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

KIMBERLY BEEMER, PAUL CAVANAUGH, and ROBERT MUISE,
Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, ALLEN TELGENHOF, in his official capacity as Charlevoix County Prosecuting Attorney, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney, and WILLIAM J. VAILLIENCOURT, JR., in his official capacity as Livingston County Prosecuting Attorney,
Defendants.

No. 1:20-cv-00323

Hon. Paul L. Maloney

EXPEDITED CONSIDERATION REQUESTED

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

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ISSUE PRESENTED

Whether the enactment and enforcement of the challenged measures of Executive Order 2020-42, which criminalize Plaintiffs' peaceful and otherwise lawful activity, violate Plaintiffs' rights guaranteed by the United States and Michigan Constitutions, thereby causing irreparable harm sufficient to warrant the requested injunctive relief.

INTRODUCTION

"*But a Constitution of Government once changed from Freedom, can never be restored. Liberty once lost is lost forever*."
John Adams

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 2020-42 to criminalize the fundamental liberties Plaintiffs enjoy as law-abiding citizens under the United States and Michigan Constitutions. More specifically, Plaintiffs seek the following:

- An order enjoining the enforcement of Executive Order 2020-42's measures that prohibit individuals from travelling between their own residences and cottages within the State of Michigan, thereby permitting Plaintiff Beemer, along with members of her household, to travel to and from her residence in Saginaw, Michigan and her cottage located in Charlevoix County, Michigan and permitting Plaintiff Cavanaugh, along with members of his household, to travel to and from his residence in Brighton, Michigan and his cottage located in Charlevoix County, Michigan;
- An order enjoining the enforcement of Executive Order 2020-42's measures that prohibit the operation of landscaping businesses within the State of Michigan, thereby permitting Plaintiff Cavanaugh to reopen his landscaping business, Cavanaugh's Lawn Care LLC, so long as he and his employees practice social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the employee's household;
- An order permitting individuals, specifically including Plaintiffs Beemer and Cavanaugh, to engage in outdoor activities that include using boats with motors for fishing and other

similar recreational purposes, consistent with remaining at least six feet from people from outside the individual's household;

- An order enjoining the enforcement of Executive Order 2020-42 insofar as it conflicts with the March 28, 2020, U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency guidance on "critical infrastructure," which identifies "Workers supporting the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges" as "critical infrastructure," thereby permitting gun stores and shooting ranges in Michigan to remain open and operational subject to social distancing measures recommended by the Centers for Disease Control and Prevention and permitting individuals, including Plaintiff Muise, to travel to and from such businesses; and
- An order enjoining the enforcement of Executive Order 2020-42's measures that prohibit private, family gatherings at private residences, thereby permitting Plaintiff Muise to hold private gatherings for meals, fellowship, and prayer with his immediate family at his private residence located in Superior Township, Michigan.[1]

STATEMENT OF FACTS[2]

Plaintiffs are adult citizens of the United States and residents of Michigan. Plaintiff Beemer resides in Saginaw, Plaintiff Cavanaugh resides in Brighton, and Plaintiff Muise resides in Superior Township. (Beemer Decl. ¶ 1; Cavanaugh Decl. ¶ 1; Muise Decl. ¶ 1).

Plaintiffs Beemer and Cavanaugh own cottages in Charlevoix County, Michigan. And Plaintiff Cavanaugh is the owner of a landscaping business, Cavanaugh's Lawn Care LLC,

[1] A proposed TRO has been submitted with this brief.
[2] Plaintiff Beemer's declaration is attached to this brief as Exhibit 1. Plaintiff Cavanaugh's declaration is attached to this brief as Exhibit 2. And Plaintiff Muise's declaration is attached to this brief as Exhibit 3.

which is located in Livingston County, Michigan. (Beemer Decl. ¶ 3; Cavanaugh Decl. ¶¶ 2, 6-8).

Defendant Gretchen Whitmer is the Governor of the State of Michigan. Per her authority as Governor, Defendant Whitmer issued Executive Order 2020-42. A "willful violation" of Executive Order 2020-42 is a misdemeanor. (Muise Decl. ¶ 3, Ex. A [Executive Order 2020-42]).

