UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SUSANA CASTILLO, *et al.*, Plaintiffs,	)	
	)	No. 1:20-cv-751
-v-	)	
	)	Honorable Paul L. Maloney
GRETCHEN WHITMER, *et al.*, Defendants.	)	

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs request a temporary restraining order enjoining the State from enforcing the August 3, 2020, Emergency Order issued by Defendant Robert Gordon, the Director of the Michigan Department of Health and Human Services. (ECF No. 1-2 Emergency Order PageID.33-39.) Plaintiffs characterize the Emergency Order as a racial classification which targets Latinos. For the purpose of deciding this request for immediate injunctive relief, the Court concludes Plaintiffs have not demonstrated a substantial likelihood of success on the merits and will deny the motion. The previously established schedule remains in place and Defendants will need to file a response so that the Court can consider whether to issue a preliminary injunction.

I.

Courts should carefully scrutinize requests for temporary restraining orders and strictly enforce the stringent requirements imposed by Rule 65(b) because "our entire jurisprudence runs counter to the notion of court action before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Granny Goose Foods,*

Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 7 of Almeda Cty., 415 U.S. 423, 439 (1974). Decisions regarding a temporary restraining order fall within the discretion of a district court. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008). Under Rule 65, a court may issue a temporary restraining order, without notice to the adverse party, only if two conditions are met. Fed. R. Civ. P. 65(b)(1). First, the moving party must establish specific facts through an affidavit or a verified complaint showing that an immediate and irreparable injury will result to the moving party before the adverse party can be heard in opposition to the motion. Fed. R. Civ. P. 65(b)(1)(A). Second, counsel for the moving party must certify in writing any efforts made to give notice and the reasons why notice should not be required. Fed. R. Civ. P. 65(b)(1)(B). In addition, the court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party*, 543 F.3d at 361 (quoting *Northeast Ohio Coal. for Homeless & Serv. Emps. Int'l Union*, 467 F.3d 999, 1009 (2006)). The four factors are not prerequisites that must be met, but are interrelated concerns that must be balanced together. *See Northeast Ohio Coal.*, 467 F.3d at 1009.

Plaintiffs have met the procedural requirements for a temporary restraining order. With their amended complaint and the motion for a temporary restraining order, Plaintiffs filed an affidavit from Tony Marr, who operates Blue Starr Farms. Marr alleges facts which establish a recent attempt by agents of the State to conduct testing of migrant workers at his farm. Plaintiffs also submitted a list of signatures from migrant workers who signed below a

statement that they do not want to be tested. Plaintiffs contend that the attempts to enforce the Emergency Order will continue before this Court can resolve their request for a preliminary injunction.

II.

When a party requests preliminary injunctive relief on the basis of a constitutional violation, the likelihood of success on the merits factor typically determines the outcome. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (citing *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam)). The Sixth Circuit has considered several challenges to recent executive orders issued under a governor's emergency powers in light of the COVID-19 public health crisis. The level of scrutiny applied to the executive action depends on the individual right affected. *See League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, —F. App'x—, 2020 WL 3468281 at *1 (6th Cir. June 24, 2020) (*LIFFT*). To restrict our enumerated liberties, such as the free exercise of religion found in the First Amendment, the government must justify its decision with a compelling interest and its actions must be narrowly tailored to advance that interest. *Maryville Baptist Church*, 957 F.3d at 614. This "strict scrutiny" also applies to state actions that differentiate on the basis of race. *See Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). For government acts that restrict other liberties, typically liberties not enumerated in our Constitution and not recognized as fundamental, courts apply lower standards of review. *LIFFT*, 2020 WL 3468281, at *1. Under the rational basis test, the plaintiff must "negate 'every conceivable basis which might support'" the government's action. *Id.* at *2 (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012). "Plaintiffs must disprove

all possible justifications for the Order regardless of whether those justifications actually motivated the Governor's decisionmaking." *Id.* (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993)).

Plaintiffs challenge the Emergency Order issued by Defendant Gordon on August 3, 2020. Plaintiffs contend that the Emergency Order mandates COVID-19 testing of Latino agricultural workers. If workers test positive for the coronavirus, or if workers refuse to be tested, they cannot work. Plaintiffs argue the State requires testing only at places where the workers and residents are overwhelmingly Latino. Plaintiffs conclude the Emergency Order discriminates on the basis of race. Plaintiffs also point to statements made by Defendant Gordon as evidence of discriminatory intent.

At this point in the litigation, Plaintiffs have not demonstrated that the Emergency Order constitutes a race-based government action subject to strict scrutiny.[1] The Emergency Order applies to agricultural employers and owners and operators of migrant housing camps. Their workers and their residents must be tested, regardless of race. The Court accepts as true Plaintiffs' assertion that the workers and residents who must be tested are overwhelmingly Latino. That fact, however, does not require the legal conclusion that the Emergency Order constitutes a racial classification. Plaintiffs' references to statements by Defendant Gordon do not change this analysis. His statements simply acknowledge that the majority of migrant agricultural workers are Latino. *See, e.g., Spurlock v. Fox*, 716 F.3d 383,

[1] Curiously, Plaintiffs' brief contains no discussion of the elements of an Equal Protection claim. While Plaintiffs do discuss the factors necessary for a temporary restraining order, they have not provided any analysis or legal citations concerning the first factor, the likelihood of success on the merits.

894 (6th Cir. 2013) ("Racial classification requires more than the *consideration* of racial data. If consideration of racial data were alone sufficient to trigger strict scrutiny, then legislators and other policymakers would be required to blind themselves to the demographic realities of their jurisdictions and the potential demographic consequences of their decision. The import of the plaintiffs' argument, in other words, is to impose a duty of ignorance on the part of public officials."). Gordon's statements do not suggest that the Emergency Order was issued *because* agricultural workers and residents at migrant housing camps are Latino.

With the conclusion that Plaintiffs have not demonstrated a racial classification in the Emergency Order, the Court will apply the rational basis test to contested government action. Plaintiffs have identified some concerns with the required testing. But, Plaintiffs have not rebutted every conceivable basis for the Emergency Order. Under this test, Plaintiffs have not shown a likelihood of success on the merits.

Plaintiffs' motion also suggests the Court should grant emergency injunctive relief as relief for a class. The proposed classes in the complaint reinforce the Court's conclusion that the Emergency Order does not discriminate on the basis of race. Plaintiffs identify four classes: (1) owners and operators of migrant housing camps licensed by the State; (2) residents of those migrant housing camps; (3) all agricultural workers as defined by the Order; and (4) all workers as defined by the Order. While members of each of these four classes might be able to establish an injury arising from the Emergency Order (*e.g.,* economic loss), the complaint does not establish how the injury results from a racial classification.

Plaintiffs do not identify the alleged violations of state law as a basis for issuing the temporary restraining order.

III.

Applying rational basis, the balance of the factors weight against issuing a temporary restraining order. The Emergency Order on the record to date

serves a legitimate public interest, slowing the spread of COVID-19. The lack of likelihood success on the merits and public interest outweighs the economic harm which Plaintiffs will likely suffer.

Accordingly, Plaintiffs' request for a temporary restraining order (ECF No. 18) is **DENIED. IT IS SO ORDERED.**

Date: August 14, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge