IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

ANDREW BELANGER, JUSTIN PHILLIPS, and CALVIN ZASTROW,
Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, and CITY OF DETROIT,
Defendants.

No. _____

EXPEDITED CONSIDERATION REQUESTED

PLAINTIFFS'BRIEF IN SUPPORT OF *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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ISSUE PRESENTED

Whether the enforcement of Executive Order 2020-21 as applied to criminalize Plaintiffs' expressive religious activity in public fora outside of abortion centers in Michigan deprives Plaintiffs of their rights protected by the First and Fourteenth Amendments, thereby causing irreparable harm sufficient to warrant the requested injunctive relief.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Bible Believers v. Wayne Cnty., 805 F.3d 228 (6th Cir. 2015)

Church of the Lukumi Babalu Aye, Inc v. City of Hialeah, 508 U.S. 520 (1993)

Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474 (6th Cir. 1995)

Elrod v. Burns, 427 U.S. 347 (1976)

G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071 (6th Cir. 1994)

Newsome v. Norris, 888 F.2d 371 (6th Cir. 1989)

Saieg v. City of Dearborn, 641 F.3d 727 (6th Cir. 2011)

INTRODUCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs seek a Temporary Restraining Order (TRO) and preliminary injunction to immediately enjoin the use of Executive Order 2020-21 to criminalize their peaceful, expressive religious activity on the public sidewalks and other public fora outside of abortion centers throughout Michigan. Plaintiffs' request is narrow in its scope. They do not seek to halt the enforcement of Executive Order 2020-21 in its entirety, only as it is enforced to restrict their peaceful free speech activity, which is protected by the First Amendment.

Paraphrasing from the Supreme Court's opinion in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971):

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion [or fear of a pandemic], this basic law [the First Amendment] and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts.

Id. at 455.

STATEMENT OF FACTS

Plaintiffs are residents of Michigan. They are Christians, and they oppose abortion based on their sincerely held religious belief that abortion is an intrinsic evil. Plaintiffs engage in expressive religious activity on the public sidewalks and other public areas outside of facilities where abortions are committed as part of their religious exercise. They are compelled by their consciences to be a public witness for life. (Belanger Decl. ¶¶ 1, 2; Zastrow Decl. ¶¶ 1, 2).[1]

As part of their expressive religious activity, Plaintiffs protest abortion by engaging in prayer, preaching, worship, and holding pro-life signs on the public sidewalks and other public

[1] Plaintiff Belanger's declaration is attached to this brief as Exhibit 1, and Plaintiff Zastrow's declaration is attached to this brief as Exhibit 2.

areas adjacent to abortion centers throughout Michigan. They engage in their expressive religious activity because it is necessary to sustain and protect life. Plaintiffs' actions are necessary to protect the most vulnerable in our society—unborn children and their mothers. (Belanger Decl. ¶ 3; Zastrow Decl. ¶ 3).

Pursuant to her executive powers as the Governor of Michigan, Defendant Gretchen Whitmer[2] issued Executive Order 2020-21 on March 24, 2020. (Belanger Decl. ¶ 4, Ex. 1; Zastrow Decl. ¶ 4, Ex. 1).

Executive Order 2020-21 is described as a "[t]emporary requirement to suspend activities that are not necessary to sustain or protect life." By its own terms, it will remain in effect until April 13, 2020 at 11:59 pm. And a "willful violation" of the order is a misdemeanor. (Belanger Decl. ¶¶ 5-7, Ex. 1; Zastrow Decl. ¶¶ 5-7, Ex. 1).

Executive Order 2020-21, states, in relevant part, the following:

> 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.
>
> * * *
>
> 7. Exceptions.
>
> a. Individuals may leave their home or place of residence, and travel as necessary:

[2] Defendant Whitmer is sued in her official capacity only. (*See* Compl. ¶ 14). A suit against a government official in her official capacity is essentially a suit against the government. *Ky. v. Graham*, 473 U.S. 159, 166 (1985). And prospective declaratory and injunctive relief are available in actions against state officials sued in their official capacities based on an allegedly unconstitutional statute or official act. *Ex Parte Young*, 209 U.S. 123, 151-56 (1908). In other words, the Eleventh Amendment is not a bar to this action. *See id.*

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

(Belanger Decl. ¶ 8, Ex. 1; Zastrow Decl. ¶ 8, Ex. 1).

Due to the outbreak of COVID-19, Plaintiffs are adhering to the social distancing measures recommended by the Centers for Disease Control and Prevention, specifically including remaining at least six feet from people on the public sidewalks when engaging in their expressive religious activities. (Belanger Decl. ¶ 9).