Defendant Telgenhof is the Charlevoix County Prosecuting Attorney. (*See* https://www.charlevoixcounty.org/prosecuting_attorney/index.php). Defendant Mackie is the Washtenaw County Prosecuting Attorney. (*See* https://www.washtenaw.org/1070/Prosecuting-Attorney). And Defendant Vailliencourt is the Livingston County Prosecuting Attorney. (*See* https://www.livgov.com/prosecutor). The County Prosecuting Attorneys are responsible for criminally prosecuting persons who violate Executive Order 2020-42 in their counties.[3]

On March 24, 2020, Defendant Whitmer issued Executive Order 2020-21, which was described as a "[t]emporary requirement to suspend activities that are not necessary to sustain or protect life." On April 9, 2020, Defendant Whitmer issued Executive Order 2020-42, which "reaffirm[ed] the measures set forth in Executive 2020-21, clarif[ied] them, and extend[ed] their duration to April 30, 2020." The executive order took effect "on April 9, 2020 at 11:59 pm." When Executive Order 2020-42 took effect, it rescinded Executive Order 2020-21. (Muise Decl. ¶¶ 2, 3, Ex. A).

[3] Defendants Whitmer, Telgenhof, Mackie, and Vailliencourt are sued in their official capacity only. (*See* Compl. ¶¶ 15, 17, 19, 21 [Doc. No. 1]). A suit against a government official in his or her official capacity is essentially a suit against the government. *Ky. v. Graham*, 473 U.S. 159, 166 (1985). Prospective declaratory and injunctive relief are available in actions against state officials (and County officials enforcing state law) 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.*

By its own terms, Executive Order 2020-42 will remain in effect until April 30, 2020 at 11:59 pm. However, it is more likely than not that Defendant Whitmer will extend the measures challenged here beyond April 30, 2020 via a new executive order. Defendant Whitmer publicly expressed a desire to extend the measures of Executive Order 2020-42 into June 2020. (*See* https://www.bridgemi.com/michigan-government/michigan-gov-whitmer-asks-legislature-extend-emergency-powers-70-days). And there are reports that another outbreak of COVID-19 this Fall is possible.

Executive Order 2020-42, 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*:
>
> 1. *To engage in outdoor physical activity*, consistent with remaining at least six feet from people from outside the individual's household. Outdoor physical activity *includes walking, hiking, running, cycling, kayaking, canoeing, or other similar physical activity*, as well as any comparable activity for those with limited mobility.
>
> * * *
>
> 6. To *obtain necessary services or supplies* for themselves, their family or household members, *their pets*, and their vehicles.
>
> A. 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.* Individuals may also leave the home to drop off a vehicle to the extent permitted under section 9(i) of this order.
>
> * * *
>
> 7. To care for a family member *or a family member's pet* in another household.
>
> * * *
>
> b. Individuals may leave their home or place of residence, and travel as necessary:
>
> 1. *To return to a home or place of residence from outside the state*.
>
> 2. *To leave this state for a home or residence elsewhere*.
>
> 3. Between two residences in this state, through April 10, 2020. *After that date, travel between two residences is not permitted.*
>
> * * *
>
> c. *All other travel is prohibited,* including all travel to vacation rentals.

(Muise Decl. ¶ 3, Ex. A [emphasis added]).

Plaintiff Beemer and members of her household frequently travel to her cottage in Charlevoix County. She would often leave from her residence in Saginaw, Michigan and travel to the cottage on a Thursday, remaining at her cottage over the weekend and returning late on Sunday or early Monday morning. Her cottage is a second home, and it is her private retreat from the daily grind of her law practice. (Beemer Decl. ¶ 4).

Plaintiff Cavanaugh and members of his household frequently travel to his cottage. It was a Cavanaugh family tradition to spend Easter at the cottage. (Cavanaugh Decl. ¶ 3).

Under the measures set forth in Executive Order 2020-42, if Plaintiffs Beemer or Cavanaugh were to travel to their cottages, they would be subject to prosecution for violating the executive order. As a result, Plaintiffs have ceased their travel and have thus been denied the use

and enjoyment of their private property by the government.[4] (Beemer Decl. ¶¶ 5, 6; Cavanaugh Decl. ¶ 4). In fact, as a result of Executive Order 2020-42, Plaintiff Cavanaugh and his family had to cancel their Easter tradition. (Cavanaugh Decl. ¶ 4). Plaintiffs have no recourse for this deprivation of their property rights other than seeking redress in a court of law, which they are doing here. (Beemer Decl. ¶ 6; Cavanaugh Decl. ¶ 4).

There is little to no chance that Plaintiffs Beemer or Cavanaugh would cause the spread of COVID-19 by travelling with members of their households from their residences in Saginaw and Brighton to their cottages in Charlevoix County. In fact, they and members of their households are more isolated at their cottages than when they are at their primary residences. (Beemer Decl. ¶ 7; Cavanaugh Decl. ¶ 5).

