UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, et al., Plaintiffs, v. GRETCHEN WHITMER, et al., Defendants.	No. 1:20-cv-00323 Hon. Paul L. Maloney Mag. Phillip J. Green

DEFENDANT BRIAN L. MACKIE'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Defendant Brian L. Mackie, Washtenaw County Prosecuting Attorney, moves to dismiss Plaintiffs' First Amended Complaint (the "Amended Complaint") under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As explained in the accompanying brief, Plaintiffs lack standing to sue Defendant Mackie and their claims are not ripe, their claims against him are moot because the challenged restrictions in Executive Order 2020-42 have been rescinded, sovereign immunity applies to Defendant Mackie in this case, and, in any event, the constitutional claims relevant to Defendant Mackie fail on the merits.

In accordance with Local Civil Rule 7.1(d), Defendant Mackie communicated with opposing counsel regarding the substance of and intent to file this motion. This motion is opposed. Defendant Mackie asks this Court to grant his motion and dismiss with prejudice the Amended Complaint as to Mackie.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.

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Dated: May 20, 2020

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BRIEF IN SUPPORT OF DEFENDANT BRIAN L. MACKIE'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

Defendant Brian L. Mackie, the Washtenaw County Prosecuting Attorney ("WCPA"), does not belong in this case. Plaintiffs' First Amended Complaint contains no allegations whatsoever that WCPA Mackie has taken any action that could possibly violate either Plaintiff's constitutional rights. Nor is there any allegation that WCPA Mackie intends to do anything that might violate Plaintiffs' rights. Further, Robert Muise is the only plaintiff with any connection to Washtenaw County, and the activities Mr. Muise is concerned about—holding prayer gatherings at his home and traveling to purchase firearms and ammunition—are now clearly allowed, despite the ongoing threat presented by COVID-19.

The upshot is that the Court lacks jurisdiction to hear Plaintiffs' claims against WCPA Mackie for three separate reasons. WCPA Mackie has not caused Plaintiffs any injury, and there is no imminent threat that he will do so. Thus, Plaintiffs lack standing to sue him. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Further, even if Plaintiffs had standing when the suit was filed, their claims against WCPA Mackie are now moot because the activities at issue relevant to WCPA Mackie are no longer restricted. *See Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60, 61 (6th Cir. 1993). Meanwhile, "[g]eneral authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law," and therefore Eleventh Amendment sovereign immunity shields WCPA Mackie here. *See Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996).

Moreover, apart from failing to clear all these jurisdictional hurdles, Plaintiffs have not pled any valid constitutional claims against WCPA Mackie. COVID-19 represents the single greatest threat to public health in at least a century. It has sickened millions and killed hundreds of thousands worldwide. In Michigan alone, tens of thousands of people have contracted the virus, and over 4,000 have died. In light of that horrible toll, the restrictions in Executive Order

2020-42 were permitted in order to protect public health. *See Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905). Thus, it could not be a constitutional violation for WCPA Mackie to enforce them. Moreover, Plaintiffs' scattershot constitutional claims fail because the State's interest in protecting the public against COVID-19 justifies any incidental limitations on Plaintiffs' rights. The bottom line, under any analysis, is that the State's paramount duty is to protect the lives of its citizens, and in the present crisis, the modest and temporary restrictions at issue were lawful.

In short, Plaintiffs' claims against WCPA Mackie should be dismissed for lack of jurisdiction and for failure to state a claim.

STATEMENT OF FACTS

COVID-19 is an extremely contagious strain of coronavirus for which there is no known treatment or vaccine. Since first identified in Wuhan, China in December 2019, it has spread globally, infecting millions and killing over 300,000 individuals worldwide.

On January 7, 2020, health authorities in China confirmed the first cluster of COVID-19 cases. By the end of January, there were nearly 10,000 cases worldwide, including several confirmed cases in the United States. By the end of February, the United States saw its first COVID-19 death and its first case of community transmission. On March 10, the first presumptive-positive cases of COVID-19 were reported in the State of Michigan. Ex. A, Exec. Order No. 2020-4.[1] Because there is no known treatment for COVID-19, the Centers for Disease Control and Prevention advocated and continue to advocate for social distancing measures as crucial to curbing the spread of COVID-19. Accordingly, on March 13, Governor Whitmer issued Executive Order 2020-5, which prohibited gatherings of 250 or more people and ordered

[1] Available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html. The Court may take judicial notice of the Governor's various COVID-19-related executive orders. *See* Fed. R. Evid. 201.

the closure of all K-12 school buildings. Ex. B, Exec. Order No. 2020-5.[2] This order was followed by Executive Order 2020-9 and Executive Order 2020-11, which ordered closure of certain non-essential businesses, including restaurants, bars, and exercise facilities, and lowered the cap on assemblages to fifty people. Ex. C, Exec. Order No. 2020-9; Ex. D, Exec. Order No. 2020-11.[3]

On March 23, 2020, after the total number of cases in Michigan topped 1,300 and reported COVID-19-related deaths jumped from nine to fifteen overnight, Governor Whitmer issued Executive Order 2020-21. Ex. E, Exec. Order No. 2020-21.[4] The order required all persons not performing essential or critical infrastructure job functions to stay home. *Id.* ¶ 2. It also prohibited, with exceptions, all public and private gatherings of individuals not of a single household. *Id.* However, it provided exceptions for obtaining groceries, caring for family members, and engaging in outdoor activities consistent with social distancing guidelines, among others. *Id.* ¶ 7. The order was set to expire on April 13, but despite these measures, COVID-19 cases and related deaths continued to rise. On April 9, the Governor issued Executive Order 2020-42, which extended the stay-at-home order through April 30, 2020. ECF No. 25-1, PageID.418.

On April 15, 2020, Plaintiffs Kimberly Beemer, Paul Cavanaugh, and Robert Muise filed suit against Governor Gretchen Whitmer, Charlevoix County Prosecuting Attorney Allen Telgenhof, Livingston County Prosecuting Attorney William J. Vailliencourt, Jr., and Washtenaw County Prosecuting Attorney Brian L. Mackie. *See* Compl., ECF No. 1, PageID.1.

[2] Available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html.
[3] Available respectively at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html and https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521890--,00.html.
[4] Available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html.

The Complaint sought a declaration that the enactment and enforcement of Executive Order 2020-42 was unconstitutional. *Id.* ¶ 4. Plaintiffs asserted the right to engage in several activities prohibited under Executive Order 2020-42, namely: travel to and from vacation homes, operation of landscaping businesses, operation of motorboats, travel to gun shops to purchase firearms and ammunition, travel to gun ranges to practice with firearms, and gatherings on Sundays and other holy days with family members not of a single household. On April 20, Plaintiffs also filed a Motion for Temporary Restraining Order and Preliminary Injunction to enjoin enforcement of the challenged provisions of Executive Order 2020-42. *See* Pls. Mot. TRO & Prelim. Inj., ECF No. 7, PageID.50.

On March 24, 2020, Governor Whitmer issued Executive Order 2020-59, which rescinded Executive Order 2020-42, amended the scope of the stay-at-home order, and extended the remaining restrictions through May 15. ECF No. 25-2, PageID.429. Notably, under Executive Order 2020-59 Plaintiffs were no longer prohibited from engaging in the activities upon which their initial Complaint was based. On April 27, the Court entered a stipulated order resolving Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and acknowledging that Executive Order 2020-59 permitted Plaintiffs to engage in all the activities listed in their Complaint. *See* Stip. Order, ECF No. 24, PageID.389.

Subsequently, Plaintiffs Beemer and Muise filed a First Amended Complaint on April 28, 2020, adding Attorney General Dana Nessel as a defendant, but dropping Defendants Vaillencourt and Telgenhof from the action. *See* Am. Compl., ECF No. 25, PageID.394. Plaintiffs maintain that they still have claims against WCPA Mackie. WCPA Mackie, however, played no role in formulating or issuing any of the Governor's executive orders and Plaintiffs do not allege otherwise. *See id.* ¶¶ 19-20, ECF No. 25, PageID.397.

In fact, WCPA Mackie is barely mentioned at all in the Amended Complaint. Plaintiffs allege only that WCPA Mackie "is the Washtenaw County Prosecuting Attorney," and that he "is responsible for criminally prosecuting persons who violate Defendant Whitmer's executive orders in Washtenaw County." *Id.* ¶ 19, ECF No. 25, PageID.397. But even where criminal penalties for violating an executive order are provided for, WCPA Mackie retains discretion to "abstain from prosecuting" in appropriate cases. *Engle v. Chipman*, 51 Mich. 524, 526, 16 N.W. 886, 887 (1883); *Fieger v. Cox*, 274 Mich. App. 449, 466, 734 N.W.2d 602, 612 (2007). Here, there is no allegation that WCPA Mackie has enforced any COVID-19-related order against either Plaintiff. Nor is there any allegation that WCPA Mackie even hinted that either Plaintiff might be subject to prosecution, much less actually threatened to charge either of them. Indeed, Plaintiff Kimberly Beemer does not live or work in Washtenaw County, and there is no allegation she intends to visit. *See id.* ¶¶ 9-10, 27-28, 36, ECF No. 25, PageID.396, 399-401. So she could not be subject to prosecution or threat of prosecution by WCPA Mackie. Only Plaintiff Muise, who does live in Washtenaw County, *see id.* ¶ 11, ECF No. 25, PageID.396, is relevant to the claims against WCPA Mackie.

As to Plaintiff Muise, there are two key sets of factual allegations. First, that Executive Order 2020-42 "prohibited Plaintiff Muise from traveling to gun stores to purchase firearms and ammunition," and from traveling "to gun ranges to train with his firearms." *Id.* ¶ 43, ECF No. 25, PageID.403. And "[b]ecause he did not want to be subject to criminal or other sanctions for violating the executive order, Plaintiff Muise did not travel to any guns stores or ranges while EO 2020-42 was in effect." *Id.* Second, that Plaintiff Muise "would like his family to gather together on Sundays, other Holy Days, and special events" for "a meal, fellowship, and prayer," and that "[s]uch gatherings are religious worship for Plaintiff Muise." *Id.* ¶ 47, ECF No. 25,

PageID.404. And, according to Plaintiff Muise, it was unclear under Executive Order 2020-42's exemption for religious worship whether his family prayer gatherings were prohibited. *See id.* ¶¶ 47-48, ECF No. 25, PageID.404.

Plaintiff Muise admits, however, that Executive Order 2020-42 was rescinded when Executive Order 2020-59 took effect. *Id.* ¶ 23, ECF No. 25, PageID.397. And he also admits that under Executive Order 2020-59, he is permitted "to travel to and from" gun stores and to complete purchases "via remote order and curbside pick-up," and that he is "not subject to penalty . . . for holding religious gatherings with his immediate family at his private residence." *Id.* ¶ 54, ECF No. 25, PageID.407. Indeed, Governor Whitmer and WCPA Mackie stipulated that the activities in question are not prohibited by Executive Order 2020-59, and that stipulation was confirmed in a binding order from this Court. *See* ECF No. 24, PageID.389. Plaintiff Muise asserts that the Governor could re-impose the challenged restrictions. *See* Am. Compl. ¶ 23, ECF No. 25, PageID.397. Whether this is true or not, Plaintiff Muise does not allege that new restrictions on gun sales or religious gatherings are actually imminent, and he certainly does not allege that there is any immediate prospect of WCPA Mackie prosecuting him. *See id.* ¶¶ 56-60, ECF No. 25, PageID.407-408.

LEGAL STANDARDS

Article III standing and sovereign immunity are questions of subject matter jurisdiction properly decided under Federal Rule of Civil Procedure 12(b)(1). *Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017) (Article III standing); *Spurr v. Pope*, 936 F.3d 478, 485 (6th Cir. 2019) (sovereign immunity). As relevant here, a complaint must allege facts sufficient to support jurisdiction. *See Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003). Well-pled allegations in the complaint are taken as true. *See Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). The Court, however, need not accept as true "conclusory

allegations" or "legal conclusions masquerading as factual conclusions." *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests whether a cognizable claim has been pled for which the pleader is entitled to relief. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011). However, a plaintiff's "obligation to provide the grounds for their claimed entitlement to relief 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

ARGUMENT[5]

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

A suit seeking pre-enforcement review of a criminal statute—or, here, an executive order with potential criminal penalties—must clear at least three jurisdictional hurdles: (1) the plaintiff must have standing; (2) the challenge must be ripe; and (3) the case must not be moot. *See Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997); *Rettig v. Kent City School Dist.*, 788 F.2d 328, 330 (6th Cir. 1986). Plaintiffs fail to clear these hurdles to presenting an actual controversy for review. First, Plaintiffs are unable to identify an actual injury or credible future injury that gives rise to a reviewable claim. Thus, there is neither standing nor ripeness in this matter. Further, Executive Order 2020-59 allows Plaintiffs to engage in the activities at issue, so there is no longer an actual controversy as to WCPA Mackie, and the claims against him are

[5] WCPA Mackie also relies upon and incorporates the arguments made by Governor Whitmer and Attorney General Nessel in their motions to dismiss, all of which would apply to him as well. And, clearly, if the Court dismisses Plaintiffs' claims against the State defendants, there can be no independent claim against WCPA Mackie.

moot not capable of review. For these reasons alone, this lawsuit must be dismissed as to WCPA Mackie.

A. Plaintiffs Are Not Entitled to Pre-Enforcement Review of the Threatened Conduct and Thus, this Lawsuit against WCPA Mackie Lacks Standing and Ripeness.

Plaintiffs lack standing to pursue claims against WCPA Mackie – claims that are also not ripe – because they do not warrant pre-enforcement review. To establish standing, a plaintiff must show (among other things) an actual injury-in-fact that is neither speculative nor hypothetical. *Lujan*, 504 U.S. at 560-61 (citations omitted). An allegation of future harm counts as an injury in fact only when the future harm is certainly impending or when there is a substantial risk that harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Plaintiffs must establish standing as to each defendant. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006). Where, as here, a plaintiff cannot plead an actual injury and relies on a "threatened" harm, the plaintiff must (1) allege that he intended to engage in a constitutionally protected activity prohibited by law and (2) establish a "credible threat of prosecution" by the defendant in question. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979); *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016). Meanwhile, the related doctrine of "ripeness" requires that "the injury in fact be certainly impending," and precludes courts from reviewing "matters that are premature because the injury is speculative and may never occur. . ." *Nat'l Rifle Ass'n*, 132 F.3d at 280 (citations and quotation marks omitted). The ripeness doctrine is often implicated where an injury alleged for standing purposes is not actual, but merely threatened. *Airline Prof'ls Ass'n of Int'l Bhd.of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne, Inc.*, 332 F.3d 983, 988 (6th Cir. 2003) (citing *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)). Plaintiffs' claims against WCPA Mackie fail on both standing and ripeness grounds.

1. Plaintiff Muise has not established a credible threat of prosecution by WCPA Mackie.

Plaintiff Muise's allegations are insufficient to establish a credible threat of prosecution by WCPA Mackie. When plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," they are not entitled to pre-enforcement review of a claim. *Babbitt*, 442 U.S. at 298-99 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). Persons "having no fear[] of state prosecution except those that are imaginary or speculative[] are not to be accepted as appropriate plaintiffs." *Younger*, 401 U.S. at 42. A plaintiff's statement that he feels "inhibited" from engaging in certain activities, even if true, is not enough to make a dispute susceptible to resolution by a federal court. *Id.* Rather, a plaintiff who has not actually been threatened with enforcement must also

> point to some combination of the following factors: (1) a history of past enforcement against the plaintiffs or others; (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action.

McKay, 823 F.3d at 869 (citations omitted). In other words, plaintiffs lack standing for a pre-enforcement challenge when "the record is silent as to whether" the defendant in question "threatened to punish or would have punished" the plaintiff "for proposed conduct that might violate the challenged policy or statute." *Id.*; *see, e.g.*, *Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 610 (6th Cir. 2008) (plaintiff failed to establish injury-in-fact because he did not establish that the defendant "school district threatened to punish or would have punished [him] for protected speech in violation of its policy," and the court was left to "speculate" as to whether he would have been punished).

Here, there is no allegation that WCPA Mackie threatened to prosecute Plaintiff Muise for holding prayer gatherings or traveling to gun stores in the past, and no allegation he threatens

to do so in the future. Nor is there any allegation WCPA Mackie has prosecuted anyone else for such conduct or sent warning letters to Plaintiff Muise. *See McKay*, 823 F.3d at 869. And there is no private enforcement mechanism in the now-rescinded Executive Order 2020-42 or any of the other relevant executive orders, nor is there any allegation of any act that made or makes "enforcement easier or more likely." *See id.* Because "the record is silent" as to any threats of enforcement by WCPA Mackie, Plaintiff Muise lacks standing to sue him. *See id.*

Younger demonstrates this point. There, four plaintiffs sought to enjoin enforcement of a state statute that was allegedly being used to target leftist political activists. *See Younger*, 401 U.S. at 38-40. The Court held that the lead plaintiff, Harris, had an "acute, live controversy with the State and its prosecutor" because he was actually being prosecuted when the suit was filed. *Id.* at 41. However, the Court held that the other plaintiffs failed to allege a live controversy. Their claim that they "fe[lt] inhibited" from exercising their First Amendment rights by Harris's prosecution was insufficient because "none ha[d] been indicted, arrested, or even threatened by the prosecutor." *Id.* Meanwhile, the Sixth Circuit's recent decision in another COVID-19 case, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 2020 WL 2111316 (6th Cir. 2020) (per curiam), illustrates the other end of the spectrum. There was clearly a credible threat the plaintiff church's members would be prosecuted for attending the next drive-in service because police officers had shown up at the prior service, told congregants "that their attendance at the drive-in service amounted to a criminal act," and recorded all their license plate numbers. *Id.* at *1.

In this case, the threat of enforcement is even more speculative than in *Younger*, and nothing like *Maryville Baptist*. Plaintiffs do not allege that WCPA Mackie has prosecuted or threatened to prosecute *anyone* for holding a prayer gathering or traveling to a gun store. Nor is there any allegation that WCPA Mackie or any other law enforcement officer contacted Plaintiff

Muise and warned him he was or would be breaking the law by praying with his family or traveling to purchase a gun.

Finally, Plaintiffs may point to their allegations that Governor Whitmer "will continue to issue executive orders in light of the current . . . pandemic" and that Attorney General Nessel "is actively involved with investigating and enforcing violations of [the executive orders], and has issued cease and desist letters to individuals and businesses that have violated these orders, threatening criminal sanctions." *See* Am. Compl. ¶ 17, ECF No. 25, PageID.396-397. But none of that matters to Plaintiff Muise's claims against Defendant Mackie. "[S]tanding is not dispensed in gross," and so Plaintiffs must establish standing as to each defendant. *DaimlerChrysler*, 547 U.S. at 353 (plaintiff challenging both state and municipal taxes was required to establish standing against each government defendant). Plaintiffs, however, failed to allege a single fact suggesting a credible threat of enforcement by WCPA Mackie. Therefore, Plaintiffs' claims against him are not ripe and should be dismissed pursuant to Rule 12(b)(1).

2. Plaintiff Muise has not properly alleged an intention to engage in a potentially proscribed gathering.

Plaintiff Muise also lacks standing for his prayer-gathering claim because he has not demonstrated an intent to engage in prohibited activity. A mere general intent or desire to do some act in the future is insufficient to establish standing. *See Lujan*, 504 U.S. at 563-64. As to this claim, Plaintiffs allege only that "Plaintiff Muise would like his family to gather together on Sundays" for association and worship. Am. Compl. ¶ 47, ECF No. 25, PageID.404. But Plaintiff Muise, his wife, and the seven children who live with them were clearly free to gather for prayer under the now-rescinded Executive Order 2020-42 because they all live under the same roof. Plaintiffs have not alleged that Plaintiff Muise's five adult children who live elsewhere – the ones who were actually potentially prevented from traveling to Plaintiff Muise's home – share

his desire for weekly prayer gatherings, or that those individuals had concrete plans to attend any particular prayer gathering. Plaintiff Muise's desire to have his adult children visit him for association and worship is understandable, and likely shared by many parents in these difficult times. But a desire to have *other people* do something that might have been prohibited does not give Plaintiff Muise standing. *See Lujan*, 504 U.S. at 563-64; *McKay*, 823 F.3d at 867. Furthermore, even if Plaintiff Muise had properly alleged intent to hold a gathering, Executive Order 2020-42 excepted "a place of religious worship, when used for religious worship" from penalty. *See* ECF No. 25-1, PageID.418 ¶ 13. Therefore any gathering at Plaintiff Muise's home for worship could not have been subject to prosecution by WCPA Mackie and Plaintiffs' claims fail for lack of standing.

B. Plaintiff Muise's Claims against WCPA Mackie are Moot and Do Not Fall Under an Exception to the Mootness Doctrine.

This action must be dismissed because Plaintiff Muise's claims are also moot. Executive Order 2020-42 is no longer in effect, and the executive orders that replaced it do not proscribe the activities in the Amended Complaint. "Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). A case is moot when the requested relief is granted or no live controversy remains. *Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60, 61 (6th Cir. 1993); *see Maryville Baptist*, 2020 WL 2111316 at *1 (stating that a challenge to Kentucky's COVID-19 order prohibiting drive-in religious services would become moot when the state permitted places of worship to reopen).

Here, there is no ongoing controversy between Plaintiff Muise and WCPA Mackie. Executive Order 2020-59 mooted Plaintiffs' claims against WCPA Mackie because it rescinded the challenged restrictions. All parties – including Plaintiffs – agreed as much, and this

agreement among the parties is binding pursuant to the Court's April 27, 2020 order. *See* ECF No. 24, PageID.389-393 (stipulated order stating that Executive Order 2020-59 permitted Plaintiffs to engage in the activities that form the basis of their Amended Complaint). Therefore, no live controversy remains. *See Maryville Baptist*, 2020 WL 2111316 at *1; *Thomas Sysco Food Servs.*, 983 F.2d at 61.