Following the issuance of Executive Order 2020-21, Defendant Whitmer has refused to order abortion centers in Michigan to close even though abortion is an elective procedure, it is never necessary to protect the life of a mother, and it results in the death of an unborn child, which is contrary to the stated goal of Executive Order 2020-21 "to sustain or protect life." (Belanger Decl. ¶ 10, Ex. 1; Zastrow Decl. ¶ 9, Ex. 1).

Because abortion centers remain open in Michigan during this current pandemic, Plaintiffs are compelled by their consciences to engage in their expressive religious activities on the public sidewalks outside of abortion centers located throughout the State. (Belanger Decl. ¶ 11; Zastrow Decl. ¶ 10).

On March 31, 2020, Plaintiff Belanger was on the public sidewalk outside of the Scotsdale Women's Center, which is an abortion center located in the City of Detroit. He was preaching, holding a pro-life sign, and practicing social distancing. (Belanger Decl. ¶ 12).

While he was engaging in his peaceful expressive activity, eight (8) City of Detroit police vehicles and fifteen (15) City of Detroit police officers arrived. Plaintiff Belanger was the only pro-lifer engaging in expressive activity at the time of their arrival. (Belanger Decl. ¶ 13).

While the police were still present, Plaintiff Phillips and one other pro-lifer arrived at the public sidewalk outside of the abortion center. During the conversation with the police officers, the officer speaking to the pro-lifers stated, "We're here for a violation of a stay at home order by the Governor." The officers told the pro-lifers that while abortion was "essential" under Defendant Whitmer's order and thus permitted, the pro-lifers' First Amendment activity was not "essential" and thus unlawful. The conversation was recorded. (Belanger Decl. ¶ 14; *see also* Zastrow Decl. ¶ 13).

Because Plaintiff Belanger was engaging in First Amendment activity on the public sidewalk outside of the abortion center, the officers issued him a "State of Michigan Uniform Law Citation" for violating Executive Order 2020-21. (Belanger Decl. ¶ 15, Ex. 2; *see also* Zastrow Decl. ¶ 12, Ex. 2).

The law violation described in the citation is "emergency powers of governor." The offense was described as "Subject refusing to leave, protesting outside while shutdown is in effect." (Belanger Decl. ¶ 16, Ex. 2).

Plaintiffs Phillips and Belanger are close friends and pro-life companions with Plaintiff Zastrow. Shortly after the police departed, Plaintiff Belanger spoke with Plaintiff Zastrow via a phone call (many pro-lifers are in constant contact with each other to share information and to provide assistance and protection for each other while they are out protesting), warning him that police officers are issuing criminal citations under Executive Order 2020-21 for engaging in peaceful, free speech activity on the public sidewalks outside of abortion centers. Plaintiff Belanger warned many other pro-lifers, and Plaintiff Zastrow echoed the warning to others as well. (Belanger Decl. ¶ 17; Zastrow Decl. ¶ 11; *see also id*. ¶¶ 12, 13).

Issuing criminal citations under Executive Order 2020-21 for exercising rights protected

by the First Amendment punishes and thus chills the exercise of those rights, causing irreparable harm to Plaintiffs and the many other pro-lifers throughout Michigan who seek to protect human life. (Belanger Decl. ¶ 18; Zastrow Decl. ¶ 14).

Absent a court order prohibiting the enforcement of Executive Order 2020-21 against pro-lifers engaging in peaceful, free speech activity on public sidewalks and other public areas adjacent to abortion centers in Michigan, harm to Plaintiffs' First Amendment rights will continue. (Belanger Decl. ¶ 19; Zastrow Decl. ¶ 15).

ARGUMENT

I. Plaintiffs Have Standing to Advance this Constitutional Challenge.

Before addressing the TRO/preliminary injunction factors, we pause here briefly to address the threshold question of standing. In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted).

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Consequently, to invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). In *National Rifle Association of America v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997), the court stated that a

plaintiff has standing to seek declaratory or injunctive relief if he can "show actual present harm or a significant possibility of future harm."

In the First Amendment context, the standing requirements are appropriately relaxed. *See Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1034 n.18 (5th Cir. 1981) (stating that the injury-in-fact requirement for standing is properly relaxed for First Amendment challenges "because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application'") (quotations in original, citations omitted); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) ("When the First Amendment is in play . . . the Court has relaxed the prudential limitations on standing to ameliorate the risk of washing away free speech protections.").

Consequently, when a challenged restriction chills the exercise of free speech, as in this case, the affected party (and even a third party)[3] has standing to challenge that restriction. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (recognizing that "a chilling effect on one's constitutional rights constitutes a present injury in fact"). As stated by the Court in *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), "[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."

