

**IN THE COURT OF COMMON PLEAS  
WARREN COUNTY, OHIO**

<b>KAISER DAYCARE INC. dba All About Kids</b>	:	<b>Case No. 20-CV-93395</b>
5250 Courseview Drive	:	
Mason, Ohio 45040	:	<b>Judge Timothy N. Tepe</b>
	:	
<b>SPANAGEL LEARNING CENTERS LLC dba All About Kids Learning Centers</b>	:	<b>AMENDED COMPLAINT for</b>
6653 Ross Lane	:	<b>DECLARATORY JUDGMENT AND</b>
Mason Ohio 45040	:	<b>IMMEDIATE INJUNCTIVE RELIEF</b>
	:	
<b>WEBBERS KIDS, LLC, dba Little Learns Too</b>	:	<b>Exhibit 1: <i>Director's May 29, 2020 Order on</i></b>
36721 Lakeshore Boulevard	:	<b><i>Child Care Services</i></b>
Eastlake, Ohio 44095	:	
	:	<b>Exhibit 2: <i>R.C. 5104.033</i></b>
<b>A.A.K. LEARNING CENTERS, LLC</b>	:	
575 Chamber Drive	:	<b>Exhibit 3: <i>Entry and Order LMV DEV SPE,</i></b>
Milford Ohio 45150	:	<b><i>LLC DBA Kalahari Resorts v. Acton</i></b>
	:	
<b>COMMUNITY MONTESSORI LLC dba Community Montessori</b>	:	<b>Exhibit 4: <i>Entry and Order in Rock House</i></b>
6703 Liberty Park Drive	:	<b><i>Fitness v. Acton</i></b>
Middletown, Ohio 45044	:	
	:	
<b>BIZ 4 KIDZ, LLC dba All About Kids</b>	:	
5733 West Fork Road	:	
Cincinnati Ohio 45247	:	
	:	
<b>J&amp;S DAYCARE INC.</b>	:	
5214 Laurenridge Lane	:	
Cincinnati Ohio 45247	:	
	:	
<b>BRIGHT STAR ACADEMY LLC</b>	:	
5575 Baybrook Lane	:	
Dublin Ohio 43016	:	
	:	
<b>SUMMIT RIDGE EDUCATION LLC</b>	:	
3475 Ridgewood Road	:	
Akron Ohio 44333	:	
	:	
<b>CHAMBERS HOLDINGS, INC.</b>	:	
199 Monroe Lane	:	
Westerville Ohio 43081	:	
	:	
<b>GRESHAM EDUCATION GROUP, LLC</b>	:	
3475 Ridgewood Road	:	
Akron Ohio 44333	:	



416 S East Street  
Lebanon, Ohio 45036

**Defendants.**

Now comes Plaintiffs, and for their Complaint for Declaratory Judgment and Injunctive Relief, allege as follows:

**INTRODUCTION**

1. This is an action for declaratory judgment, and preliminary and permanent injunction, pursuant to Ohio Rev. Code Chapter 2721 and Ohio Rev. Code Chapter 2727, arising from Defendants' unconstitutional official conduct, policies, practices, regulations, restrictions and/or harassment.
2. At the very same time that Defendants' own policies - - through shuttering schools and nearly every child-oriented activity - - have rendered daycare services more necessary to more Ohioans than ever before, Defendants have unilaterally, arbitrarily, and unlawfully restricted the number of families that Ohio daycares may serve.
3. Defendants continue to obstruct rather than advance Ohioans' physical and mental health, all the while having continuously overinflated the risk of harm to the general public.
4. The pandemic itself has inflicted no deaths on Ohio children, apart from those caused by the *policies* of Defendants.
5. While the Ohio Department of Health and its Director and former Director, LANCE HIMES and AMY ACTON, together with local health departments, including the WARREN COUNTY GENERAL HEALTH DISTRICT, maintain latitude to enforce regulations that ameliorate the effects of a pandemic, that latitude remains subject to limitations imposed by both the Ohio Constitution and the Ohio General Assembly.
6. However, the Ohio Department of Health, its Director, and county health departments claim the authority to criminalize and otherwise sanction Ohio Daycares for adhering to safe practices that are expressly protected by the Ohio General Assembly. And Plaintiffs remain entitled to due process and a government that abides by the doctrine of separation of powers with the attendant checks and balances.

7. The various “orders” of the Director of the Ohio Department of Health, together with their enforcement, violate those fundamental rights through the arbitrary imposition of excessive strict liability, together with criminal, civil, and equitable sanctions – unilaterally created by just one unelected individual within the bureaucracy of the State of Ohio – without due process, or just compensation, *irrespective of safety*, and in violation of the doctrine of separation of powers.

8. As a direct and proximate result of the unconstitutional conduct, policies, practices, regulations, restrictions, threats, and/or harassment of the Director of the Ohio Department of Health, together with enforcement efforts by local health departments, Plaintiffs (as well as many others) face an imminent risk of criminal prosecution and extensive daily fines, loss of revenue, and/or the decimation of their businesses, livelihoods, and economic security, as well as continued irreparable harm to their rights, to their clients’ lives, and to the general public.

9. This harm may only be remedied by a ruling from this Court, and Defendants must be immediately and permanently enjoined from imposing criminal, civil, or equitable sanctions on the safe operation of Ohio Daycares, including those owned by Plaintiffs.

#### **PARTIES**

10. Plaintiff Community Montessori LLC dba Community Montessori is a private child care center owned by Todd and Jamie Minniear in Butler County, Ohio.

11. Plaintiff Kaiser Daycare Inc. dba All About Kids is a private child care center owned by James M. Kaiser in Butler County and Warren County, Ohio.

12. Plaintiff Spanagel Learning Centers LLC dba All About Kids Learning Centers is a private child care center owned by Steve Spanagel in Warren County, Ohio.

13. Plaintiff Biz 4 Kidz, LLC dba All About Kids is a private child care provider owned by Greg Davis in Delaware County, Ohio.

14. Plaintiff Sun-Day Inc. is a private child care provider, owned by Cathy Sunderman, located in Hamilton County, Ohio.
15. Plaintiff J&S Daycare Inc. is a child care provider, owned by Cathy Sunderman, located in Hamilton County, Ohio.
16. Plaintiff Bright Star Academy LLC is a private child care provider owned by Ann Farrauto located in Franklin County, Ohio.
17. Plaintiff Summit Ridge Education LLC is a private child care provider, owned by Jana Massary, located in Summit County, Ohio.
18. Plaintiff Gresham Education Group, is a private child care provider, owned by Jana Massary, located in Cuyahoga County, Ohio.
19. Plaintiff N&E Learning, LLC is a private child care provider operating five child care centers, owned by Natasha Eskander, located in Franklin County, Ohio.
20. Plaintiff VDKC Inc. dba Primrose School of Hilliard West is a private child care provider, owned by Annelies Condon, operating daycares in both Franklin and Union County, Ohio.
21. Plaintiff Chambers Holdings Inc. is a private child care provider, owned by Jennifer Chambers, located in Franklin County, Ohio.
22. Plaintiff KidsFirst Learning Centers LLC is a private child care provider, owned by Willis B. Boyer, with four locations in Cuyahoga County, Ohio.
23. Plaintiff A.A.K. Learning Centers, LLC is a private child care provider, owned by Gregory Davis, without one location in Butler County, Ohio and another location in Warren County, Ohio.
24. Plaintiff Webbers Kids, LLC, doing business as Little Learners Too, is a private child care provider, owned by Sandra Webber, located in Lake County, Ohio.
25. Plaintiff TLT Learning Center, LLC is a private child care provider, owned by Timothy Rizzo, located in Montgomery County, Ohio.

26. Plaintiff Positive Beginnings Childcare and Preschool Center LLC is a private child care provider, owned by Brenda Assian, located in Cuyahoga County, Ohio.

27. Plaintiff Le Chaperon Rouge Company is a private child care provider, owned by Stella Moga-Kennedy with eleven locations located in Cuyahoga County, Summit County and Lorain County Ohio.

28. Plaintiff HisPath LLC, DBA Mangos Place, is a private child care provider, owned by Mary Frances Curtis, with locations in Franklin and Delaware County, Ohio.

29. Plaintiff Struck School of Learning, LLC is a private child care provider, owned by Cameron Struck, located in Delaware County, Ohio.

30. In total, the 20 Plaintiffs in this case own and operate 40 Daycare locations across Ohio.

31. Defendant LANCE HIMES is the Director of the Ohio Department of Health.

32. Defendant AMY ACTON was, at all times relevant to the facts at issue in this case, the Director of the Ohio Department of Health.

33. Defendant WARREN COUNTY GENERAL HEALTH DISTRICT is a county health district organized under Ohio Rev. Code Chapter 3709, charged with enforcing the Ohio Department of Health's Orders and empowered to make its own orders.

34. Pursuant to both past *Orders* and Ohio Rev. Code § 3701.56, Defendant WARREN COUNTY GENERAL HEALTH DISTRICT maintains authority to enforce the criminalization of amusement park and water park operations against Plaintiffs.