Contrary to Plaintiffs' assertions, the "voluntary cessation" exception to the mootness rule does not change the analysis. *See* Am. Compl. ¶ 56, ECF No. 25, Page.ID 407-408 (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). *W.T. Grant* held that where a *private defendant* voluntarily ceases allegedly illegal conduct, a claim is only moot if that *private defendant* can sustain the "heavy" burden of demonstrating "that there is no reasonable expectation that the wrong will be repeated." *See* 345 U.S. at 632-33. But a different standard applies to voluntary cessation by *government officials*. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). The "burden in showing mootness is lower," and government defendants are entitled to be "treated with more solicitude by the courts." *Id.* "Government action receives this solicitude because courts assume that the government acts in good faith." *Id.* (cleaned up). And because of that assumption, courts "*presume* that the same allegedly wrongful conduct by the government is unlikely to recur." *Id.* (emphasis added; citations omitted). This rule applies to "both legislative and non-legislative governmental actions." *Id.* at 768 (citations omitted). At the same time, when "one agency or individual" has the power to reverse a government policy, a government defendant may not rely on "the bare solicitude" of the courts to demonstrate mootness. *See id.* But as long as a "government's self-correction . . . appears genuine," it "provides a secure foundation for dismissal based on mootness." *Id.* at 767.

Here, Governor Whitmer and WCPA Mackie agreed to a stipulated order confirming that Executive Order 2020-59, which replaced Executive Order 2020-42, permits "the sale of guns from any store via remote order and curbside pick-up, and the sale of guns in-store from stores that sell necessary supplies as well as guns in their normal course of business," and that Executive Order 2020-59 also "permits individuals, including Plaintiff Muise, to travel to and from such businesses." ECF No. 24, PageID.391. Similarly, the stipulated order confirms that Executive Order 2020-59 "exempts from penalty religious gatherings at private residences," and that "Plaintiff Muise is not subject to penalty under the order for holding religious gatherings with his immediate family at his private residence." *Id.* Plaintiff Muise does not claim that WCPA Mackie has reneged on those agreements. And, it appears that Plaintiff Muise is still permitted to hold prayer gatherings in his home and travel to gun stores under the executive orders that followed Executive Order 2020-59. There is certainly nothing to suggest that WCPA Mackie is not acting in good faith, and therefore the agreement memorialized in the stipulated order "provides a secure foundation for dismissal based on mootness." *Speech First*, 939 F.3d at 767; *see, e.g.*, *Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017) (Count I of amended complaint held moot because it "challenge[d] a statutory provision that ceased to apply to Plaintiffs six months before they filed" the operative pleading). Thus, Plaintiff Muise's claims against WCPA Mackie must be dismissed as moot.

II. WCPA MACKIE IS ENTITLED TO SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT.

Generally speaking, Eleventh Amendment sovereign immunity extends to state officials in general. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984) ("[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as citizens of another state."). It also applies to Michigan county prosecutors (such as WCPA

Mackie) when they carry out a criminal prosecution pursuant to their authority under state law, which would be the case here. *See Cady v. Arenac Cty.*, 574 F.3d 334, 343 (6th Cir. 2009); *Gavitt v. Ionia Cty.*, 67 F. Supp. 3d 838, 842 (E.D. Mich. 2014), *aff'd sub nom. Gavitt v. Born*, 835 F.3d 623 (6th Cir. 2016).

When city or county prosecutors are responsible for prosecuting "state" charges, the prosecutors are pursuing their duties as state agents who enforce state law or policy. *Cady*, 574 F.3d at 342. Under statutory law, county prosecutors are charged with prosecuting and defending "all prosecutions, suits, applications and motions, whether civil or criminal, in which the state or county may be a party of interested." Mich. Comp. Laws § 49.153. In this case, there are no allegations specific to WCPA Mackie, let alone allegations that WCPA Mackie is not a state agent. Nor could there be because the conduct underlying any hypothetical prosecution by WCPA Mackie would relate to the state's Executive Orders, and therefore state law or policy. Thus, WCPA Mackie is a state agent who is insulated from any liability in this matter through sovereign immunity under the Eleventh Amendment. *See id.*

Nor does any exception to Eleventh Amendment sovereign immunity apply in this case. Although federal courts may grant relief when state agents threaten and are about to commence enforcement against parties allegedly harmed by an unconstitutional act, this exception to sovereign immunity is strictly applied and inapplicable here. *See Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996) (refusing to read the exception to sovereign immunity in *Ex parte Young*, 209 U.S. 123, 155-56 (1908) expansively and instead, upholding sovereign immunity against state official who did not commence and was not about to commence proceedings against plaintiffs). Critically, the exception does not apply "when a defendant state official has neither enforced nor threatened to enforce the allegedly

unconstitutional state statute." *Id.* (citations omitted). Thus, their "mere" authority to enforce state laws is not enough to exercise jurisdiction over a state actor. *Id.* (citing *1st Westco Corp. v. School Dist. of Phila.*, 6 F.3d 108, 113 (3d Cir. 1993)).

Here, WCPA Mackie's "general authority" to enforce the laws in Washtenaw County is not enough for Plaintiff Muise to invoke the exception to sovereign immunity. *See Children's Healthcare*, 92 F.3d at 1416. For the exception to apply, WCPA Macke must threaten *and* be about to commence proceeding. *Id.* But Plaintiff Muise has not alleged that WCPA Mackie enforced or threatened to enforce Executive Order 2020-42 against him, nor has he asserted that WCPA Mackie has otherwise threatened to prosecute him for holding prayer gatherings in his home or traveling to a gun store. "What we have here is not action, but inaction, and [the] *Young* [exception] does not apply." *Id.*

Nor is there a realistic possibility that WCPA Mackie will take legal or administrative actions against the Plaintiffs. For there to be a "realistic possibility" of prosecution that would skirt sovereign immunity, there must plainly be a realistic risk that WCPA Mackie will conclude that what Plaintiff Muise wants to do is illegal. *Cf. Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1044, 1048 (6th Cir. 2015) (state officials and board were not entitled to sovereign immunity because while no prosecution under the challenged election law had been initiated, state agents routinely administered election law and trained others in its enforcement). Here, there is no such risk because Executive Order 2020-42 has been rescinded, WCPA Mackie stipulated that Executive Order 2020-59 permits Plaintiff Muise to hold prayer gatherings in his home and travel to a gun store, and no other executive order or law prohibits those activities. There is no realistic possibility that WCPA Mackie will prosecute Plaintiff Muise for conduct that everyone agrees is legal. Furthermore, Executive Order 2020-42 excepted "a place of religious worship,

when used for religious worship" from penalty, and therefore WCPA Mackie could not have prosecuted Plaintiff Muise under this executive order. *See* ECF No. 25-1, PageID.418 ¶ 13. Thus, WCPA Mackie is entitled to Eleventh Amendment immunity, and Plaintiffs' claims against him should be dismissed.

III. THE CHALLENGED RESTRICTIONS WERE A PROPER EXERCISE OF THE STATE'S EXPANDED AUTHORITY UNDER *JACOBSON* TO PROTECT THE PUBLIC HEALTH.

Setting the jurisdictional defects of this matter aside, the challenged restrictions under Executive Order 2020-42 were a proper exercise of the Governor's expanded authority to "protect the public health" from the dire effects of the unprecedented COVID-19 pandemic. *See Jacobson*, 197 U.S. at 28. Plaintiffs cannot reasonably deny that the COVID-19 pandemic is a public health crisis. *See In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020) (writing on April 7, 2020 and stating that "Federal projections estimate that, even with mitigation efforts, between 100,000 and 240,000 people in the United States could die"). Therefore, pursuant to *Jacobson*, the usual tiers of scrutiny do not apply and the restrictions, to be upheld, need only be "substantial[ly] relat[ed] to the protection of the public health and the public safety." *Id.* at 31. Even accepting all of Plaintiffs' allegations as true, the restrictions are constitutionally permissible under the *Jacobson* framework, and Plaintiffs' Amended Complaint should be dismissed.

A. A State Combatting A Public Health Crisis Has Expanded Authority Under *Jacobson*.

"[U]nder the pressure of great dangers," state actions taken to preserve the public health and safety must be upheld as long as they are "substantial[ly] relat[ed] to those objects." *Jacobson*, 197 U.S. at 31. In *Jacobson*, the Supreme Court upheld a state's mandatory smallpox vaccination law, implemented in response to a growing smallpox epidemic, as a proper exercise of the state's expanded police power to combat a public health crisis. *Id.* The Court reasoned that

"the liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be . . . wholly freed from restraint." *Id.* at 38. Rather, "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state." *Id.* at 26. "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." *Id.* at 27. The Court recognized that when state officials implement emergency measures to save lives in the face of a deadly epidemic, a federal court should not hamstring their efforts by second-guessing their decisions unless an action "has no real or substantial relation" to the public health or safety, "or is, beyond all question, a plain, palpable invasion of" constitutional rights. *Id.* at 31.

The Fifth Circuit recently confirmed that *Jacobson* applies to state actions – such as those here – which are taken to limit the spread of COVID-19. *See In re Abbott*, 954 F.3d at 785 ("*Jacobson* remains good law."). In that case, several abortion providers challenged the Governor of Texas's executive order requiring all healthcare facilities and professionals to postpone elective surgeries. *Id.* at 780. The district court granted a temporary restraining order, creating a blanket exception to the executive order for abortion providers. *Id.* at 783. But the Fifth Circuit temporarily stayed, and ultimately vacated the temporary restraining order. *Id.* at 779, 781. The court found that while the "measures would be constitutionally intolerable in ordinary times" they are "recognized as appropriate and even necessary responses to the present crisis." *Id.* at 787. The court went on to explain that

> [t]he 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 at least 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." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are

> pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

Id. at 784-85.

Other courts evaluating COVID-19 restrictions similar to those here have come to the same conclusion. *See In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (concluding that the district court failed to meaningfully apply the *Jacobson* framework and abused discretion in granting a temporary restraining order exempting abortion clinics from an Arkansas directive postponing elective, non-emergency surgical procedures); *Joseph Martin McGhee v. City of Flagstaff, et. al.*, No. cv-20-08081, 2020 WL 2308479, *3 (D. Ariz. May 8, 2020) (plaintiff was unlikely to succeed on the merits of his constitutional challenge of COVID-19 stay-at-home order under the *Jacobson* framework); *Cross Culture Christian Center v. Newsom*, No. 2:20-cv-00832, 2020 WL 2121111, *4 (E.D. Cal. May 5, 2020) (under *Jacobson*, plaintiffs were not likely to succeed on the merits of their challenge to California's stay-at-home orders); *Cassell v. Snyders*, No. 20-c-50153, 2020 WL 2112374, *7 (N.D. Ill. May 3, 2020) (finding that the plaintiffs had a "less than negligible chance" of prevailing on their challenge to the constitutionality of Illinois's stay at home order, because, as *Jacobson* explains, "the traditional tiers of constitutional scrutiny do not apply" during an epidemic); *Gish v. Newsom*, No. EDCV 20-755 JGB, 2020 WL 197990, (C.D. Cal. April 23, 2020) (under *Jacobson*, COVID-19 restrictions are "not subject to traditional constitutional scrutiny," and state defendants are entitled to "substantial judicial deference"). Indeed, even when it found Kentucky's prohibition on drive-in church services improper, the Sixth Circuit still recognized that the state was entitled to great deference under *Jacobson*. *See Maryville Baptist*, 2020 WL 2111316 at *4.