Under Executive Order 2020-42, a Wisconsin resident, as just one example, could travel from his State to his cottage in Charlevoix County, Michigan without violating Executive Order 2020-42. Prohibiting individuals from traveling from one place of residence in the State to another place of residence or cottage within the State has no real or substantial relation to promoting the objectives of Executive Order 2020-42, particularly in light of the numerous exceptions permitted under the order. (*See* Muise Decl., ¶ 3, Ex. A [Executive Order 2020-42 at 10/19).

Following the issuance of Executive Order 2020-21, and reaffirmed in Executive Order 2020-42, Defendant Whitmer permits marijuana businesses to remain open during this pandemic. In fact, pursuant to the Michigan Marijuana Regulatory Agency, because Secretary of State

[4] Plaintiff Beemer also fears that she could jeopardize her Michigan law practice if she violated the executive order. Defendant Whitmer was quoted in the news on or about April 1, 2020, as follows: "You know, just about every business in the state has some sort of license, from the state of Michigan or not, and so we've encouraged them not to play fast and loose with this order because their licenses could be in jeopardy as a result." (Beemer Decl. ¶ 5).

offices are closed and "individuals may not be able to renew their driver's licenses or government-issued identification cards while the Executive Order is in effect . . , licensed provisioning centers and adult-use retailers are temporarily allowed to sell or transfer marijuana to a patient, caregiver, or customer who has an expired driver license or government-issued identification card during home delivery and curbside sales." (Muise Decl. ¶ 4, Ex. B [MRA Advisory Bulletin]).

For the past ten years, Plaintiff Cavanaugh has worked hard to develop and expand his landscaping business, Cavanaugh's Lawn Care LLC. As a result of Defendant Whitmer's executive orders, his company came to an abrupt halt. The early spring brought an early start to the season. Eleven of Plaintiff Cavanaugh's fulltime employees had returned to work for two weeks before the shutdown. One additional, fulltime employee was returning from a trip abroad. Plaintiff Cavanaugh had high hopes of getting ahead of the workload and having a normal start to the season. As a result of Defendant Whitmer's shutdown of his business, Plaintiff Cavanaugh was unable to perform his obligations under existing contracts and as a direct result missed out on approximately $25,000 for spring cleanups, $12,000 for fertilizing for first round preemergent, $30,000 for mowing for the month of April, and $35,000 for landscape installs. In fact, his business has been losing approximately $5,000 to $6,000 a day in revenue. The lost revenue is impossible to replace. Eighty percent of Plaintiff Cavanaugh's business is contract work with existing customers. Consequently, the measures set forth in Defendant Whitmer's executive order have substantially impaired Plaintiff Cavanaugh's contract obligations, have no reasonable basis, and are entirely inappropriate for their intended purposes, especially in light of the stated exceptions to the executive order. (Cavanaugh Decl. ¶¶ 6, 7, Ex. A [Sample Contract]; *see also* ¶ 9 [noting that metro parks permit landscaping]).

There is little to no chance that Plaintiff Cavanaugh's landscaping business will spread COVID-19. Plaintiff Cavanaugh's employees practice social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the employee's household. The business is an outdoor business, which can operate without any personal contact with customers and with minimal to no contact between employees. Indeed, there is far less likelihood of Plaintiff Cavanaugh's business spreading COVID-19 than other businesses that Defendant Whitmer permits under her executive orders, specifically including hardware stores, grocery stores, gas stations, marijuana businesses, and pet stores. (Cavanaugh Decl. ¶ 8).

During his free time, which he now has in abundance due to the fact that Defendant Whitmer's executive orders have shut down his business, Plaintiff Cavanaugh enjoys time with his son fishing in his boat on Lake Charlevoix. However, Defendant Whitmer's executive order has now stripped that away from him as well. Under her executive order, Defendant Whitmer permits kayaking or canoeing, but arbitrarily prohibits the use of boats with motors. (Cavanaugh Decl. ¶ 10). Plaintiff Beemer is likewise prohibited from boating with her family members on Lake Charlevoix as a result of the executive order. (Beemer Decl. ¶ 8).

Plaintiff Muise served as an officer on activity duty in the United States Marine Corps for thirteen years. He was an infantry officer, he is a veteran of Operations Desert Shield and Desert Sword, and he trained with 42 Commando, British Royal Marines. Plaintiff Muise resigned his commission as a Major in 2000. (Muise Decl. ¶ 5).

Plaintiff Muise has a valid Michigan Concealed Pistol License. He is professionally trained in the use of firearms, he legally owns firearms, and he is a staunch defender of the Second Amendment, which constitutionally guarantees him the right to bear arms for self-

defense, defense of his family, and for the defense of a free State. He also uses firearms to hunt in Michigan and in other States. (Muise Decl. ¶ 6).