35. At all times relevant to the allegations in this Complaint, each and all of the acts of Defendants alleged herein were undertaken in conformity with the regulations, customs, usages, policies, and practices of the State of Ohio and the Ohio Department of Health.

36. The actions of Defendants described herein were either outside the scope of her respective office, or, if within the scope, undertaken in an arbitrary manner, grossly abusing the lawful powers of her office.

37. Defendants have personally undertaken and/or threaten to continue to personally undertake specific action so as to deprive and/or violate the constitutional rights of the Plaintiffs.

38. All Defendants are being sued in their official capacities.

### FACTS

39. The May 29, 2020 *Director's Order on Child Care Services* seeks to criminalizes that which the Ohio General Assembly has expressly exempted from criminal liability.

40. Ohio Rev. Code § 3701.13 delegates to the Director of the Ohio Department of Health, amongst other things, “ultimate authority in matters of quarantine and isolation” and authority “to make special orders.”

41. Ohio Rev. Code § 3701.352 mandates that “[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.”

42. In turn, Ohio Rev. Code § 3701.99(C) provides that any violation of Ohio Rev. Code § 3701.352 constitutes a second-degree misdemeanor, thus, subjecting any person violating Ohio Rev. Code § 3701.352 to up to 90 days in jail and a \$750 fine, or both.

43. To enforce its orders, including the *May 29, 2020 Director's Order on Child Care Services*, the Ohio Department of Health and its enforcement agents rely upon Ohio Rev. Code §3701.352, and also 3701.56 for the proposition that “boards of health of a general or city health district . . . shall enforce quarantine and isolation orders.”

44. On March 22, 2020, AMY ACTON, in her capacity as the Director of the Ohio Department of Health, issued a *Director's Stay at Home Order*, ordering that “non-essential businesses and operations must cease” and “effective at 11:59 pm on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations as set forth in this Order.”

45. Rather than defining the category articulated as “Essential Businesses and Operations,” the *Director's Stay at Home Order* attempted to name “essential businesses and operations” over the course of three pages and 25 paragraphs.

46. While the standard of “essentiality” may initially appear clear, *i.e.*, “necessary for survival,” the *Director’s Stay at Home Order* included within the category of “essential”, *inter alia*, liquor, marijuana, dry cleaners, and the state lottery.

47. “Daycares” were not deemed “essential.”

48. Plaintiffs and other daycares’ daily practices and operations are regulated by the May 29, 2020 *Director’s Order on Child Care Services* is attached hereto as Exhibit 1.

49. A true and accurate copy of the May 29, 2020 *Director’s Order on Child Care Services* is attached hereto as Exhibit 1.

**The Director’s Order forbids statutorily-protected staff-to-child ratio.**

50. R.C. 5104.033 permits one staff member to supervise **five** infants; however, the Director’s Order only permits one staff member to supervise **four** infants. See *Director’s Order*, ¶10(a)(i)(1).

51. R.C. 5104.033 permits one staff member to supervise **eight** “toddlers”; however, the Director’s Order only permits one staff member to supervise **six** “toddlers”. See *Director’s Order*, ¶10(a)(i)(2).

52. R.C. 5104.033 permits one staff member to supervise **14** “pre-school children”; however, the Director’s Order only permits one staff member to supervise **nine** “pre-school children”; See *Director’s Order*, ¶10(a)(i)(3).

53. R.C. 5104.033 permits one staff member to supervise **20** “school-age children”; however, the Director’s Order only permits one staff member to supervise **9** “school-age children”. See *Director’s Order*, ¶10(a)(i)(4).

**The Director’s Order forbids statutorily-protected “group” sizes**

54. R.C. 5104.033 permits groups of up to **12** infants; however, the Director’s Order forbids groups of greater than **six** infants (by forbidding the number of infants who may be “in the room”). See *Director’s Order*, ¶10(a)(i)(1).



55. R.C. 5104.033 permits groups of up to **16** “toddlers”; however, the Director’s Order forbids groups of greater than **six** toddlers (by forbidding the number of infants who may be “in the room”). See *Director’s Order*, ¶10(a)(i)(2).

56. R.C. 5104.033 permits groups of up to **28** “preschool-aged children”; however, the Director’s Order forbids groups of greater than **nine** preschool-aged children (by forbidding the number of infants who may be “in the room”). See *Director’s Order*, ¶10(a)(i)(3).