Closer to home, a Michigan state court, relying on *Jacobson*, denied a motion for a preliminary injunction restraining Defendant Whitmer and Defendant Nessel from implementing

certain provisions of Executive Order 2020-59. *Martinko v. Whitmer*, No. 20-00062-MM (Mich. Ct. Cl. April 29, 2020) (Ex. F). The court explained that *Jacobson* "compels [it] to conclude that plaintiffs do not have a substantial likelihood of success on the merits . . . . not because the rights asserted by plaintiffs are not fundamental" but because "those liberty interests are, and always have been, subject to society's interests." *Id.* at 10. It further explained that the "role courts play under *Jacobson* . . . is not to second-guess the state's policy choices in crafting emergency public health measures, but is instead to determine whether [the measures have] a 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.'" *Id.* at 11 (quoting *In re Abbott*, 954 F.3d at 784).

B. The Restrictions under Executive Order 2020-42 Were Substantially Related to Combatting the COVID-19 Pandemic.

Again, Plaintiffs cannot reasonably deny that COVID-19 is a public health crisis unparalleled in recent history. *See In re Abbott*, 954 F.3d at 779. This unprecedented global public health crisis is precisely the sort of "great danger" contemplated by *Jacobson*. Therefore the Court cannot interfere with state officials' COVID-19 mitigation efforts unless a particular action has no substantial relation to public safety, or if it is "beyond all question, a plain, palpable invasion of" constitutional rights. *Jacobson*, 197 U.S. at 31.

The challenged aspects of Executive Order 2020-42 relevant to WCPA Mackie—that it limited the Muise family's ability to gather for prayer and Plaintiff Muise's ability to travel to gun stores—easily survive this level of review. As the introduction to Executive Order 2020-42 makes clear, the Governor restricted nonessential travel after careful consideration of the known facts: COVID-19 was spreading quickly and brutally, and there was "no approved vaccine or antiviral treatment." *See* ECF No. 25, PageID.418. Plaintiffs disagree with the Governor's choices, but they cannot plausibly contend that the stay-at-home order was not substantially

related to public safety. *See Jacobson*, 197 U.S. at 31. And this Court "may not second-guess the wisdom or efficacy of the measures." *In re Abbott*, 954 F.3d at 785 (citing *Jacobson*, 197 U.S. at 28, 30). Tellingly, in *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of Louisiana*, 186 U.S. 380, 381, 393 (1902), the Supreme Court held that it was not unconstitutional for state officials to prohibit healthy people from entering portions of the state where "infectious and contagious diseases were present." That holding, and the Court's subsequent approval of compulsory vaccinations in *Jacobson*, make clear that COVID-19 justified the restrictions in Executive Order 2020-42. Indeed, where COVID-19 has been found to justify an order requiring women to carry unwanted pregnancies until the order's expiration, it cannot be said that Governor Whitmer's temporary restrictions on nonessential travel are "*beyond question*, in palpable conflict with the Constitution." *See In re Abbott*, 954 F.3d at 789 (quoting *Jacobson*, 197 U.S. at 31) (emphasis in *In re Abbott*).[6]

IV. THE RESTRICTIONS RELEVANT TO WCPA MACKIE ALSO SURVIVE UNDER A STANDARD CONSTITUTIONAL ANALYSIS.

Even under a standard constitutional analysis, the now-rescinded restrictions that WCPA Mackie *might* have been called upon to enforce against Plaintiff Muise still pass muster. For the following reasons, Plaintiffs' claims for equal protection, due process, Second Amendment, freedom of association, and free exercise violations should all be dismissed.

A. Plaintiff Muise Fails to State an Equal Protection Violation.

The Equal Protection Clause of the Fourteenth Amendment "embodies the principle that all persons similarly situated should be treated alike." *Scarborough v. Morgan Cty. Bd. of Educ.*,

[6] Plaintiffs do repeatedly allege that "[t]he challenged measures . . . have no real or substantial relation to the objectives of the orders, and are a palpable invasion of rights secured by fundamental law." *See, e.g.*, Am. Compl. ¶ 66, ECF No. 25, PageID.409-410. But a plaintiff cannot survive a motion to dismiss by relying on mere "labels and conclusions," and "a formulaic recitation of the elements of a cause of action will not do." *Rondigo*, 641 F.3d at 680 (quoting *Twombly*, 550 U.S. at 555).

470 F.3d 250, 260 (6th Cir. 2006). To state a claim for relief under the Equal Protection Clause, a plaintiff must demonstrate that the government treated the plaintiff differently from similarly situated persons *and* that such disparate treatment (1) burdens a fundamental right, (2) targets a suspect class, or (3) was intentional and without a rational basis. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312-13 (6th Cir. 2005). Disparate treatment is "the threshold element of an equal protection claim." *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011). Therefore, failure to plead a "plausible allegation of disparate treatment" is grounds for dismissal under Rule 12(b)(6). *Id.*

For example, in *Center for Bio-Ethical Reform*, a pro-life non-profit organization asserted an equal protection claim arising out the Department of Homeland Security's alleged policy of targeting those individuals and groups deemed to be "rightwing extremists." *Id.* at 367. The court, however, dismissed the plaintiff's equal protection claim because it failed "to make a plausible allegation that similarly situated organizations and individuals, of a different political viewpoint, have not been subject to the same alleged treatment." *Id.* at 379. It explained that plaintiffs failed "to make any comparison to similarly situated groups" and that the complaint "read broadly . . . alleges injury to nearly all Americans." *Id.*

As in *Center for Bio-Ethical Reform*, Plaintiff Muise fails to state a "plausible allegation of disparate treatment" by WCPA Mackie (again, Plaintiff Muise fails to allege *any* allegations against WCPA Mackie). Plaintiffs generally allege that the "executive orders deprive Plaintiffs of their fundamental rights and freedom" yet "provide exceptions for other activity and conduct that is similar in its impact and effects." *See* Am. Compl. ¶ 66, ECF No. 25, PageID.409-410. But the Amended Complaint does not identify the fundamental rights supposedly at issue, the mistreated group that Plaintiff Muise supposedly belongs to, or the similarly-situated persons

who supposedly received more favorable treatment, much less allege that WCPA Mackie did or intends to do anything to cause any disparate treatment. *See* Am. Compl. ¶¶ 64-68, ECF No. 25, PageID.409-410. Plaintiff Muise's mere recitations of the elements of an equal protection claim are insufficient, and this claim must be dismissed. *Center for Bio-Ethical Reform*, 648 F.3d at 379; *see Rondigo*, 641 F.3d at 680.

B. Plaintiff Muise Has Not Stated a Claim for a Due Process Violation of His Right To Travel.

The Sixth Circuit recognizes a fundamental right to intrastate travel—the "right to travel locally through public spaces and roadways"—under the Due Process Clause of the Fourteenth Amendment. *See Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002). But that right, like even the most "importan[t] and fundamental" individual liberties, "may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *See id.* at 503 (citing *United States v. Salerno*, 481 U.S. 739 (1987)).

Horribly, there were nearly 1,000 confirmed COVID-19 deaths and over 20,000 confirmed cases in Michigan when Executive Order 2020-42 was issued on April 9, and the virus was "spreading very easily and sustainably throughout the country." ECF No. 25, PageID.419; *In re Abbott*, 954 F.3d at 779 (citation omitted). "Federal projections estimate[d] that, even with mitigation efforts, between 100,000 and 240,000 people in the United States could die." *Id.* Travel restrictions were imposed to stop the spread of the virus. There can be no more weighty an interest than preventing thousands of needless deaths. If COVID-19 does not justify temporary restrictions on the right to travel, then the standard articulated in *Johnson* is meaningless.[7]

[7] In any case, the travel restrictions at issue here were of limited scope and duration, and thus subject only to intermediate scrutiny. *See Cole v. City of Memphis*, 839 F.3d 530, 537-38 (6th Cir. 2016). And the restrictions survive intermediate scrutiny because fighting COVID-19 is

C. Plaintiff Muise Fails to State a Second Amendment Claim.

Plaintiff Muise fails to state a claim for violation of his Second Amendment right to bear arms because the restrictions under Executive Order 2020-42 were facially neutral and generally applicable. Neutral laws of general applicability are presumed constitutional. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986) ("It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems."). Here, Executive Order 2020-42 is facially neutral. And the Second Amendment "is not implicated by the enforcement of a public health regulation of general application against" a store that "happen[s] to sell" guns. *Id.* at 707. Therefore, Plaintiffs failed to state a claim for violation of the Second Amendment and that claim should therefore be dismissed.

Furthermore, Executive Order 2020-42 could not have infringed on Plaintiffs' Second Amendment right to bear arms because the activity alleged in Plaintiffs' complaint falls outside the scope of activities protected by the Second Amendment. Where a challenged statute "regulates activity falling outside the scope of the Second Amendment," as historically understood, then "the activity is unprotected and the law is not subjected to further constitutional scrutiny." *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 685-86 (6th Cir. 2016) (en banc).

Here, according to Plaintiff Muise, Executive Order 2020-42 prevented him from purchasing and training with firearms. *See* ECF No. 25, PageID.402, 412. But these activities

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Continued from previous page.
unquestionably a "significant governmental interest," and the restrictions were reasonably fit to that interest, even if the fit was "not necessarily perfect." *See, e.g., Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 480 (6th Cir. 1991) (recognizing "the compelling government interest in protecting public safety"); *Neinast v. Bd. of Trustees of Columbus Metro. Library*, 346 F.3d 585, 594 (6th Cir. 2003) (explaining intermediate scrutiny); *see also* Def. Whitmer's Resp. to Pls.' Mot. for TRO and PI, ECF No. 10, PageID.191-193.

fall outside the scope of the Second Amendment and have no impact on Muise's right to bear arms. But even if purchasing and training with firearms were historically recognized as activity protected by the Second Amendment, *see Tyler*, 837 F.3d at 688, it was *also* historically understood that the exercise of those rights was subject to "the laws of public order," *see District of Columbia v. Heller*, 554 U.S. 570, 617 (2008) (citation omitted). Indeed, "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively valid." *Id.* at 626-27 & n.26. Or, as relevant here, there was and is no historically recognized right to purchase guns and visit shooting ranges during a deadly pandemic. Thus, Executive Order 2020-42 "is not subject[] to further constitutional scrutiny." *Tyler*, 837 F.3d at 685-86; *see also* Def. Whitmer's Resp. to Pls.' Mot. for TRO and PI, ECF No. 10, PageID.195-201.[8]

D. Plaintiffs Fail to State a First and Fourteenth Amendment Freedom of Association Claim.

Plaintiff Muise appears to plead a full range of freedom of association claims. *See* Am. Compl. ¶¶ 82-86, ECF No. 25, PageID.413-414 (referencing rights to expressive, religious, and intimate association). But all association rights are subject to regulation in appropriate circumstances. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Akers v. McGinnis*, 352 F.3d 1030, 1040 (6th Cir. 2003). And under any level of scrutiny, temporarily limiting interactions between households was and is an appropriate reaction to the dire, ongoing threat posed by COVID-19. *See* Def. Whitmer's Resp. to Pls.' Mot. for TRO and PI, ECF No. 10, PageID.200-203.

