 924, 930 (1997).

The U.S. Supreme Court established a three-part balancing test for procedural due process that considers: (1) the private interest affected by the government action; (2) the risk of erroneous deprivation and the value of additional safeguards; and (3) the state interest involved, including the administrative burdens to the government of additional safeguards. *Mathews v. Eldridge*, 424 U.S. 319 (1976). However, the Court has acknowledged that a different level of process is called for in times of emergency. *Bell v. Burson*, 402 U.S. 535, 542 (1971). The Court also held: "Protection of the health and safety of the public is a paramount governmental interest which justifies summary adjudicative action. Indeed, deprivation of property to protect the public health and safety is 'one of the oldest examples' of permissible summary action." *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300-301 (1981).

Here, the "deprivation of liberty" that Plaintiff alleges to have suffered is so slight and temporary, that procedural due process would be vastly inapt and inordinate to the compelling governmental interest. A pre-deprivation process (as opposed to post-deprivation) would be

even more incongruent to this situation. Under the rapid spread of infectious disease, and the urgent need to protect Guam residents from illness and death, the Governor was in no position to provide for pre-deprivation notice and an opportunity to be heard by Plaintiff and every single Guam resident. The result would have been to delay Executive Order 2020-10 by weeks, months, or even years, which is an untenable result given the Governor's duty under the Emergency Health Powers Act to swiftly abate a growing disaster.

Moreover, procedural due process is intended to protect persons from *erroneous* or mistaken deprivation of life, liberty, or property. The U.S. Supreme Court holds:

> Procedural due process rules are meant to protect person not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process …." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Such rules "minimize substantively unfair or mistaken deprivations of" life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin, supra*, 407 U.S., at 81, 92 S.Ct., at 1994.

Carey v. Piphus, 435 U.S. 247, 259-260 (1978).

In the present case, everyone is subject to the alleged momentary deprivation of liberty, and no one person is exempt or may be mistakenly deprived, as opposed to another person. Thus, the application of procedural due process in this context is inapposite, because Plaintiff was not subjected to a "mistaken" or "erroneous" deprivation of liberty. As to "the individual's strong interest in liberty[,] … as our cases hold, this right may, where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *United States v. Salerno*, 481 U.S. 739, 750-751 (1987). The state interest at the heart of Executive Order No. 2020-10 is that it seeks to protect the health, safety, and welfare of citizens on Guam in the face of a deadly pandemic, which is a compelling state interest. Therefore, it cannot be argued in the

alternative that everyone subject to the road closure traffic flow plan is "mistakenly" or "erroneously" deprived of liberty, because the compelling state interest outweighs the fleeting and negligible liberty deprivation alleged.

II. PLAINTIFF IS NOT LIKELY TO SUFFER IRREPARABLE HARM IF PRELIMINARY INJUNCTION IS DENIED

Generally, courts presume irreparable injury when a plaintiff alleges a violation of a constitutional right. *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Plaintiff rests his argument on this presumption. Motion, at 12 ("as long as the checkpoints are allowed to continue he will continue to suffer a *constitutional* violation if preliminary relief is not granted") (original emphasis). However, when the presumption is rebutted by the facts that fail to sustain a cognizable injury, then the presumption is negated. *See Id.*, at 578.

The Court has already found that Plaintiff's "threatened injury—an allegedly unlawful seizure of his person … will not occur unless Plaintiff attempts to travel by automobile through one of four 'checkpoints' established at predetermined locations around the island, and only if he does so during particular times." *Order Denying Motion For A Temporary Restraining Order*, CV20-00017, J. Tydingco-Gatewood, Apr. 21, 2020 ["TRO Order"], at 2. The Court also found that Plaintiff made an inadequate showing of "irreparable" harm with his "assertion that every deprivation of a constitutional right is *per se* irreparable." *Id.* The Court held Plaintiff lacked irreparable injury, [h]aving provided no other [non-First Amendment] legal authority for his proposition, and having made no attempt at a factual showing beyond his irreparable-harm-*per-se* argument." *Id.*, at 3.

Plaintiff has since augmented his declaration with a factual showing to include that he "do[es] not like leaving [his] house before 9:00 a.m." and that he "could take a route that would

permit [him] to avoid the checkpoints." Motion, at Exh. B, ¶¶ 5, 9. Despite his contradicting facts, Plaintiff intimates that he will inevitably pass through the checkpoints and thereby suffer the harm of continued, supposedly illegal, seizures. See also, Motion, at 11. However, this is the same exact presumptive "irreparable-harm-*per-se* argument" that the Court previously found insufficient, and the amended declaration, offering no reasonable evidence of irreparable harm just as before, is unavailing to Plaintiff.