57. R.C. 5104.033 permits groups of up to **40** “school-age children”; however, the Director’s Order forbids groups of greater than **nine** school-aged children (by forbidding the number of infants who may be “in the room”). See *Director’s Order*, ¶10(a)(i)(4).

58. R.C. 5104.016 provides that “the director of job and family services . . . shall adopt rules establishing minimum requirements for child day-care centers,” however, “the rules shall include the requirements set forth in Sections 5104.32 to 5104.034 of the Revised Code,” and these “rules shall not change . . . the maximum number of children per child-care staff member and maximum group size requirements of section 5104.033.”

59. While R.C. 5104.015(F) authorizes the Ohio Department of Job and Family Services (and not the Director of the Department of Health) to “adopt rules in accordance with Chapter 119” governing “Health care policies and procedures, including procedures for the isolation of children with communicable diseases,” the Director’s Orders do not enforce “isolation” and there is no evidence that any of the regulated daycares serve children with communicable diseases.

60. Pursuant to OAC 3701-3-01(R), “‘Isolation’ means the separation of an infected individual from others during the period of disease communicability in such a way that prevents, as far as possible, the direct or indirect conveyance of an infectious agent to those who are susceptible to infection or who may spread the agent to others.” See also *Rock House Fitness, Inc. v. Acton*, Case No. 20CV000631 (Lake Cty. C.P. 5-20-2020)(Decision attached).

61. Further, the Ohio Revised Code already safeguards against overcrowding and in favor of social distancing by requiring “for each child for whom the center is licensed, at least thirty-five square feet of usable indoor floor space.” See R.C. 5104.032(A).

62. R.C. 5104.01(L) defined "Child day-care center" to mean “any place that is not the permanent residence of the licensee or administrator in which child care or publicly funded child care is provided for seven or more children at one time,” subject to exceptions.

63. R.C. 5104.01(X) "Infant" means a child who is less than eighteen months of age.

64. R.C. 5104.01(TT) "Toddler" means a child who is at least eighteen months of age but less than three years of age.

65. R.C. 5104.01(KK) "Preschool-age child" means a child who is three years old or older but is not a school-age child.

66. R.C. 5104.01(OO) "School-age child" means a child who is enrolled in or is eligible to be enrolled in a grade of kindergarten or above but is less than fifteen years old or, in the case of a child who is receiving special needs child care, is less than eighteen years old.

67. The May 29, 2020 *Director’s Order on Child Care Services* seeks to criminalizes that which the Ohio General Assembly has expressly exempted from criminal liability.

**DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

***Article I, Sections 1, 2, 16, 19 and 20 and Article II, Section 1 of the Ohio Constitution***

68. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

***Vagueness and Separation of Powers***

69. Section 1, Article II of the Ohio Constitution vests the legislative power of the state solely in the Ohio General Assembly.

70. One of two conclusions is necessarily true: either (i) the General Assembly’s *delegation* of authority to the Ohio Department of Health in Ohio Rev. Code § 3701.13 is too broad or vague; or (ii) the

Ohio Department of Health's *exercise* of the delegated authority is too broad. Under either conclusion, the May 29, 2020 *Director's Order on Child Care Services*, in criminalizing daycare operations that are expressly protected by the Ohio General Assembly and otherwise limiting them, violates the separation of powers guarantees to which Plaintiffs are entitled.

71. In delegating "ultimate authority in matters of quarantine and isolation" to the Ohio Department of Health, the Ohio General Assembly has delegated legislative authority without an intelligible principle.

72. The vagueness concerns raised by the delegation of "ultimate authority" to the Ohio Department of Health is aggravated by the unilateral creation of strict liability crimes by the various orders issued by Defendants.

73. "Without sufficient limitations, the delegation of authority can be deemed void for vagueness as allowing ad hoc decisions or giving unfettered discretion." *Biener v. Calio*, 361 F.3d 206, 215-17 (3d Cir. 2004).

74. "A delegation of legislative authority offends due process when it is made to an unaccountable group of individuals and is unaccompanied by 'discernible standards,' such that the delegatee's action cannot be 'measured for its fidelity to the legislative will.'" *Ctr. for Powell Crossing, LLC v. City of Powell, Ohio*, 173 F. Supp. 3d. 639, 675-79 (S.D. Ohio 2016).

75. "Though the degree of review for vagueness is not described with specificity, if the enactment 'threatens to inhibit the exercise of constitutionally protected rights,' (such as property rights in Ohio), a more stringent vagueness test is to be applied." *Yoder v. City of Bowling Green, Ohio*, No. 3:17 CV 2321, 2019 WL 415254, at 4-5 (N.D. Ohio Feb. 1, 2019), citing *Norwood*, 110 Ohio St.3d at 379.