To support his right to bear arms, which necessarily includes the right to purchase firearms and ammunition, Plaintiff Muise patronizes local gun shops, specifically including a gun shop located in Washtenaw County. (Muise Decl. ¶ 7).

Executive Order 2020-42 orders all nonessential businesses and activities to cease. Though this order exempts "critical infrastructure," Defendant Whitmer references an outdated list of such industries (issued March 19, 2020) rather than the most current federal guidance (issued March 28, 2020) that designates firearm and ammunition retailers as critical.[5] This deliberate action effectively makes gun stores and firing ranges in Michigan nonessential. (Muise Decl. ¶¶ 8-10, Ex. A [Executive Order 2020-42 at 10/19 (citing March 19, 2020 guidance and stating, "This order does *not* adopt any subsequent guidance document released by this same agency.")]), Ex. C [March 19, 2020 guidance], Ex. D [March 28, 2020 guidance]).

Consequently, Executive Order 2020-42 makes it a crime *to travel* to gun stores or gun ranges. Yet, the order permits individuals to travel to buy food for a pet, marijuana, Lotto tickets, or liquor, among other items. (Muise Decl. ¶¶ 12, 13).

Due to the panic caused by the pandemic, and the unemployment, loss of income, poverty, and uncertainty caused by Defendant Whitmer's executive orders, owning and possessing firearms is critically important at this time. (Muise Decl. ¶ 14).

[5] Per the March 28, 2020 guidance, "Workers supporting the operation of firearm, or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges" are considered part of the "Essential Critical Infrastructure Workforce." (Muise Decl. ¶ 11, Ex. D [March 28, 2020 guidance at 8/19]).

Plaintiff Muise and his wife have been blessed with twelve children and ten grandchildren (with two more grandchildren expected by June). Three of his adult children are married and reside locally in homes they own in Michigan, and two of his adult children reside locally in rental properties in Michigan. His other seven children reside at his home in Superior Township. (Muise Decl. ¶ 15).

On most Sundays and Holy Days, the family would gather at Plaintiff Muise's home for a meal, fellowship, and prayer. (Muise Decl. ¶ 16).

Plaintiff Muise and his family are devout Catholics. Because of COVID-19, there are no public Masses in the Lansing Diocese. However, Jesus Christ taught that where two or more gather in His name, He is present. (Matthew 18:20). Plaintiff Muise would like his family to gather together on Sundays and other Holy Days to associate for a meal, fellowship, and prayer, and thus gather as a family in Christ's name. During these gatherings, Plaintiff Muise's family members would adhere to social distancing measures recommended by the Centers for Disease Control and Prevention. Under the measures set forth in Executive Order 2020-42, it is now a crime in Michigan to engage in such family associations and gatherings. (Muise Decl. ¶ 17).

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." *See also 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."

Here, we have an executive order that is currently in effect and being enforced to criminalize and thus restrict fundamental freedoms protected by the United States and Michigan Constitutions. There is nothing hypothetical about Plaintiffs' challenge. Plaintiffs' standing to advance this challenge to an executive order that criminalizes constitutionally protected activity is well established.

II. The Pandemic Does Not Empower the Governor to Infringe Fundamental Rights Nor Does It Deprive this Court of Its Duty and Power to Say So.

Neither *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), nor this current pandemic deprives this Court from declaring the challenged measures of Executive Order 2020-42 unlawful and enjoining their enforcement.

In *Jacobson*, amid a smallpox outbreak, a city (acting pursuant to a state statute) mandated the vaccination of all of its citizens. The Court upheld the statute against a Fourteenth Amendment challenge, clarifying that the State's action was a lawful exercise of its police powers and noting that, "[u]pon 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. While the Court in *Jacobson* urges deferential review in times of emergency, it clearly demands that the courts enforce the Constitution. *See id.* at 28. Indeed, the Court explicitly contemplates an important backstop role for the judiciary: "[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, *it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*" *Id.* at 30 (emphasis added); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) (citing *Jacobson* for the proposition that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims").

Under *Jacobson*, therefore, a State's emergency response can still be unlawful if it impinges on a fundamental right in a "plain, palpable" way or has "no real or substantial relation" to the public safety concerns at issue. *Jacobson*, 197 U.S. at 31. Accordingly, per *Jacobson*, requiring a vaccination for a disease that is the source of the public emergency is

directly related to the government's public safety concerns. The same is not true of the challenged measures imposed by Executive Order 2020, as we explain in this brief.