III. THE BALANCE OF EQUITIES TIPS TOWARD THE GOVERNOR'S CONTINUED OPERATION OF THE ROAD CLOSURE TRAFFIC FLOW PLAN

The harm that Plaintiff will experience if the Court denies a temporary injunction must be balanced against the catastrophic and permanent harm that the people of Guam would suffer if the Court grants temporary injunction. *See Winter*, 555 U.S. at 24 ("courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief" and "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") (citation and internal quotation marks omitted).

The inferable harm that Plaintiff potentially suffers is that he is limited by knee pain and poor vision to driving between 9:00 a.m. and dusk when he leaves the house for groceries or pharmaceuticals about once a week. Motion, at Exhibit B, ¶¶ 5-8. Although Plaintiff admits he could avoid the "checkpoints" if he wanted to, his ultimate claim of harm is that he will have to encounter such a stop in traffic and be seized. Motion, at Exh. B, ¶¶ 8, 9. As explained in the previous section, this is not a fact-based injury but a claim of legal wrong. *See* TRO Order, at 2; and see Motion, at 12.

In comparison, the harm that the populace of Guam will absolutely suffer, but to unknown degree, is increased numbers of residents infected with COVID-19, increased demand

upon limited ICU and ventilator resources, increased exposure to attending health care workers, and, ultimately, increased deaths. Given the highly contagious nature of coronavirus, it seems inevitable that the Governor's social distancing policies, to include reducing (human) traffic flow by dissuasion, meant that less people came into contact with each other. As a result, this necessarily reduced the probability that more were infected and either risked death or died. If the Court grants the extraordinary remedy of preliminary injunction, the loss of the road closure traffic flow plan would just as inevitably lead to more infected and more dead.

IV. INJUNCTION WOULD BE CATASTROPHIC TO THE PUBLIC INTEREST

Assuming a violation occurred, "[g]enerally speaking, 'the public interest is served by preventing the violation of constitutional rights.' " *League of Women Voters v. Hargett*, 400 F.Supp.3d 706, 733-734 (M.D. Tenn. 2019) (quoting *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004)). "Nevertheless, enjoining public officials from pursuing their chosen policies is not without costs. The court, therefore, must consider whether any harm to the public interest associated with enjoining the [executive action] would outweigh the benefit." *Id.*, at 734.

At complete odds with the public interest, granting Plaintiff's requested relief will inevitably and to unknown degree lead to the increased transmission of a deadly disease for which there currently is no cure. At best, Plaintiff can only claim the inconvenience of waiting in traffic to have a brief, non-investigatory, and minimally invasive conversation with a National Guard member, and then proceeding through regardless of his purpose for travel.

On the other hand, a "state's wish to prevent the spread of a communicable disease clearly constitutes a compelling interest." *Workman v. Mingo Cty. Bd. of Educ.*, 419 Fed. Appx.

348, 353 (4th Cir. 2011). It is difficult to imagine a more compelling public interest than the preservation of life and health during a global pandemic.

Again, there may be competing interests at issue, yet the overwhelming public interest, by comparison, lies with the exercise of policies aimed at promoting social distancing to prevent the spread of potentially fatal disease. While not everyone on Guam minds waiting in traffic a few or several minutes before briefly encountering a National Guard member, everyone on Guam could become infected, severely ill, and/or killed by COVID-19. So, in terms of a greater public interest, not only are the consequences of one interest more dire, but they are more ubiquitous as well, potentially affecting every single person on Guam and placing them at risk of death.

CONCLUSION

For the foregoing reasons, and for good cause shown, Defendant Governor Lourdes A. Leon Guerrero respectfully requests the Court deny Plaintiff's motion for preliminary injunction or, as moved alternatively, motion for temporary restraining order, and see that he takes nothing therefrom. Defendant additionally requests the Court grant Defendant any other relief in equity or law that the Court deems appropriate.

Dated this 27th day of April, 2020.

OFFICE OF THE ATTORNEY GENERAL
Leevin Taitano Camacho, Attorney General

By: /s/
JAMES L. CANTO II
Deputy Attorney General

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of Guam that on April 27, 2020, I caused the foregoing document to be electronically filed with the Clerk of Court for the United States District Court of Guam using the CM/ECF system and that immediately after the filing of the above document I will cause it to be served upon the parties as authorized by law and court order.

Executed at Tamuning, Guam, on April 27, 2020.

/s/
JAMES L. CANTO II