76. Because there is no means of exercising judicial review over any order issued by AMY ACTON purportedly under the authority of Ohio Rev. Code § 3701.13, that delegation is impermissibly vague.

77. The vague delegation, both on its own and in combination with the various orders issued by AMY ACTON, has violated, continues to violate, and will further violate Plaintiffs' rights.

78. AMY ACTON has already conceded, and in fact repeatedly claimed that “Dr. Acton’s generally-applicable orders are legislative acts,” and “general policy decisions.” See *Hartman v. Acton*, Case No. 2:20-cv-1952 (S.D. Ohio 2020), *Memorandum in Opposition to Motion for TRO* (Doc. 4, PageID#71, 79, 80 & 81 (“the Amended Order is a legislative act of general application.... A State can make general policy decisions...”).

79. AMY ACTON and her attorneys have framed her as a policymaker, explaining that “Dr. Acton weighed the danger from the spread of Covid-19 with the need of Ohioans to obtain necessary goods and services.” *Memorandum in Opposition to Motion for TRO*, at PageID#80.

80. AMY ACTON and her attorneys have claimed that all Ohio businesses “take their business-operation rights subject to those restrictions” that may be imposed by Acton, no matter what those restrictions may be. *Memorandum in Opposition to Motion for TRO*, at PageID#83.

81. AMY ACTON and her attorneys have claimed that the Ohio Department of Health may usurp the function of the Ohio General Assembly by creating strict liability criminal penalties, *i.e.*, disobedience with any order issued by AMY ACTON, including, without limitation, the *Director’s Stay at Home Order*, the *Amended Director’s Stay at Home Order*, and the *Director’s Stay Safe Ohio Order*, and the May 29, 2020 *Director’s Order*.

82. At the time of this filing, just two Ohio Court have adjudicated the merits of the Defendants’ pandemic “orders” criminalizing businesses issued by Director of the Ohio Department of Health.

83. The aforesaid Courts each held that the penalties flowing from such orders to be impermissibly unconstitutional and otherwise unlawful. See *Rock House Fitness, Inc. v. Acton*, Case No. 20CV000631 (Lake Cty. C.P. 5-20-2020)(Decision attached).

84. In *Rock House Fitness*, the Court explained that “[t]he director has quarantined the entire people of the state of Ohio, for much more than 14 days. The director has no statutory authority to close all businesses . . . She has acted in an impermissibly arbitrary, unreasonable, and oppressive manner and without any procedural safeguards . . . Fundamental liberties to own and use property and earn a living are at stake and

are violated [Acton's] actions . . . and there is no administrative appeal process within the department of health regulation for this taking.” *Id.*, at ¶26, 31, 34.

85. Further, the *Rock House Fitness* court rejected the notion that “one unelected individual could exercise such unfettered power to force everyone to obey impermissibly, vague, arbitrary, and unreasonable rules that the Director devised and revised, modified and reversed, whenever and as she pleases, without any legislative guidance.” *Id.*, at ¶37. The Court then enjoined Director Acton and the local health department “from imposing or enforcing penalties solely for noncompliance with the director’s order.” *Id.*, at ¶37.

86. In addition, “the statute granting [the Health Director] the authority, power to enforce, and criminalize also violates the separation of powers that exist in our Constitutional framework to protect our citizens from the consolidation of power in one person.” *LMV DEV SPE, LLC DBA Kalahari Resorts & Conventions v. Acton*, Case No. 2020-CV-0201 (Erie Cty. C.P. 6-20-2020)(Decision attached).

87. “Moreover, if one unelected, unaccountable to the public, official is allowed to invoke unfettered Orders, which can criminalize an otherwise non-criminal activity only for disobedience to her Orders, then the right to Due Process is extinguished. The authority to issue Orders, create strict liability crimes without legislative or Administrative oversight, and impose criminal sanctions. To restrict the fundamental right of property based on an impermissible classification of ‘identity’ rather than on ‘safety’. To violate the separation of powers by delegating policy making, rather than policy shaping, to an Administrative agency without proper oversight or reservation of authority to override Orders. All these are a concern for this Court in regards to Due Process and Equal Protection rights of the citizens being violated.” *Id.*

88. The Ohio Department of Health has “been improperly granted the power to create and criminally enforce, with strict liability, laws simply by a decision of an unelected, unaccountable to the general public, administrative officer by virtue of an Order, application of which is, can and does trample of the fundamental rights of the citizens.” *Id.*

89. The *Director's Order* on Child Care Services and any materially similar rules or orders are imposed pursuant to vague and unfettered enforcement authority that creates the crime of operating a daycare even within express legislative parameters; this violates the doctrine of separation of powers.