III. 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). Plaintiffs satisfy each of the elements.

IV. Plaintiffs Satisfy the Standard for Granting the Requested Injunctive Relief.

A. Plaintiffs' Likelihood of Success on the Merits.

1. Right to Association.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). The Sixth Circuit echoed this fundamental understanding, stating, "Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech." *Connection*

Distributing Co., 154 F.3d at 295 (citing *NAACP v. Ala.*, 357 U.S. 449, 460 (1958)). "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

As noted by the Sixth Circuit, "The Constitution protects two distinct types of association: (1) freedom of expressive association, protected by the First Amendment, and (2) freedom of intimate association, a privacy interest derived from the Due Process Clause of the Fourteenth Amendment but also related to the First Amendment."[6] *Anderson v. City of LaVergne*, 371 F.3d 879, 881 (6th Cir. 2004).

It cannot be gainsaid that the right of family members to associate to further their religious beliefs is fundamental. *See Roberts*, 468 U.S. at 619-20 ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. . . . As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."); *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (stating that the challenged law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"). And this association should be afforded its greatest protection in one's private

[6] Plaintiff Muise advances his right to association under the First and Fourteenth Amendments. (*See* Compl. ¶¶ 58, 76). However, because the family gatherings are principally centered around the sharing of the family's Catholic faith, Plaintiff advances the claim principally under the First Amendment. *Anderson*, 371 F.3d at 881 ("[T]he Supreme Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, *and the exercise of religion*.") (internal quotations and citation omitted) (emphasis added). Nonetheless, the executive order's restriction fails under the First and Fourteenth Amendments.

home. *See, e.g., Frisby v. Schultz*. 487 U.S. 474, 484 (1988) ("Our prior decisions have often remarked on the unique nature of the home, the last citadel of the tired, the weary, and the sick, and have recognized that preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.") (internal quotations and citations omitted).

The government's total ban of this right under Executive Order 2020-42 must satisfy the highest level of strict scrutiny. *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575 (1987) ("We think it obvious that [an absolute ban on activity protected by the First Amendment] cannot be justified even [in] a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech."); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (acknowledging that in a traditional public fora, "the government may not prohibit all communicative activity"); *Anderson*, 371 F.3d at 882 ("A direct and substantial interference with intimate associations is subject to strict scrutiny. . . .") (internal quotations and citation omitted). Moreover, Executive Order 2020-42 expressly exempts "a place of religious worship, when used for religious worship" (Muise Decl. ¶ 3, Ex. A [Executive Order 2020-42 at ¶ 13]), but it does not exempt a private home from being used by immediate family members to gather and worship as a family. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of [First Amendment activity] 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.").

Here, the government, by operation of the measures set forth in Executive Order 2020-42, makes it a ***crime*** for Plaintiff Muise to associate with his *immediate* family members *in his own*

home to share a meal and their faith. Our Constitution does not permit such an infringement of personal liberty secured by the First and Fourteenth Amendments.

2. Second Amendment and Article I, §6.

Both the United States and Michigan Constitutions grant individuals a right to keep and bear arms for self-defense and to ensure the security of a free State. The Second Amendment to the United States Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., Am. II. Article 1, § 6 of the 1963 Michigan Constitution, which is Michigan's equivalent to the Second Amendment, states, "Every person has a right to keep and bear arms for the defense of himself and the state." The Second Amendment is fully applicable to the states through the Fourteenth Amendment. *See McDonald v. City of Chi.*, 561 U.S. 742, 791 (2010) (holding that the "Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment"); *Meeks v. Larsen*, 611 F. App'x 277, 286 (6th Cir. 2015) (same).

The Second Amendment guarantees the individual right to possess and carry weapons in case of confrontation. "At the core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *People v. Deroche*, 829 N.W.2d 891, 894 (Mich. Ct. App. 2013) (internal quotations and citations omitted). Moreover, the right to keep and bear arms "implies a corresponding right to obtain the bullets necessary to use them," *Jackson v. City & Cnty. S.F.*, 746 F. 3d 953, 967 (9th Cir. 2014) (internal quotation marks omitted), and "to acquire and maintain proficiency in their use," *Ezell v. Chi.*, 651 F. 3d 684, 704 (7th Cir. 2011). *See also D.C. v. Heller*, 554 U.S. 570, 617-18 (2008) (citing T. Cooley, *General Principles of Constitutional Law* 271 (2d ed. 1891) (discussing the implicit right to train with weapons)); *United State v. Miller*, 307 U.S. 174, 180 (1939) (citing 1 H.

Osgood, *The American Colonies in the 17th Century* 499 (1904) (discussing the implicit right to possess ammunition)); *Andrews v. State*, 50 Tenn. 165, 178 (1871) (discussing both rights).