[3] *See, e.g., King Enters. v. Thomas Twp.*, 215 F. Supp. 2d 891, 906 (E.D. Mich. 2002) ("It is important to observe that prudential standing rules are somewhat relaxed in the First Amendment context. . . . [T]he freedom of expression and the unfettered exchange of ideas is considered the lifeblood which sustains a democracy. Thus, where a law regulates speech based on content, contains a prior restraint of protected speech, chills the right of expression of third parties, or restricts the expression of others not before the court, third parties may wage a facial challenge to the offending law based on First Amendment rights.") (internal quotations and citations omitted).

Here, we have an executive order that is currently in effect and being enforced to criminalize and thus restrict protected speech. Indeed, yesterday (March 31, 2020), the City, through its police officers, enforced Executive Order 2020-21 to criminalize pro-life expressive activity by issuing a criminal citation to Plaintiff Belanger for engaging in his free speech activity on a public sidewalk outside of an abortion center in Detroit. Additionally, the officers expressly warned the pro-lifers that their free speech activity violates the executive order. There is nothing hypothetical about Plaintiffs' challenge to the enforcement of Executive Order 2020-21. Plaintiffs' standing to advance this challenge to an executive order that criminalizes and thus chills the exercise of their rights protected by the First Amendment is well established. We turn now to demonstrate why the Court should issue the requested TRO/preliminary injunction.

II. Standard for Issuing a TRO/Preliminary Injunction.

"The standard for issuing a temporary restraining order is logically the same as for a preliminary injunction with emphasis, however, on irreparable harm given that the purpose of a temporary restraining order is to maintain the status quo." *Reid v. Hood*, No. 1:10CV2842, 2011 U.S. Dist. LEXIS 7631, at *4-5 (N.D. Ohio Jan. 26, 2011) (citing *Motor Vehicle Bd. of Cal. v. Orrin W. Fox, et al.*, 434 U.S. 1345, 1347 n. 2 (1977)).

The standard for issuing a preliminary injunction is well established:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (same). Typically, the reviewing court will balance these factors, and no single factor will necessarily be determinative of whether or not to grant the

injunction. *Connection Distributing Co.*, 154 F.3d at 288. However, because this case deals with a violation of Plaintiffs' First Amendment right to freedom of speech, the crucial and often dispositive factor is whether Plaintiffs are likely to prevail on the merits. *Id*.

III. Plaintiffs Satisfy the Standards for Granting the Requested Injunctive Relief.

A. Plaintiffs' Likelihood of Success on the Merits.

1. First Amendment Free Speech Claim.

We begin with Plaintiffs' free speech claim arising under the First Amendment, noting that the right to freedom of speech is not simply a right to catharsis that can be quarantined to one's home and thus treated as something less than walking, hiking, running, cycling, or some other similar recreational activity. The fundamental right to free speech is the right to have your voice heard, particularly when exercising that right in a traditional public forum. As stated by the Supreme Court, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted) (emphasis added). Accordingly, Plaintiffs' expressive activity "is entitled to special protection" under the First Amendment, not criminal prosecution under an executive order.

Plaintiffs' First Amendment free speech claim is reviewed in three steps. First, the Court must determine whether Plaintiffs' expressive religious activity is protected speech under the First Amendment. Second, the Court must conduct a forum analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the Court must then determine whether the challenged restriction comports with the applicable standard. *Saieg v. City of Dearborn*, 641 F.3d 727, 734-35 (6th Cir. 2011).

We turn to the first step. It is clearly established that Plaintiffs' expressive activity is protected by the Free Speech *and* Free Exercise Clauses of the First Amendment. *See Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (observing that "*private* speech endorsing religion" is protected by "the Free Speech and Free Exercise Clauses").

In *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015), the Sixth Circuit, sitting *en banc*, held that government officials violated the plaintiffs' rights to freedom of speech *and* the free exercise of religion by threatening to arrest them for engaging in *expressive* religious activity. As stated by the court:

> The right to free exercise of religion includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim. *Prater v. City of Burnside*, 289 F.3d 417, 427 (6th Cir. 2002). The government cannot prohibit an individual from engaging in religious conduct that is protected by the First Amendment. *Id.*
>
> The Bible Believers' proselytizing at the 2012 Arab International Festival constituted religious conduct, as well as expressive speech-related activity, that was likewise protected by the Free Exercise Clause of the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943). Plaintiff Israel testified that he was required "to try and convert non-believers, and call sinners to repent" due to his sincerely held religious beliefs. We do not question the sincerity of that claim. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778, 189 L. Ed. 2d 675 (2014) ("[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable." (internal parentheses omitted)).
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> Free exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Rosenberger*, 515 U.S. at 841.