90. Because R.C. 3701.13 fails constitutional scrutiny, any order imposed in sole reliance on that statute also fails scrutiny, and is therefore unenforceable.

91. In order to prevent the continued violation of Plaintiffs' constitutional rights by Defendants, it is appropriate and proper that a declaratory judgment be issued, declaring unconstitutional and otherwise unlawful the May 29, 2020 *Director's Order* on Child Care Services and any other administrative order that alters the permissions granted to child care service facilities ("daycares") by the Ohio General Assembly and the Ohio Constitution.

92. It is further appropriate and hereby requested that preliminary and permanent injunctions issue prohibiting the Defendants from enforcing the *Director's Order* on Child Care Services and any materially similar rules or orders against Plaintiffs.

93. It is further appropriate and hereby requested that preliminary and permanent injunctions issue enjoining Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from engaging in any further official conduct that threatens, attempts to threaten, and/or actually interferes with Plaintiffs' exercise of the rights and liberties preserved through the Ohio General Assembly's designation of permissible group sizes and children-per-child-care-staff-member ratios in R.C. 5104.033.

***The Department of Health may not Override Legislative Acts***

94. In framing the Ohio Constitution, the people of this state conferred on the General Assembly the legislative power. This lawmaking prerogative cannot be delegated to or encroached upon by the other branches of government. *See State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶ 46; *Cent. Ohio Transit Auth. v. Transport Workers Union of Am., Local 208*, 37 Ohio St.3d 56, 62 (1988) (plurality opinion); *Matz*

v. *J.L. Curtis Cartage Co.*, 132 Ohio St. 271, 279 (1937). *City of Toledo v. State*, 2018-Ohio-2358, 154 Ohio St. 3d 41, 47.

95. The *only* purpose of administrative rules is to accomplish the ends sought by legislation enacted by the General Assembly. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 2002-Ohio-4172, ¶¶ 40, 96 Ohio St. 3d 250, 254–57; *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St.3d 376, 2007-Ohio-2201, at ¶ 17.

96. “Rules promulgated by administrative agencies” may not be “in conflict with statutory enactments covering the same subject matter.” *State ex rel. Curry v. Indus. Comm.* (1979), 58 Ohio St.2d 268, 269.

97. If an administrative rule either adds to or subtracts from a legislative enactment, it creates a clear conflict with the statute, and the rule is invalid and unconstitutional. *Cent. Ohio Joint Vocational School Dist. Bd. of Edn. v. Ohio Bur. of Emp. Servs.* (1986), 21 Ohio St.3d 5, 10; *Midwestern College of Massotherapy v. Ohio Med. Bd.* (1995), 102 Ohio App.3d 17, 23, 656 N.E.2d 963 (stating that “a rule that is in conflict with the law is unconstitutional because it surpasses administrative powers and constitutes a legislative function”).

98. “All powers of governmental agencies are legislatively granted, and such agencies have only such regulatory authority as is granted, and the acts of such agency may not exceed such authority or be in direct conflict with the exercise of specific powers granted to state departments for statewide regulatory control.” *Johnson's Markets, Inc. v. New Carlisle Dep't of Health*, 58 Ohio St. 3d 28, 36 (1991).

99. It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency. *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 379.

100. “In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it.” *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 2002-Ohio-4172, ¶¶ 40, 96 Ohio St. 3d 250, 254–57, citing *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47.

101. No executive branch official or agency may “transcend its administrative rule-making power and exercise legislative functions in violation of Section 1 of Article II of the Constitution of Ohio.” *Weber*, 148 Ohio St. 389.

102. There is no express grant of power in R.C. 3709.21, or elsewhere, allowing local boards of health unfettered authority to promulgate any health regulation deemed necessary. Since there is no express delegation, it follows that there is no implied authority . . . Administrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly.” *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 2002-Ohio-4172, ¶¶ 37-41 (“[P]olicy-making require[es] a balancing of social, political, economic, and privacy concerns. Such concerns are legislative in nature, and by engaging in such actions, petitioners have gone beyond administrative rule-making and usurped power delegated to the General Assembly”).