In sum, without protection for these closely related rights (purchasing firearms and ammunition and training with firearms) the Second Amendment would be toothless. *See Ezell*, 651 F.3d at 704 ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.").

The Sixth Circuit has adopted a two-step inquiry to determine whether government action violates the Second Amendment. *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018). First, the *burden is on the government* to establish "that the challenged statute regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 Bill of Rights ratification or 1868 Fourteenth Amendment ratification." *Stimmel*, 879 F.3d at 204. If the government can meet this burden, then "the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review." *Id*. However, "[i]f the government offers historical evidence that is inconclusive or suggests that the regulated activity is *not* categorically unprotected, [then the court] must inquire into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." *Id.* (internal alterations omitted). In this second step, the court must "determine and apply the appropriate level of heightened means-end scrutiny, given that the Supreme Court has rejected rational-basis review in this context." *Id.*

To determine whether to apply intermediate or strict scrutiny, the court must look at "(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the

law's burden on the right." *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) (internal quotation marks omitted).

Under the first prong, and as demonstrated above, Executive Order 2020-42 regulates activity (purchasing firearms and ammunition and training with them) that falls within the scope of the Second Amendment. In fact, it regulates activity that goes to the "core" right of the Second Amendment—it prohibits law-abiding citizens from purchasing firearms and ammunition for the protection of their "hearth and home." *See supra*; *Heller*, 554 U.S. at 634, 635; *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) ("What we know from [*Heller* and *McDonald*] is that Second Amendment guarantees are at their zenith within the home."). At stake here is a "basic right," *McDonald*, 561 U.S. at 767, "that the Framers and ratifiers of the Fourteenth Amendment counted . . . among those fundamental rights necessary to our system of ordered liberty," *id*. at 778. Indeed, "[t]he [Supreme] Court [in *Heller*] went to great lengths to emphasize the special place that the home—an individual's private property—occupies in our society." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1259 (11th Cir. 2012). Here, the challenged executive order substantially burdens this fundamental right. The burden imposed is not merely incidental.

Accordingly, turning to the second prong, "any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). Defendants cannot satisfy this highest level of scrutiny under the law, particularly in light of the exceptions permitted under the challenged executive order, as noted in the text above and discussed further below. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("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 Republican Party v. White*, 536 U.S. 765, 780 (2002) (noting that as a means of pursuing its alleged objectives, the government cannot enact regulations that are "so woefully underinclusive as to render belief in [its stated] purpose a challenge to the credulous"). In addition to failing strict scrutiny, the challenged measures of Executive Order 2020-42 cannot satisfy intermediate scrutiny under the Second Amendment.

While the Supreme Court "has not definitively resolved the standard for evaluating Second Amendment claims, . . . the Courts of Appeals generally evaluate Second Amendment claims under intermediate scrutiny." *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J. dissenting from denial of writ of certiorari); *see also Stimmel*, 879 F.3d at 206, 207 ("We hold that intermediate scrutiny is warranted for our review of [a statute prohibiting domestic violence offenders from having guns]" because the statute "places a substantial burden on [Second Amendment] right, but does not touch the Second Amendment's core."); *Tyler*, 837 F.3d at 691 (applying intermediate scrutiny to a Second Amendment challenge by a person who was involuntarily committed).

"Under intermediate scrutiny, the government must state a significant, substantial, or important objective and establish a reasonable fit between the challenged restriction and that objective." *Stimmel*, 879 F.3d at 206, 207 (internal quotation marks omitted).

While curbing the spread of a virus may well qualify as "a significant, substantial, or important objective" of the government—in fact, the objective may be compelling—that alone does not end the inquiry. The government also has the burden of establishing a "reasonable fit" between the challenged restriction and its objective under intermediate scrutiny, *see Stimmel*, 879

F.3d at 206, 207, or that the burden is narrowly tailored and the least restrict means of accomplishing that objective under strict scrutiny, *see generally Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000) ("The Due Process Clause provides heightened protection against government interference with certain fundamental rights and liberty interests. Government actions that burden the exercise of those fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest.") (internal quotations and citations omitted).

It is this latter burden that the government fails to satisfy (under strict or immediate scrutiny). *See, e.g.*, *Ezell*, 651 F.3d at 709 (holding that a ban on gun ranges within a city violated the Second Amendment because "the City produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft").