[8] Plaintiff Muise does not claim that Article 1, § 6 of the Michigan Constitution applies any differently here than the Second Amendment, *see* Am. Compl. ¶¶ 76-81, ECF No. 25, PageID.412-413, so there is no need to address it separately.

E. Plaintiff Muise Fails to State a First Amendment Free Exercise Claim.

Finally, Plaintiff Muise has not adequately asserted a Free Exercise Claim. The protections of the Free Exercise Clause only apply when a law "discriminates against some or all religious beliefs or regulates or prohibits conduct *because* it is undertaken for religious reasons." *Church of Lukumi Babalu Aye*, 508 U.S. at 532 (emphasis added). However, "neutral, generally applicable laws that incidentally burden the exercise of religion do not violate the Free Exercise Clause of the First Amendment." *Holt v. Hobbs*, 574 U.S. 352, 356-57 (2015); *see also New Doe Child #1 v. Congress of the United States*, 891 F.3d 578, 592-93 (2018) (affirming dismissal of the plaintiffs' free exercise claim because the challenged statute was neutral and generally applicable, there were no allegations that the statute was intended to discriminate against the plaintiffs or suppress any religion, and the statute had a secular purpose). Executive Order 2020-42 was a neutral order of general applicability and only incidentally burdened Plaintiff Muise's exercise of religion, if it imposed any burden at all. Further, there is no allegation that the order was intended to discriminate against or suppress Plaintiff Muise's Catholic faith. And the secular purposes of the order—most importantly "to avoid needless deaths"—are self-evident. *See* ECF No. 25, PageID.419. Executive Order 2020-42 passes constitutional muster.

CONCLUSION

COVID-19 has disrupted the lives of hundreds of millions of Americans, including virtually every Michigander. Tens of thousands of have died. And because there is no vaccine and no cure, many more will likely die needlessly if government officials do not impose reasonable restrictions on otherwise normal activities. That means everyone must sacrifice. Fortunately, that collective sacrifice has led to progress, and the restrictions relevant to WCPA Mackie—travel restrictions that limited Plaintiff Muise's ability to hold prayer gatherings in his home and his ability to visit gun stores and shooting ranges—have been lifted. But that is not

good enough for Plaintiff Muise. He now asks this Court to enter an order guaranteeing that no such restrictions will ever be imposed again.

The Court may not grant his request. In legal terms, Plaintiff Muise lacks standing, his claims are not ripe, his claims are moot, and sovereign immunity is an impassable bar as to WCPA Mackie. Plus, *Jacobson* prohibits this Court from micro-managing the Governor's response to the pandemic, and Plaintiff Muise's claims would fail under a routine constitutional analysis regardless. This case, though, is about much more than the usual struggle to define constitutional limits on government power. COVID-19 is still killing dozens of people in Michigan every day, hundreds of people around the country, and thousands worldwide. Plaintiffs' logic leads to a patchwork response that is subject to the policy preferences of individual judges, likely acting without complete information, as well as to the whims of persons who are willing to risk the lives of others by putting their own personal interests ahead of public safety. The Constitution does not require others to die so that Plaintiff Muise may enjoy unfettered exercise of his personal liberties – liberties that are not even being restricted. The Court should dismiss Plaintiff Muise's claims against WCPA Mackie with prejudice.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.

By: */s/ Sonal Hope Mithani*

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Dated: May 20, 2020

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief contains 8,675 words and therefore complies with Local Civil Rule 7.2(b)(i). This word count was generated using Microsoft Word 2010.

By: */s/ Sonal Hope Mithani*
Sonal Hope Mithani

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2020, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

By: */s/ Sonal Hope Mithani*
Sonal Hope Mithani

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, et al., Plaintiffs, v. GRETCHEN WHITMER, et al., Defendants.	No. 1:20-cv-00323 Hon. Paul L. Maloney Mag. Phillip J. Green

INDEX OF EXHIBITS TO DEFENDANT BRIAN L. MACKIE'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Exhibit A: Executive Order 2020-4

Exhibit B: Executive Order 2020-5

Exhibit C: Executive Order 2020-9

Exhibit D: Executive Order 2020-11

Exhibit E: Executive Order 2020-21

Exhibit F: *Martinko v. Whitmer*, No. 20-00062-MM, Michigan Court of Claims

EXHIBIT A

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-4

Declaration of State of Emergency

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person.

COVID-19 has been identified as the cause of an outbreak of respiratory illness first detected in Wuhan City in the Hubei Province of China. Person-to-person spread of the virus has occurred in the United States, with some of those occurring in people with no travel history and no known source of exposure. On January 31, 2020, the United States Department of Health and Human Services Secretary Alex Azar declared a public health emergency for COVID-19, and affected state and local governments have also declared states of emergency.

The State of Michigan has been taking proactive steps to prevent and prepare for the spread of this disease. On February 3, 2020, the Michigan Department of Health and Human Services (MDHHS) activated the Community Health Emergency Coordination Center, and has been working diligently with local health departments, health systems, and medical providers throughout Michigan to make sure appropriate screening and preparations for COVID-19 are being made. On February 28, 2020, I activated the State Emergency Operations Center to maximize coordination with state, local and federal agencies, as well as private partners, and to help prevent the spread of the disease. On March 3, 2020, I created four task forces comprising key state government agencies to coordinate the state's response and work closely with the appropriate community and non-governmental stakeholders to combat the spread of COVID-19 and assess the impact it may have on Michiganders' day-to-day lives. And throughout this time, the State has been working with schools, businesses, medical providers, local health departments, and residents to make sure they have the information they need to prepare for potential cases.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan.

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Management Act, 1976 PA 390, as amended, MCL 30.403(4), provides that "[t]he governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists."

The Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31(1), provides that "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, . . . the governor may proclaim a state of emergency and designate the area involved."

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. A state of emergency is declared across the State of Michigan.

2. The Emergency Management and Homeland Security Division of the Department of State Police must coordinate and maximize all state efforts that may be activated to state service to assist local governments and officials and may call upon all state departments to utilize available resources to assist.

3. The state of emergency is terminated when emergency conditions no longer exist and appropriate programs have been implemented to recover from any effects of the emergency conditions, consistent with the legal authorities upon which this declaration is based and any limits on duration imposed by those authorities.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 10, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 3/10/2020 AT 11:30pm

SECRETARY OF SENATE
2020 MAR 11 AM 9:02

EXHIBIT B

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-5

Temporary prohibition on large assemblages and events, temporary school closures

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19 and to provide essential protections to vulnerable Michiganders and this state's health care system and other critical infrastructure, it is reasonable and necessary to impose limited and temporary restrictions on large events and assemblages of people.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning on March 13, 2020 at 5:00 pm, and continuing through April 5, 2020 at 5:00 pm, all assemblages of more than 250 people in a single shared space and all events of more than 250 people are prohibited in this state, except for assemblages for the purpose of: industrial or manufacturing work; mass transit; or the purchase

of groceries or consumer goods. A single shared space includes but is not limited to a room, hall, cafeteria, auditorium, theater, or gallery. This prohibition does not abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

2. Beginning on March 16, 2020, all elementary school buildings and secondary school buildings in this state must close to students for educational purposes through April 5, 2020. This requirement includes all public, nonpublic, and boarding schools in the state. This requirement does not apply to residential facilities at schools and childcare providers at schools.

3. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order shall constitute a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 13, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

SECRETARY OF SENATE
2020 MAR 13 AM 11:43

FILED WITH SECRETARY OF STATE
ON 3/13/20 AT 11:14 A.M.

EXHIBIT C

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-9

Temporary restrictions on the use of places of public accommodation

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is reasonable and necessary to impose limited and temporary restrictions on the use of places of public accommodation.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning as soon as possible but no later than March 16, 2020 at 3:00 pm, and continuing until March 30, 2020 at 11:59 pm, the following places of public accommodation are closed to ingress, egress, use, and occupancy by members of the public:

   (a) Restaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverage for on-premises consumption;

(b) Bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption;

(c) Hookah bars, cigar bars, and vaping lounges offering their products for on-premises consumption;

(d) Theaters, cinemas, and indoor and outdoor performance venues;

(e) Libraries and museums;

(f) Gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas;

(g) Casinos licensed by the Michigan Gaming Control Board, racetracks licensed by the Michigan Gaming Control Board, and Millionaire Parties licensed by the Michigan Gaming Control Board; and

(h) Places of public amusement not otherwise listed above.

Places of public accommodation subject to this section are encouraged to offer food and beverage using delivery service, window service, walk-up service, drive-through service, or drive-up service, and to use precautions in doing so to mitigate the potential transmission of COVID-19, including social distancing. In offering food or beverage, a place of public accommodation subject to this section may permit up to five members of the public at one time in the place of public accommodation for the purpose of picking up their food or beverage orders, so long as those individuals are at least six feet apart from one another while on premises.

This section does not prohibit an employee, contractor, vendor, or supplier of a place of public accommodation from entering, exiting, using, or occupying that place of public accommodation in their professional capacity.

2. The restrictions imposed by this order do not apply to any of the following:

(a) Places of public accommodation that offer food and beverage not for on-premises consumption, including grocery stores, markets, convenience stores, pharmacies, drug stores, and food pantries, other than those portions of the place of public accommodation subject to the requirements of section 1;

(b) Health care facilities, residential care facilities, congregate care facilities, and juvenile justice facilities;

(c) Crisis shelters or similar institutions; and

(d) Food courts inside the secured zones of airports.

3. For purposes of this order:

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, or recreation facility, or an institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Place of public accommodation also includes the facilities of private clubs, including country clubs, golf clubs, boating or yachting clubs, sports or athletic clubs, and dining clubs.

(b) "Place of public amusement" means a place of public accommodation that offers indoor services or facilities, or outdoor services or facilities involving close contact of persons, for amusement or other recreational or entertainment purposes. A place of public amusement includes an amusement park, arcade, bingo hall, bowling alley, indoor climbing facility, skating rink, trampoline park, and other similar recreational or entertainment facilities.

4. The director of the Department of Health and Human Services, the Michigan Liquor Control Commission, and the executive director of the Michigan Gaming Control Board must issue orders and directives and take other actions pursuant to law as necessary to implement this order.

5. This order does not alter any of the obligations under law of an employer affected by this order to its employees or to the employees of another employer.

6. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Gretchen Whitmer

Date: March 16, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

Jocelyn Benson

SECRETARY OF STATE

SECRETARY OF SE
2020 MAR 16 PM1:38

SECRETARY OF SENATE
2020 MAR 16 PM1:38

FILED WITH SECRETARY OF STATE
ON 3/16/20 AT 1:10 P.M.