103. “It is well established, however, that administrative rules, in general, may not add to or *subtract from*, as is the situation herein, the legislative enactment.” See, e.g., *Ransom & Randolph Co. v. Evatt* (1944), 142 Ohio St. 398. Moreover, if Ohio Adm.Code 3301–21–39(E)(3) were so construed, it would be rendered a nullity, for it has been held that a rule is invalid where it clearly is in conflict with any statutory provision. See, e.g., *Matz v. J.L. Curtis Cartage Co.* (1937), 132 Ohio St. 271; *Carroll v. Dept. of Adm. Serv.* (1983), 10 Ohio App.3d 108; *Cent. Ohio Joint Vocational Sch. Dist. Bd. of Educ. v. Admr., Ohio Bureau of Employment Servs.*, 21 Ohio St. 3d 5, 10 (1986)(“Thus, to the extent that Ohio Adm.Code 3301–21–39(E)(3) may have been interpreted, as appellant contends, to permit only one renewal of a one-year vocational teaching certificate, it is invalid as it is in conflict with R.C. 3319.281 which provides for a maximum of three renewals”).

104. The May 29, 2020 *Director’s Order on Child Care Services* seeks to criminalizes that which the Ohio General Assembly has expressly exempted from any type of sanction: supervising “groups” of ten children at the same time, and supervising five infants, seven toddler, ten pre-schoolers, or ten school-aged children at the same time.



105. The May 29, 2020 *Director's Order on Child Care Services* forbids important Daycare practices which the Ohio General Assembly has expressly protected, and “clearly subtracts from, and therefore conflicts with,” R.C. 5104.033.

### ***Procedural Due Process***

106. While the State has afforded a hearing on safety to some, it has afforded no such hearings to Plaintiffs.

107. A procedural due process limitation, unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person’s life, liberty, or property interest. It simply requires that the government provide ‘due process’ before or after making such a decision.

108. The goal is to minimize the risk of substantive error, to assure fairness in the decision-making process, and to assure that the individual affected has a participatory role in the process. The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard ‘in a meaningful manner.’” *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996), citing *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 563 (6th Cir.1983), *aff'd*, 470 U.S. 532 (1985).

109. Interests in operating a business or earning a living are more than sufficient to invoke procedural due process guarantees. *Johnson v. Morales*, 946 F.3d 911, 935–37 (6th Cir. 2020)(“Johnson’s interest in her business license is enough to invoke due process protection”).

110. “There is no dispute that *never* providing an opportunity to challenge a permit revocation violates due process. Thus, the revocation of [the right to remain in business] without a pre-deprivation hearing or a post-deprivation hearing violated due process.” *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 488 (6th Cir. 2014).

111. Even when such property interests are deprived in an “emergency situation,” government must provide an “adequate post-deprivation process.” *United Pet Supply*, 768 F.3d at 486.

112. These safeguards for liberty are so beyond objection that “[n]o reasonable officer could believe that revoking a permit to do business without providing any pre-deprivation or post-deprivation remedy [is] constitutional.” *Id.*, at 488.

113. Heavily regulating an Ohioan or putting an Ohioan out of business without any opportunity for a hearing “is one of the rare situations where the unconstitutionality of the application of a statute to a situation is plainly obvious” such that “a clearly established right” is violated, and even qualified immunity is to be denied. *Id.*, at 489.

114. The fundamental requirement of due process is the opportunity to be heard and it is an “opportunity which must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

115. *Further*, even when the “the government has a substantial interest in ensuring the safety of its citizens,” a postdeprivation hearing is still required. See *Johnson v. Morales*, 946 F.3d 911, at 923 (6th Cir. 2020).

116. *Finally*, in requiring a postdeprivation hearing, at least with respect to the decimation of one’s business and livelihood, it matters not that the deprivation may be only “temporary” in nature. *Fuentes v. Shevin*, 407 U.S. 67, at 84–85 (“[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a ‘deprivation’ in the terms of the Fourteenth Amendment.”).

117. “Due process of law requires that plaintiffs be afforded a *prompt* hearing before a neutral judicial or administrative officer.” *Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006)(25 day delay for post-deprivation hearing unconstitutional); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993)(“the Due Process Clause requires ... an opportunity for some kind of predeprivation or *prompt* post-deprivation hearing at which some showing of the probable validity of the deprivation must be made”).

118. The Ohio Department of Health is required to supply Ohio daycares with a prompt hearing where the burden is on the Department to justify its decision to either close or impose crippling regulations on these daycares.

119. The Ohio Department of Health has entirely ignored these clear and important safeguards in imposing its “Orders” indefinitely regulating Plaintiffs’ businesses, even though the Orders have been renewed and carried on for over three months at the time of this filing, and even though county health departments alone have been privileged to receive hearings.