Here, the Executive Order permits individuals to travel to pet stores to purchase food for their goldfish, to travel to a convenience store to purchase Lotto tickets, to travel to a grocery store to purchase ice cream, to travel to stores to purchase marijuana, among other exceptions, but Plaintiff Muise and other law-abiding Michigan residents are prohibited from traveling to gun stores/gun ranges to purchase firearms and ammunition and to train with them. This is, "beyond all question, a plain, palpable invasion of rights secured by the" Second Amendment to the U.S. Constitution and Article I, §6 of the Michigan Constitution.

3. Fourteenth Amendment.

The Fourteenth Amendment provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court addressed the question of "whether the statute as

construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment." *Id*. at 399. As stated by the Court:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . *The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive* <u>*but is subject to supervision by the courts*</u>.

Id. at 399-400 (emphasis added).

a. Due Process—Vagueness.

As stated by the Sixth Circuit:

> We have recognized that the vagueness doctrine has two primary goals: (1) to ensure fair notice to the citizenry and (2) to provide standards for enforcement by police, judges, and juries. *Columbia Natural Res. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995). With respect to the first goal, the Supreme Court has stated that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1925) (cited in *Tatum*, 58 F.3d at 1105). With respect to the second goal, the Supreme Court stated that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).
> The Court has also held that "the degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). A more stringent test applies if the provision interferes with constitutional rights, and a less stringent test applies if the provision concerns civil rather than criminal penalties. *Id.* at 499.

Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 551 (6th Cir. 2007).

As set forth in the Complaint and in this brief, the challenged measures of Executive Order 2020-42 "lack any rational basis, are arbitrary, capricious, and vague, have no real or substantial relation to the objectives of the order, and are a palpable invasion of rights secured by fundamental law in violation of the Due Process Clause of the Fourteenth Amendment." (Compl. ¶ 58). The challenged measures are not simply suggestions—they are mandates that carry with them criminal penalties. There is no rational basis for permitting individuals to travel to purchase pet supplies, Lotto tickets, marijuana, or liquor, but prohibit individuals from travelling to purchase firearms or to visit their own cottages within the state. There is no rational basis for permitting out-of-state residents to travel to their cottages within the State but prohibiting Michigan residents to travel to their cottages within the State. There is no rational basis for designating and thus permitting some businesses as essential or critical infrastructure to operate—businesses such as pet stores, marijuana retailers, and liquor stores—but prohibiting firearms retailers or businesses that can operate safely, such as Plaintiff Cavanaugh's landscaping business. There is no rational basis for permitting "places of worship" to operate but prohibiting immediate family members to meet at their private homes to pray as a family. Indeed, the below stated exceptions to intrastate travel "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis":

> 1. *To engage in outdoor physical activity*, consistent with remaining at least six feet from people from outside the individual's household. Outdoor physical activity *includes walking, hiking, running, cycling, kayaking, canoeing, or other similar physical activity*, as well as any comparable activity for those with limited mobility.
>
> * * *
>
> 6. To *obtain necessary services or supplies* for themselves, their family or household members, *their pets*, and their vehicles.

In the final analysis, the challenged measures of Executive Order 2020-42 violate the fundamental right to due process.

b. Due Process—Right to Travel.

"[T]he Due Process Clause of the Fourteenth Amendment protects the 'right to travel locally through public spaces and roadways.'" *Cole v. City of Memphis*, 839 F.3d 530, 535 (6th Cir. 2016) (quoting *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002)). "To avoid [] disorder, state and local governments should be afforded some degree of flexibility to regulate access to, and use of, the publicly held instrumentalities of travel." *Id*. at 536 (internal quotation marks and alterations omitted). To determine what degree of scrutiny to apply, the court looks to the severity of the restriction, *comparable to First Amendment free speech tests*. If a travel restriction regulates the time or manner of access to a place, it is subject to intermediate scrutiny. *Id*. at 537. If it broadly limits access, *as in this case*, it is subject to strict scrutiny. *Id*.

In *Cole v. City of Memphis*, a statute cleared the streets in a two-block radius for two hours on weekend mornings and after special events. *Id*. at 538. The court determined that this is a narrow place restriction subject to intermediate scrutiny. *Id*. Because the city failed to show any conditions or potential conditions for the sweep during the specified times, the ordinance failed intermediate scrutiny. *Id*. at 539.

In contrast, in *Johnson v. City of Cincinnati*, an ordinance prohibited individuals from entering certain drug-exclusion zones for up to 90 days if an individual was arrested or taken into custody in one of the zones for a drug related offense. *Johnson*, 310 F.3d at 487. Because the ordinance broadly prohibited individuals' access to entire neighborhoods, the court applied strict scrutiny. *Id*. at 502. The court determined that the ordinance failed strict scrutiny because it

broadly prohibited access to a large metropolitan district regardless of the reason for travel (it excluded innocent travel and travel to obtain drugs). *Id*. at 503.