EXHIBIT D

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-11

Temporary prohibition on large assemblages and events, temporary school closures

Rescission of Executive Order 2020-5

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19 and to provide essential protections to vulnerable Michiganders and this state's health care system and other critical infrastructure, it is reasonable and necessary to impose limited and temporary restrictions on large events and assemblages of people.

Executive Order 2020-5 imposed such restrictions. This order changes the temporary restrictions imposed on events and assemblages by Executive Order 2020-5, in light of the most recent guidance from the Centers for Disease Control and Prevention. This order does not change the scope of temporary restrictions imposed by Executive Order 2020-5 as to the closure of elementary school buildings and secondary school buildings. When the new restrictions set forth in this order take effect, Executive Order 2020-5 is rescinded.

While this order continues to permit certain assemblages and events, these assemblages and events should only occur as necessary and in adherence with the measures needed to mitigate the potential transmission of COVID-19, including social distancing, proper hand hygiene and respiratory etiquette, and using electronic communication platforms in lieu of in-person interaction as feasible.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning on March 17, 2020 at 9:00 am, and continuing through April 5, 2020 at 5:00 pm, all assemblages of more than 50 people in a single indoor shared space and all events of more than 50 people are prohibited in this state. A single indoor shared space includes but is not limited to a room, hall, cafeteria, auditorium, theater, or gallery. The prohibition on assemblages set forth in this section does not apply to:

   (a) health care facilities;

   (b) workplaces or portions thereof not open to the public;

   (c) the state legislature; and

   (d) assemblages for the purpose of mass transit, the purchase of groceries or consumer goods, or the performance of agricultural or construction work.

   The prohibition set forth in this section does not abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

2. Beginning on March 16, 2020, all elementary school buildings and secondary school buildings in this state must close to students for educational purposes through April 5, 2020. This requirement includes all public, nonpublic, and boarding schools in the state. This requirement does not apply to residential facilities at schools and childcare providers at schools.

3. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order shall constitute a misdemeanor.

4. On March 17, 2020 at 9:00 am, Executive Order 2020-5 is rescinded.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 16, 2020

Time: 6:07 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

SECRETARY OF SENATE
2020 MAR 17 AM10:47

FILED WITH SECRETARY OF STATE
ON 3/17/20 AT 10:22 A.M.

EXHIBIT E

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-21

Temporary requirement to suspend activities that are not necessary to sustain or protect life

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. Older adults and those with chronic health conditions are at particular risk, and there is an increased risk of rapid spread of COVID-19 among persons in close proximity to one another. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.

2. Subject to the exceptions in section 7, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.

3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

   (a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9.

   (b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

   Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm.

5. Businesses and operations that employ critical infrastructure workers may continue in-person operations, subject to the following conditions:

   (a) Consistent with sections 8 and 9, businesses and operations must determine which of their workers are critical infrastructure workers and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm. Businesses and operations need not designate:

(1) Workers in health care and public health.

(2) Workers who perform necessary government activities, as described in section 6.

(3) Workers and volunteers described in section 9(d).

(b) In-person activities that are not necessary to sustain or protect life must be suspended until normal operations resume.

(c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons. Those practices and measures include, but are not limited to:

(1) Restricting the number of workers present on premises to no more than is strictly necessary to perform the business's or operation's critical infrastructure functions.

(2) Promoting remote work to the fullest extent possible.

(3) Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible, including for customers who are standing in line.

(4) Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

(5) Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person who is known or suspected to have COVID-19.

(6) Any other social distancing practices and mitigation measures recommended by the Centers for Disease Control.

6. All in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to supporting those businesses and operations that are necessary to sustain or protect life, are suspended.

(a) For purposes of this order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders.

(b) Such activities also include, but are not limited to, public transit, trash pick-up and disposal, activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor recreation.

(c) For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b). Workers performing such activities need not be designated.

(d) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 5(c).

7. Exceptions.

(a) Individuals may leave their home or place of residence, and travel as necessary:

(1) To engage in outdoor activity, including walking, hiking, running, cycling, or any other recreational activity consistent with remaining at least six feet from people from outside the individual's household.

(2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) may leave their home for work without a designation.)

(3) To conduct minimum basic operations, as described in section 4(b), after being designated to perform such work by their employers.

(4) To perform necessary government activities, as described in section 6.

(5) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including procedures that, in accordance with a duly implemented nonessential procedures postponement plan, have not been postponed).

(6) To obtain necessary services or supplies for themselves, their family or household members, and their vehicles. *Individuals must secure such services or supplies via delivery to the maximum extent possible.* As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences.

(7) To care for a family member or a family member's pet in another household.

(8) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.

(9) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.

(10) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.

(11) To work or volunteer for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(b) Individuals may also travel:

(1) To return to a home or place of residence from outside this state.

(2) To leave this state for a home or residence elsewhere.

(3) To travel between two residences in this state.

(4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available here). Such workers include some workers in each of the following sectors:

(a) Health care and public health.

(b) Law enforcement, public safety, and first responders.

(c) Food and agriculture.

(d) Energy.

(e) Water and wastewater.

(f) Transportation and logistics.

(g) Public works.

(h) Communications and information technology, including news media.

(i) Other community-based government operations and essential functions.

(j) Critical manufacturing.

(k) Hazardous materials.

(l) Financial services.

(m) Chemical supply chains and safety.

(n) Defense industrial base.

9. For purposes of this order, critical infrastructure workers also include:

(a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers as defined in this order. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of critical infrastructure workers.

(b) Workers at designated suppliers and distribution centers, as described below.

(1) A business or operation that employs critical infrastructure workers may designate suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the work of its critical infrastructure workers.

(2) Such suppliers, distribution centers, or service providers may designate workers as critical infrastructure workers *only* to the extent those workers are necessary to enable, support, or facilitate the work of the original operation's or business's critical infrastructure workers.

(3) Designated suppliers, distribution centers, and service providers may in turn designate additional suppliers, distribution centers, and service providers whose continued operation is necessary to enable, support, or facilitate the work of their critical infrastructure workers.

(4) Such additional suppliers, distribution centers, and service providers may designate workers as critical infrastructure workers *only* to the extent that those workers are necessary to enable, support, or facilitate the work of the critical infrastructure workers at the supplier, distribution center, or service provider that has designated them.

(5) Businesses, operations, suppliers, distribution centers, and service providers must make all designations in writing to the entities they are designating, whether by electronic message, public website, or other appropriate means. Such designations may be made orally until March 31, 2020 at 11:59 pm.

(6) Businesses, operations, suppliers, distribution centers, and service providers that abuse their designation authority shall be subject to sanctions to the fullest extent of the law.

(c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.

(d) Workers and volunteers for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

10. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, a place of religious worship, when used for religious worship, is not subject to penalty under section 14.

11. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

12. This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

13. The governor will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, she will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health-care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

14. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 23, 2020

Time: 10:39 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 3/23/2020 AT 11:51 AM

EXHIBIT F

STATE OF MICHIGAN

COURT OF CLAIMS

STEVE MARTINKO, et al,

Plaintiffs,

OPINION AND ORDER REGARDING PLAINTIFFS' APRIL 23, 2020 MOTION FOR A PRELIMINARY INJUNCTION

v

Case No. 20-00062-MM

Hon. Christopher M. Murray

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANIEL EICHINGER, in his official capacity as Director of the Michigan Department of Natural Resources, and DANA NESSEL, in her official capacity as the Attorney General for the State of Michigan,

Defendants.
_____/

I. INTRODUCTION

This matter was filed by five Michigan residents who claim that three of Governor Whitmer's executive orders, Executive Orders 2020-21 and 2020-42,[1] and now Executive Order 2020-59, infringe on their constitutional rights to procedural due process and substantive due

[1] Plaintiffs recognize that EO 2020-21 was rescinded by EO 2020-42, and they claim that EO 2020-42 "extended the timeline originally set by [EO] 2020-21 and grossly expands its restrictions on businesses' and individuals' fundamental rights." After the verified complaint was filed, EO 2020-42 was rescinded by EO 2020-59, which (among other things) eliminated the prohibitions on traveling intrastate to another residence, from not using motorized boats on the waterways, and to an extent allows the re-opening of some businesses and state parks. Although plaintiffs challenge the same restrictions set forth in EO 2020-42, the Court will for clarity sake refer to the restrictions within the current executive order, EO 2020-59, unless the timing period is relevant to any issue.

process. Specifically, plaintiffs' verified complaint alleges that the "mandatory quarantine" imposed by EO 2020-59 violates their right to both procedural due process (Count I) and substantive due process (Count II), and that the intrastate travel restrictions contained in EO 2020-42 also violate their rights to procedural due process (Count III) and substantive due process (Count IV). They also allege in Count V of their verified complaint that the Emergency Management Act, MCL 30.401 *et seq*., is an unconstitutional delegation of legislative power to the Governor. Plaintiffs have requested the Court issue a preliminary injunction—but not a permanent one—restraining these defendants from continuing to implement the provisions of EO 2020-59.[2] Once restrained, plaintiffs seek a declaration that the challenged restrictions and the EMA are invalid.[3]

II. JURISDICTION

Defendants first argue that this Court lacks subject matter jurisdiction because plaintiffs seek only injunctive relief based upon federal constitutional claims, which deprives the Court of jurisdiction to decide the matter. Defendants rely upon MCL 600.6440, which provides:

> No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

[2] On April 23, 2020, the Court denied plaintiffs' motion for an *ex parte* temporary restraining order on the ground that plaintiffs had not shown the threat of immediate and irreparable harm of physical injury or loss of property.

[3] The Court appreciates the speed at which counsel submitted briefs, and for the high caliber of the briefs submitted.

Because a federal court can exercise jurisdiction against state officers in their official capacity when seeking only prospective injunctive relief, defendants argue, MCL 600.6440 applies and the Court lacks jurisdiction to decide the matter.

The legal principles put forward by defendants are sound, but they do not apply to plaintiffs' case. First, the statute refers to claims filed in the Court of Claims against the state, its departments, agencies, etc., and does not pertain to claims brought in this Court against individuals, as plaintiffs have done here. Thus, it is irrelevant whether claims against state officers in their official capacity brought in federal court might essentially be considered claims against the state. Second, with respect to defendants' argument, plaintiffs seek declaratory rulings on each of their three challenges, and one of those challenges—the claim that the EMA violates the separation of powers doctrine—is based upon state law. So too is their challenge to the intrastate ban on travel to vacation rentals. Additionally, in their complaint plaintiffs seek "other and further relief as the Court deems appropriate," which whatever that could end up being, it would go beyond the declaratory and limited injunctive relief requested in the complaint, and could include damages, even if only nominal. Because plaintiffs' claims and forms of relief do not meet all the requirements of MCL 600.6440, this Court does not lack subject matter jurisdiction.

III. MOOTNESS

Defendants also argue that plaintiffs' case is moot because they only challenge EO 2020-21 and EO 2020-42, which have been rescinded, and EO 2020-59 is the only existing executive order containing these restrictions. True enough, but as defendants seem to recognize, it was *after* plaintiffs' filing last week that the Governor issued EO 2020-59, and plaintiffs have not had time to seek to amend their complaint, and several of plaintiffs' challenges to the prior EOs—the stay-at-home provision and the ban on intrastate travel to vacation rentals—remain within EO 2020-

59. Those two challenges are therefore not moot, as the Court can still render complete relief against those provisions. See *CD Barnes Assoc, Inc v Star Haven, LLC*, 300 Mich App 389, 406; 834 NW2d 878 (2013). The remainder of the challenges to EOs 2020-21 and 2020-42, as well as to the Department of Natural Resources rule[4], have been removed by EO 2020-59, and are now moot.

The Court therefore concludes that the only remaining ripe challenges to the executive orders are (1) the stay-at-home provision, (2) the prohibition of traveling to a third-party vacation rental, and (3) the limited public access to certain public land. And, of course, plaintiffs' challenge to the constitutionality of the EMA remains a live controversy.

IV. STANDARDS FOR A PRELIMINARY INJUNCTION

"The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655–656; 588 NW2d 133 (1998). The status quo has been defined as " 'the last actual, peaceable, noncontested status which preceded the pending controversy.' " *Buck v Thomas Cooley Law School*, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006), quoting *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985). In *Mich AFSCME Council 25 v Woodhaven–Brownstown Sch*

[4] Specifically, plaintiffs challenge a Department of Natural Resources rule, implemented in furtherance of EO 2020-42, that "restricts the use of powerboats on public waterways yet allows sailboats and kayaks." Plaintiffs likewise question a DNR rule, also implemented in furtherance of EO 2020-42, that "further restricted access to public lands, parks and trails to residents of 'local communities.' " Much to the pleasure of outdoor enthusiasts, EO 2020-59 seems to have eliminated the restrictions on use of powerboats and use of state parks during certain hours of the day.

Dist, 293 Mich App 143, 146; 809 NW2d 444 (2011), the Court of Appeals instructed that, "[w]hen deciding whether to grant an injunction under traditional equitable principles,

> a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.[5]

Not surprisingly, the Court will first turn to the initial consideration, i.e., whether plaintiffs have shown a likelihood of prevailing on the merits. Though plaintiffs do not have to prove they *will* succeed on the merits, they do have to prove that they have a *substantial likelihood* of success on the merits. *Int'l Union v Michigan*, 211 Mich App 20, 25; 535 NW2d 210 (1995).

V. THE MERITS

A. BACKGROUND AND FACTS

Michigan residents, like all other Americans, cherish their liberty. We always have, though the liberties and freedoms we seek to protect have changed over time. At and before our founding, our forefathers fought for the inalienable right to own property, freely engage in commerce, represent ourselves through our own elected representatives, worship where and how we wanted, etc. The Declaration of Independence's list of grievances against the King of England prove as much, as do several of the amendments to the United States Constitution, and in particular, the Fifth and Fourteenth Amendments.

[5]Quoting in part *Alliance for the Mentally Ill*, 231 Mich App at 655–656.

Today we have all the freedoms and liberties that the founders fought for, and our branches of government exist in large part to ensure that those rights remain intact. See Declaration, ¶ 2.[6] The liberty and freedoms at stake in this matter do not in large part involve those rights and liberties the founders fought so hard for; instead, plaintiffs focus on the right to freely move about one's community and state, to do commerce when one pleases, and to travel about the state for vacation purposes. It is the restrictions to those activities within EO 2020-59 that plaintiffs challenge here.

As any reader of this opinion knows, the challenged executive orders were issued to address the public health crisis occasioned by the world-wide spread of the novel coronavirus, which hit our great state in early March. Specifically, on March 10, 2020, was when the first two cases of the virus were diagnosed in our state[7], while the first death resulting from the virus occurred on March 18, 2020.[8] As a result of the quick spread of the virus within our state borders, and to meet the myriad challenges that immediately arose Governor Whitmer issued numerous executive orders, including EO 2020-21, EO 2020-42 and EO 2020-59. The main element of the executive

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[6] The Court realizes that the Declaration is a political document, not a legal one, but it is good evidence of the founding political theories and objectives. See *Troxel v Granville*, 530 US 57, 91; 120 S Ct 2054; 147 L Ed 2d 49 (2000)(SCALIA, J., dissenting)("The Declaration of Independence ... is not a legal prescription conferring powers upon the courts[.]"); *Derden v McNeel*, 978 F2d 1453, 1456 n4 (CA 5, 1992)("[G]eneral statements about inalienable rights ... tell us little about the prerogatives of an individual in concrete factual situations."); *Coffey v United States*, 939 F Supp 185, 191 (EDNY, 1996)("While the Declaration of Independence states that all men are endowed certain unalienable rights including 'Life, Liberty and the pursuit of Happiness,' it does not grant rights that may be pursued through the judicial system." (citation omitted)).

[7] Executive Order No, 2020-21; Detroit Free Press, *Coronavirus Timeline* https://www.freep.com/story/news/local/michigan/2020/03/18/coronavirus-timeline-first-case-michigan-first-death/5069676002/ (accessed April 28, 2020). This article contains a compilation of information from the state Department of Health and Human Services.

[8] Detroit Free Press, *First Michigan Death Due to Coronavirus is Southgate Man in his 50s* https://www.freep.com/story/news/local/michigan/wayne/2020/03/18/coronavirus-deaths-michigan/5054788002/ (accessed April 28, 2020).

orders is the requirement that most residents remain in their home unless engaging in certain essential activities, or certain limited outdoor activities. The result of the order, from an economic standpoint, was thousands of Michigan residents being unable to work unless they could do so remotely, the closing of all restaurants, bars, and other small and large businesses.[9]

At the time the first stay-at-home order was issued on March 23, 2020—only 13 days since the first confirmed case in this state—there were already 1,328 confirmed cases and 15 deaths.[10] Today, just over one month later, Michigan has over 36,000 confirmed cases of the virus and over 3,000 related deaths.

B. THE MERITS

In their complaint, plaintiffs do not challenge the Governor's authority to issue the executive orders on this subject-matter. Instead, plaintiffs challenge the scope of the order through separate claims based on procedural due process and substantive due process. Although these claims entail different considerations and standards, see *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 573-574; 892 NW2d 388 (2016), the Court will address the claims together since, under these circumstances, each protected right is subject to the same overriding principle. In other words, the constitutional right asserted does not make a difference when considering this issue, because both are subject to a balancing with the state's interest to protect the public health. This holds true because, and perhaps contrary to common knowledge, most, if not all, individual constitutional rights are not absolute and are subject to a balancing with the

[9] Michigan was not alone in this regard. The Court takes notice that the worldwide economy has come to a virtual standstill as a result of state and national actions taken to control the virus.

[10] Detroit Free Press, *Michigan Coronavirus Cases, Tracking the Pandemic*, https://www.freep.com/in-depth/news/nation/coronavirus/2020/04/11/michigan-coronavirus-cases-tracking-covid-19-pandemic/5121186002/ (accessed April 28, 2020).

countervailing state interest. See *New Rider v Board of Ed of Independent School Dist No 1*, 480 F2d 693, 696 (CA 10, 1973) ("Constitutional rights, including First Amendment rights, are not absolutes.") and *In re Abbott*, 954 F3d 772, 784 (CA 5, 2020) (Recognizing, when addressing Texas emergency rules during the coronavirus pandemic, that individual rights secured by the Constitution could be reasonably restricted during a health crisis).

As can be seen, then, there are two competing constitutional principles at play. First, as plaintiffs note in their verified complaint, in *Ex Parte Milligan*, 71 US 2, 120-121; 18 L Ed 281 (1866), the United States Supreme Court recognized—in a case that arose during the height of the Civil War—that our rights enshrined in the Constitution do not become less important or enforceable because of exigent circumstances:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Though our individual constitutional rights cannot be suspended or eliminated, they are, as noted, subject to reasonable regulation by the state. And, when it comes to the power of the state to act in the best interests of the public health when faced with a serious contagious disease, which is the state interest acted upon by the Governor,

> "[w]e are plowing no virgin field in considering the questions here involved. Numerous decisions, both federal and state, have considered the questions now before us. They are not all in accord and in some instances are not reconcilable. There is, however, a very marked trend in them in one direction, that which upholds the right of the state, in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, as will prevent the spread of this dread disease." [*People ex rel Hill v Lansing Bd of Ed*, 224 Mich

> 388, 390; 195 NW 95 (1923). See, also, *Jacobsen v Commonwealth of Mass*, 197 US 11, 25-26; 25 S Ct 358; 49 L Ed 643 (1905) (upholding state's power to require vaccination over plaintiff's Fourteenth Amendment liberty interest to not be told what to do), and *In re Abbott*, 954 F3d at 784-785.]

As noted earlier, plaintiffs' due process claims set out in Counts I and III are challenges to the quarantine[11] requirement and (as amended by the changes contained in EO 2020-59), the prohibition on intrastate travel to a vacation rental. Plaintiffs' specific assertion is that, although the state may have the ability to quarantine those who are infected with the virus, the state cannot quarantine everyone without some showing that the individual(s) are infected. Because EO 2020-59 does so, the executive order violates their right to procedural due process. The same holds true, they argue, for the prohibition of intrastate travel to a third parties' vacation home.[12]

In addressing this argument, it is imperative to recognize the limited question the Court is empowered to decide. Except in limited circumstances mentioned later, it is not for the courts to pass on the wisdom of state action that is granted to it by the general police power or by statute. Certainly the state cannot simply ignore the individual rights enshrined in our federal (or state) constitution in the name of a public health threat. Judicial review of state actions is therefore (and quite obviously) appropriate and necessary. But the *depth* of that review is limited, and does not include delving deep into the pros and cons of what is the better plan of action between two reasonable alternatives. This point was well-made by three concurring Justices in *Rock v Carney*,

[11] Plaintiffs characterize the "stay-at-home" provision as a quarantine, which defendants quarrel with, but quarantine is defined as "a restraint upon the activities or communications of persons … designed to prevent the spread of disease or pests." Merriam-Webster's Collegiate Dictionary (11th Ed).

[12] Plaintiffs have not asserted that they own a second home in Michigan or that they had rented a third parties' vacation home for use during a time in which any executive order remained in place.

216 Mich 280, 283; 185 NW 798 (1921), a case involving the state's response to the spread of venereal diseases during World War I:

> The questions involved in this litigation are of supreme importance, not only to the individuals composing this commonwealth, but also to the numerous boards of health and to the state itself. We approach their consideration with a due regard of their importance. Neither a desire to sustain the state, nor a supersensitiveness prompted by the delicacy of the examination here involved, should in any way enter into or control our decision. Policies adopted by the legislative and executive branches of the state government are not submitted to this branch for approval as to their wisdom. They stand or fall in this court because valid or invalid under the law, and their wisdom or want of wisdom in no way rests with us. If valid, they must be upheld by this court; if invalid, they must be so declared by this court. If these defendants have transcended their power, they must be held liable, and they may not be excused from liability by the fact that their motives were of the highest. If they had not transcended their power, they are not liable, and supersensitiveness or preconceived notions of proprieties, no matter of how long standing, do not render them liable. The case must be determined by the application of cold rules of law.