120. In an unknown and unknowable but not insignificant number of cases, such as Plaintiffs’ case, the Ohio Department of Health would be unable to justify forbidding Plaintiffs from serving larger groups or operating at higher adult-to-child ratios.

121. With each passing day and week that Plaintiffs’ businesses remain closed or impermissibly regulated, additional irreparable harm is inflicted on the Plaintiffs’ many employees and affiliates, surrounding businesses, and local governments.

122. Neither the May 29, 2020 *Director’s Order* nor any other law or rule entitles Plaintiffs or others to any hearing where they can explain these factors to a neutral decisionmaker with the power to lift or amend the closure of their business.

### ***Conclusion***

123. Because Defendants claim in paragraph 1 of the *Director’s Order* issued on May 29, 2020, that “if the situation deteriorates additional targeted restrictions will need to be made,” any permission to operate issued to Plaintiffs by Defendants fails to moot Plaintiffs’ claims.

124. The *Director’s Order* is entitled to no deference and no presumption of constitutionality, because it is neither a statute duly enacted by the Ohio General Assembly nor an administrative rule enacted through the Notice and Comment rulemaking procedures required by R.C. 119.

125. Nearly every prediction made by Defendants and their attorneys to justify their arbitrary policymaking during the pandemic has been proven false.

126. Paragraph 10(a) of the *Director’s Order* dramatically escalates to costs of Ohio daycares, including Plaintiffs, by drastically increasing staffing requirements.

127. When staffing is not dramatically increased, Paragraph 10(a) of the *Director's Order* dramatically reduces the revenue of Ohio daycares by reducing the number of children they can supervise.

128. Paragraph 10(a) of the *Director's Order* dramatically escalates to costs of Ohio families who require daycare services, including Plaintiffs' clients, by drastically increasing staffing requirements or reducing the number of children daycares may supervise.

129. By dramatically reducing the number of children Ohio daycares may supervise, Paragraph 10(a) of the *Director's Order* leaves parents unable to return to work, and also increases the opportunity for exposure and spread of the pandemic between children and their parents and grandparents.

130. All evidence is clear that the pandemic poses no harm, much less unique harm, to children.

131. Upon information and belief, Defendants maintain no intention of permitting the regulations challenged here to expire on July 1, 2020, and intend to renew these regulations indefinitely, if not enjoined by this Court.

132. Plaintiffs respectfully incorporate by reference all Exhibits submitted with the original complaint in this case (Exhibits 1, 2, 3, and 4, as identified in the caption on page 1).

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for judgment against Defendants, and that this Court:

- (1) Declare that R.C. 3701.352 and R.C. 3701.99, when enforcing R.C. 3701.13 or 3701.56 are unconstitutional on their faces and as applied to Plaintiffs due to the statutes and the *Director's Order*: (i) failing to provide meaningful procedural due process (ii) violating the doctrine of separation of powers; and (iii) delegating unfettered and unbridled vague power to unelected officials.
- (2) Issue a temporary restraining order, and a preliminary and permanent injunction, prohibiting Defendants and Defendants' agents from enforcing the group, ratio, and room limits that are inconsistent with those provided for in the Ohio Revised Code, including but not limited to those articulated in the May 29, 2020 *Director's Order* regarding "child care services," so long as Plaintiffs' Daycares operate safely.
- (3) Issue a preliminary and permanent injunction prohibiting Defendants from enforcing or relying on non-statutory regulations governing "group," "room," or "ratio" limits.

- (4) Enjoin Defendants from enforcing penalties for non-compliance with the Order or any other non-statutory limit so long as Plaintiffs and/or Daycares operate within the limits of the Ohio Revised Code and adhere to otherwise generally-applicable safety guidelines.
- (5) Enjoin Defendants from retaliating against Plaintiffs through conduct affecting Plaintiffs' licensure, whether pursuant to Plaintiffs non-compliance with Defendants unlawful group, room, and ratio limits or otherwise.
- (6) Enjoin Defendants from imposing penalties predicated solely on non-compliance with the Order or any other limit on ratios or group sizes at Daycares that is more limiting than the Ohio Revised Code.
- (7) Pursuant to Ohio Rev. Code § 2335.39 ("the Equal Access to Justice Act"), and other applicable law, award Plaintiff its costs, actual damages, nominal damages and expenses incurred in bringing this action, including reasonable attorneys' fees;

*and*

- (8) Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

*/s/ Maurice A. Thompson*

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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served on Defendants, through email to Defendants' Counsel, on **June 23, 2020.**

Respectfully submitted,

*/s/ Maurice A. Thompson*

Maurice A. Thompson (0078548)