Bible Believers, 805 F.3d at 255-56. In sum, Plaintiffs' expressive religious activity is protected by the First Amendment.

Regarding the second step, the forum in question (a public sidewalk) is indisputably a traditional public forum. *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) ("[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.' No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.") (internal citation omitted). Traditional public forums "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). This includes public sidewalks adjacent to abortion centers. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (striking down on First Amendment grounds buffer zone restrictions around abortion clinics).

As stated by the Supreme Court, "[T]he streets are natural and proper places for the dissemination of information and opinion, and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. N.J.*, 308 U.S. 147, 163 (1939); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (striking down the city ordinance and stating, "Constitutional concerns are heightened further where, as here, the [challenged ordinance] restricts the public's use of streets and sidewalks for political speech"); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 55 (1983) ("In a public forum . . . all parties have a

constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers. . . .").

Regarding the final step, "restrictions on speech in traditional public fora must either be (1) reasonable time, place, and manner regulations or (2) 'narrowly drawn to accomplish a compelling governmental interest.' *United States v. Grace*, 461 U.S. 171, 177 (1983). In general, then, 'the government's ability to permissibly restrict expressive conduct' on public streets and sidewalks 'is very limited.' *Id*." *Saieg*, 641 F.3d at 734. Accordingly, "[t]he requisite principle applicable to this case is that '[t]ime, place, and manner restrictions may be enforced even in a *traditional public forum* so long as they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Id*. at 735 (citation omitted). The enforcement of Executive Order 2020-21 does not satisfy this standard.

While Executive Order 2020-21 on its face does not proscribe the content of Plaintiffs' speech, it does permit individuals to use the very same sidewalks that Plaintiffs are prohibited from using for their First Amendment activity "[t]o engage in [other] 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 home." (Belanger Decl., Ex. 1 [Executive Order 2020-21 at § 7.a.1.]). As stated by the Supreme Court, "Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). As a means of pursuing its alleged objectives, the enforcement of

Executive Order 2020-21 "is so woefully underinclusive as to render belief in [its stated] purpose a challenge to the credulous." *Republican Party v. White*, 536 U.S. 765, 780 (2002).

The Sixth Circuit's ruling in *Saieg v. City of Dearborn* is dispositive on this issue. In *Saieg*, the court struck down a content-neutral restriction on leafletting, concluding as follows:

> Even though the leafleting restriction is content neutral and might provide ample alternative means of communication, the policy is not a reasonable time, place, and manner restriction. Within the inner perimeter, the restriction does not serve a substantial governmental interest, as evidenced by the defendants' willingness to permit sidewalk vendors and ordinary pedestrian traffic on the same sidewalks where they prohibited Saieg from leafleting.

Saieg, 641 F.3d at 740-41. In sum, the enforcement of Executive Order 2020-21 in this case is not a reasonable time, place, and manner restriction. Therefore, it violates Plaintiffs' rights protected by the First Amendment.[4]

2. First Amendment Free Exercise Claim.

With regard to Plaintiffs' Free Exercise challenge, when a law burdens religious exercise, as in this case, and it provides an exemption for non-religious conduct, as in this case,[5] the

[4] It is no defense to this constitutional challenge that Plaintiffs might have alternative ways of communicating their message. *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984) ("[L]aws regulating public fora cannot be held constitutional simply because they leave potential speakers alternative fora for communicating their views."); *see also Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 607 ("[B]ecause we have already found that the Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . ."). Moreover, there are no adequate alternatives that would permit Plaintiffs to reach their intended audience—the women who are going to abortion centers and those who work at these centers. *See, e.g., Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) ("[A]lternative mode[s] of communication may be constitutionally inadequate if the speaker's 'ability to communicate effectively is threatened' [and a]n alternative is not ample if the speaker is not permitted to reach the 'intended audience.'"); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) ("[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.") (citations omitted).

[5] As noted, while Executive Order 2020-21 is being used to punish Plaintiffs' expressive religious activity, it permits individuals "[t]o engage in [other] outdoor activity, including walking, hiking, running, cycling, or any other recreational activity consistent with remaining at

government must satisfy strict scrutiny—the "most rigorous scrutiny" under the law. *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520, 534, 546 (1993) (striking down on Free Exercise Clause grounds an ordinance prohibiting the sacrifice of animals). That is, the government must have a compelling interest to punish Plaintiffs for their speech activity, and the reason for punishing them must be narrowly tailored to support that interest. *See id*. at 546 ("To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.") (internal quotations and citations omitted). When a law restricts conduct protected by the First Amendment and yet permits other similar non-religious conduct that is not constitutionally protected, the government's interest is not compelling. *See id.* at 547 ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (internal quotations and citation omitted); *see also Telescope Media Group v. Lucero*, 936 F.3d 740, 754 (8th Cir. 2019) ("In an as-applied challenge like this one, the focus of the strict-scrutiny test is on the actual speech being regulated, rather than how the law might affect others who are not before the court.").