Thus, whether and to what extent this Court agrees with policy implemented in the executive orders is of no moment or consideration. Instead, the Court must dutifully apply the "cold rules of law" to determine the validity of the challenged provisions of the executive order.

Binding authority from the United States Supreme Court and the Michigan Supreme Court compels this Court to conclude that plaintiffs do not have a substantial likelihood of success on the merits. This is not because the rights asserted by plaintiffs are not fundamental—being forced (with some important exceptions) by the state to remain in one's home, in turn causing many residents to be unable to work, visit elderly relatives, and to generally move about the state. But those liberty interests are, and always have been, subject to society's interests—society being our fellow residents. They—our fellow residents—have an interest to remain unharmed by a highly communicable and deadly virus, and since the state entered the Union in 1837, it has had the broad

power to act for the public health of the entire state when faced with a public crisis. As the *Jacobsen* Court so aptly held:

> The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. *But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.* This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' In *Crowley v Christensen*, 137 US 86, 89; 34 L Ed 620, 621; 11 S Ct 13 (we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, 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.' [*Jacobson*, 197 US at 26; citations omitted in part; emphasis supplied.]

The role courts play under *Jacobson* and *Lansing Bd of Ed* is not to "second-guess the state's policy choices in crafting emergency public health measures," *In re Abbott*, 954 F3d at 784, but is instead to determine whether the state regulation has a "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.' " *Id*., quoting in part *Jacobson*, 197 US at 31. Part of this review includes

looking to whether any exceptions apply for emergent situations, the duration of any rule, and whether the measures are pretextual. *Id*. at 785.[13]

Turning to plaintiffs' specific challenges, the stay-at-home provision, the most restrictive portion of the executive order, was first implemented by the Governor on March 23, 2020, thirteen days after the first case of COVID-19 was diagnosed in the state. Though there were at that point approximately 1,328 cases in the state and 15 reported deaths, Governor Witmer was not acting on a blank slate. Instead, it was common knowledge that the virus had already rapidly spread throughout the state of Washington, was prevalent in several other states, and was devastating parts of Italy, China, and other countries. Indeed, the speed at which the virus spread was well known at the time the stay-at-home provision was implemented. It is true that this measure is a severe one, and greatly restricts each of our liberties to move about as we see fit, as we do in normal times. But the governor determined that severe measures were necessary, and had to be quickly implemented to prevent the uncontrolled spreading of the virus. As noted, Michigan was not alone in this regard:

> To be sure, [the order] is a drastic measure, but that aligns it with the numerous drastic measures Petitioners and other states have been forced to take in response to the coronavirus pandemic. Faced with exponential growth of COVID-19 cases, states have closed schools, sealed off nursing homes, banned social gatherings, quarantined travelers, prohibited churches from holding public worship services, and locked down entire cities. These measures would be constitutionally intolerable in ordinary times, but are recognized as appropriate and even necessary responses to the present crisis. [*In re Abbott*, 954 F3d at 787.]

[13] Plaintiffs' correctly note that *Jacobson* did not involve a state-wide requirement to stay at home, and instead addressed an involuntary vaccination program. But most cases have different facts, and it is the legal principle set forth in the decision that guides future courts. Thus, despite some factual differences, the Court relies (as did the *In re Abbott* court) upon *Jacobson* as it is the most relevant decision on this issue from the Supreme Court.

Plaintiffs suggest that the better—and more constitutionally sound decision—would have been to quarantine only those who have the virus. It may have been a better option to some, as doing so may have had a less severe impact on the movement of the Michigan population, and may have reduced unemployment. Or, as plaintiffs argue, a more narrowly tailored order by region may have been more reasonable for the entire state. But some of that is simply hindsight, and to accept it would be to impermissibly delve too deep into the choices made. Additionally, the Governor's concerns were not limited to what was most convenient or palatable at the time, as she also had to protect, to the extent possible, the health and safety of all Michigan residents and to not overburden the health care system. The introduction to EO 2020-59 outlines some of the other serious considerations that went into issuing the stringent order:

> To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

And, contrary to plaintiffs' arguments, the Supreme Court has upheld, against a constitutional challenge, a state's quarantine of individuals even when they are *not* infected with the disease being controlled. See *Compagnie Francaise de Navigation a Vapeur v Louisiana*, 186 US 380, 393; 22 S Ct 811; 46 L Ed 1209 (1902).

As noted, the Court's role is not to pick which alternative may be more reasonable, more preferential, or more narrowly tailored, as the latter is in deciding some constitutional cases. Monday morning quarterbacking is the role of sports fans, not courts reviewing the factual basis supporting executive action to protect the public health. Instead, it is the role of the executive and legislative branches to determine what *steps* are necessary when faced with a public health crisis.

In re Abbott, 954 F3d at 792 ("Such authority [to determine what measures are best to take] properly belongs to the legislative and executive branches of the governing authority"); *Rock,* 216 Mich at 296; *Lansing Bd of Ed*, 224 Mich at 397.[14] Under federalism principles, it is the States that retained the police power, and that power—though not unlimited—is quite broad. See *Nat'l Federation of Independent Business v Sebelius*, 567 US 519, 536; 132 S Ct 2566; 183 L Ed 2d 450 (2012) ("The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power") and *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 73; 367 NW2d 1 (1985) (discussing the scope of the police power and how that power extends to enacting regulations to promote public health, safety, and welfare, and providing that regulations "passed pursuant to the police power carry with them a strong presumption of constitutionality.").

What the Court must do—and can only do—is determine whether the Governor's orders are consistent with the law. *Rock*, 216 Mich at 283. Under the applicable standards, they are. The undisputed facts known at the time the first stay-at-home order was made, and the undisputed facts known today, compel the conclusion that the order had a real and substantial relation to the public health crisis. The challenged measures relate to limiting human interaction which helps control the spread of a virus considered to be extremely communicable. To make it voluntary, or more limited in scope, were perhaps other avenues to pursue, but even accepting that proposition does

[14] As will be discussed shortly, the Legislature has also spoken on the issue of how to address emergent situations. MCL 10.21; MCL 30.401 *et seq*. Additionally, the Court takes notice that the Legislature recently established an oversight committee to review the measures implemented through the Governor's various executive orders.

not make what the Governor reasonably chose to do invalid. Instead, the Governor's determination as to the speed and ease with which the virus spreads, and the potential impact that spread would have on the health care system, and the threat it had to the lives of thousands of Michigan residents in a short period of time, allows for the conclusion that the two challenged provisions had a real and substantial relation to the public health crisis. *Jacobson*, 197 US at 31. There is nothing presented to the Court to draw any other legal conclusion.[15]

Nor is there any evidence (or even a suggestion) that the stay-at-home provision was a pretext to accomplish some other objective. Additionally, the record is clear that these measures are temporary, and limited in time to address the speed at which the virus spreads, the status of the available health care system, and the need to get Michigan residents back to enjoying their liberties. Indeed, since this lawsuit was filed last week, the Governor issued EO 2020-59, easing some of the very restrictions challenged by plaintiffs, and has indicated more lifting of restrictions are imminent. Plaintiffs have not shown a substantial likelihood of success on the merits in their challenge to the executive order restrictions.

C. CONSTITUTIONALITY OF THE EMA[16]

Turning again to *In re Forfeiture of 2000 GMC Denali and Contents*, the Court set forth the rather difficult standards governing a challenge to the constitutionality of a state statute:

> A party challenging the constitutionality of a statute has the burden of proving the law's invalidity. *Gillette Commercial Operations North America & Subsidiaries v*

[15] Plaintiffs submitted documentary evidence which, if believed, could allow a governor to issue a more narrowly tailored order. But because this Governor made a different conclusion that was likewise based on other supporting evidence related to the virus, her decision had a real and substantial relation to the public health crisis.

[16] Plaintiffs do not challenge the Governor's exercise of authority under either statute, nor whether she needs legislative approval to continue her emergency declaration.

> *Dep't of Treasury*, 312 Mich App 394, 414-415; 878 NW2d 891 (2015). The challenging party must overcome a heavy burden because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). When interpreting a statute, our primary goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628; 765 NW2d 31 (2009). To do so, we examine the plain language of the statute itself, and "[i]f the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). [*In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 569.]

As far as the Court can discern, plaintiffs' challenge to the EMA is an as-applied one:

> A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge. This is an as-applied challenge, meaning that claimant has alleged " 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014), quoting *Village of Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v Guam Society of Obstetricians & Gynecologists*, 506 US 1011, 1012; 113 S Ct 633; 121 L Ed 2d 564 (1992) (SCALIA, J., dissenting). See also *United States v Frost*, 125 F3d 346, 370 (CA 6, 1997). [*In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 569-570.]

Plaintiffs' challenge to the delegation of power from the Legislature to the executive will likely not succeed. It is certainly true that the Legislature cannot grant some vague, unfettered discretion to the executive to carry out what is a legislative function. But if the challenged legislation contains sufficient guidance to the executive on how to execute the law to further the Legislature's policy, it does not violate the non-delegation doctrine. *City of Ann Arbor v Nat'l Ctr for Mfg Sciences, Inc*, 204 Mich App 303, 308; 514 NW2d 224 (1994) ("[T]he standards must be sufficiently broad to permit efficient administration so that the policy of the Legislature may be complied with, but not so broad as to give uncontrolled and arbitrary power to the administrators.").

As defendants point out, plaintiffs allege in their complaint that the powers granted to the Governor are "limited," and none of the provisions in the act are such that the executive would have "uncontrolled, arbitrary power." *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308; 240 NW2d 206 (1976). The provisions of the EMA are not vague, and contain specific procedures and criteria for the Governor to declare a state of disaster or emergency, and what conditions qualify as a disaster or emergency. See MCL 30.402(e) and (h); MCL 30.403(3) and (4). The EMA also grants the Governor additional, specific duties and powers when addressing any declared disaster or emergency, MCL 30.405, and sets for a comprehensive state and local jurisdictional system to address declared state-wide disasters or emergencies. MCL 30.407-MCL 30.411. As a result, plaintiffs are unable to establish a likelihood of success on the merits on this claim.

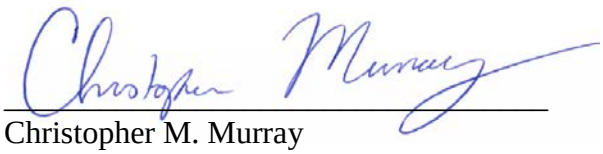
D. HARM TO THE PUBLIC INTEREST

Finally, and for many of the same reasons, the Court concludes that entry of a preliminary injunction would be more detrimental to the public than it would to plaintiffs. Although the Court is painfully aware of the difficulties of living under the restrictions of these executive orders, those difficulties are temporary, while to those who contract the virus and cannot recover (and to their family members and friends), it is all too permanent. That is not to say that every new virus will require the action taken here, but given the authority of the Governor to do so in the face of these circumstances, the Court must conclude issuing injunctive relief would not serve the public interest, despite the temporary harm to plaintiffs' constitutional rights.

VI. CONCLUSION

For these reasons, plaintiffs' motion for a preliminary injunction is DENIED.

Date: April 29, 2020



Christopher M. Murray
Judge, Court of Claims