City of Hialeah illustrates this axiom of constitutional law. There, the Court struck down on free exercise grounds an ordinance prohibiting the sacrifice of animals that defined sacrifice as the "unnecessary" killing of an animal. *See id.* The law permitted some animal killings as "necessary," but deemed the ritual, religious killing of an animal as unnecessary and thus criminal. By exempting some animal killings but prohibiting animal killings for religious reasons, the ordinance violated the challengers' right to free exercise of religion under the First

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least six feet from people from outside the individual's home." (Belanger Decl., Ex. 1 [Executive Order 2020-21 at § 7.a.1.]).

Amendment. Here, Executive Order 2020-21 permits walking, hiking, running, cycling, and other similar outdoor activity on the public sidewalks throughout Michigan—conduct it considers "necessary"[6]—but it criminalizes Plaintiffs' expressive religious activity on the very same sidewalks as "unnecessary" in violation of the Free Exercise Clause of the First Amendment.

3. Fourteenth Amendment Equal Protection Claim.

When the government treats an individual disparately "as compared to similarly situated persons and that such disparate treatment . . . burdens a fundamental right, targets a suspect class, or has no rational basis," such treatment violates the equal protection guarantee of the Fourteenth Amendment. *Bible Believers*, 805 F.3d at 256 (internal quotations and citation omitted). "In determining whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead seek relevant similarity." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) (internal quotation marks omitted).

As argued and demonstrated throughout this brief, the enforcement of Executive Order 2020-21 to criminalize Plaintiffs' First Amendment activity on public sidewalks adjacent to abortion centers while permitting individuals to use these same public sidewalks to engage in their "outdoor activity, including walking, hiking, running, cycling or other recreational activity" not only violates the First Amendment, but it also deprives Plaintiffs of the equal protection guarantee of the Fourteenth Amendment.

In the final analysis, the enforcement of Executive Order 2020-21 "makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution." *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971).

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[6] (*See* Belanger Decl., Ex. 1 [Executive Order 2012-21 at 7.a.1 (considering outdoor activity, such as walking, hiking, running, and cycling, "necessary")]).

B. Irreparable Harm to Plaintiffs without the TRO/Preliminary Injunction.

Plaintiffs will be irreparably harmed without the TRO/preliminary injunction. Defendants' criminal prohibition on Plaintiffs' expressive religious activity deprives Plaintiffs of their fundamental First Amendment rights to freedom of speech and the free exercise of religion and their Fourteenth Amendment right to equal protection—and this deprivation will continue absent injunctive relief because Executive Order 2020-21 remains in full force.

It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Connection Distributing Co.*, 154 F.3d at 288. And this injury is sufficient to justify the requested injunctive relief. *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*).

C. Whether Granting the TRO/Preliminary Injunction Will Cause Substantial Harm to Others.

In this case, the likelihood of harm to Plaintiffs is substantial because Plaintiffs intend only to exercise their First Amendment rights in a public forum, and the deprivation of this right, even for minimal periods, constitutes irreparable injury. *See supra*. Moreover, Plaintiffs are adhering to the social distancing measures recommended by the Centers for Disease Control and Prevention, specifically including remaining at least six feet from people on the public sidewalks when engaging in their expressive religious activities.

On the other hand, if Defendants are restrained from enforcing Executive Order 2020-21 against Plaintiffs' expressive religious conduct, Defendants will suffer no harm because the

exercise of constitutionally protected expression can never harm any of Defendants' or others' legitimate interests. *See Connection Distributing Co.*, 154 F. 3d at 288.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distribution Co.*, 154 F.3d at 288. For if Plaintiffs show that their constitutional rights have been violated (which they have shown here), then the harm to others is inconsequential.

D. The Impact of the TRO/Preliminary Injunction on the Public Interest.

The impact of the TRO/preliminary injunction on the public interest turns in large part on whether Defendants violated Plaintiffs' rights protected by the First and Fourteenth Amendments. As the Sixth Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

As noted previously, Defendants' enforcement of Executive Order 2020-21 criminalizes Plaintiffs' expressive religious activity, thereby punishing and thus depriving Plaintiffs of their fundamental rights protected by the First and Fourteenth Amendments. It is in the public interest to issue the TRO/preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

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