Here, the executive order's overly broad travel restriction cannot survive strict scrutiny, the highest scrutiny under the law, particularly in light of the exceptions permitted. *See City of Hialeah*, 508 U.S. at 547.

Regardless, the restriction fails intermediate scrutiny as well. The Sixth Circuit's ruling in *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011), further demonstrates this point. In *Saieg*, the court struck down a content-neutral restriction on leafletting, applying intermediate scrutiny and 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 (emphasis added). The same is true here. The challenged measures of Executive Order 2020-42 fail intermediate scrutiny because they do not serve a substantial government interest as evidenced by Defendant Whitmer's willingness to make numerous and irrational exceptions to the restrictions—exceptions which we have recounted repeatedly throughout this brief.

c. Due Process—Right to Property.

Plaintiffs own real property in this State—their cottages. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law."). Executive Order 2020-42 deprives Plaintiffs of their cognizable property interest in the quiet use and enjoyment of their real property in violation of the Fourteenth Amendment. *See Arill v. Maiz*, 992 F. Supp. 112, 117 (D.P.R. 1998) (holding that

the complaint fully alleged a due process claim under § 1983 based on the deprivation of a cognizable property interest in the plaintiffs' quiet use and enjoyment of their property).

d. Equal Protection.

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 v. Wayne Cnty.*, 805 F.3d 228, 256 (6th Cir. 2015) (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 set forth in this brief, the challenged measures of Executive Order 2020-42 burden fundamental rights (First and Second Amendments and Due Process right to travel) in violation of the equal protection guarantee of the Fourteenth Amendment. Similarly, as set forth in this brief, the challenged measures lack any rational basis and harm Plaintiffs' interests in violation of the Equal Protection Clause of the Fourteenth Amendment. *See supra*.

4. Contract Clause.

Executive Order 2020-42 has substantially impaired the contracts between Plaintiff Cavanaugh and his clients, in violation of the Contracts Clause of the United States Constitution. This impairment will continue absent declaratory and injunctive relief. In fact, Plaintiff Cavanaugh is suffering irreparable harm because it is not possible for him to recoup his lost business and revenue due to the nature of his business—the early Spring has come and gone.

Under the United States Constitution, a State governor cannot substantially impair a private citizen's contractual obligations, particularly when fulfilling the contracts, as is the case with Plaintiff Cavanaugh's landscaping business, poses no harm to public health and safety. The Contracts Clause of the United States Constitution states, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" U.S. Const. Art. I, § 10. "It long has been established that the Contracts Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 17 (1977) (citing *Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819); *Fletcher v. Peck*, 10 U.S. 87 (1810)).

In its most recent decision addressing the Contracts Clause, the United States Supreme Court reaffirmed its long-standing two-part analysis of state laws that impair private contracts:

> To determine when such a law crosses the constitutional line, this Court has long applied a two-step test. The threshold issue is whether the state law has operated as a substantial impairment of a contractual relationship. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose.

Sveen v. Melin, 138 S. Ct. 1815, 1821-22 (2018) (internal citations and quotation marks omitted).

In the instant case, Defendant Whitmer's executive order goes to the heart of Plaintiff Cavanaugh's contractual bargain with his clients, entirely interferes with the parties' contractual expectations, and, given the nature of the seasonal landscape services lost ($25,000 for spring cleanups, $12,000 for fertilizing for first round preemergent, $30,000 for mowing for the month of April, and $35,000 for landscape installs), Plaintiff Cavanaugh's business will never be able to recoup these losses. In fact, he is losing approximately $5,000 to $6,000 each day this order is in

effect. (Cavanaugh Decl. ¶ 6). Quite simply, as to these current contractual obligations, the impairment is not only substantial, but also permanently so. The harm is irreparable.

While Plaintiff Cavanaugh understands and accepts the state's legitimate exercise of its police power to protect its residents from the current pandemic as a "significant and legitimate public purpose," the executive order challenged here with regard to his landscape business is patently inappropriate and unreasonable given the exceptions granted under the order. *Id.* For example, individuals may walk their dogs and take leisurely walks in public provided they safeguard social distancing measures recommended by the Centers for Disease Control and Prevention. Indeed, under Defendant Whitmer's orders, as explained by her Frequently Asked Covid-19 Questions website, Michiganders may not only walk their dogs in public, they are permitted to train them on state lands. (*See* https://www.michigan.gov/coronavirus/0,9753,7-406-98810-523919--,00.html). Plaintiff Cavanaugh's landscape employees are no less capable of safeguarding social distancing than individuals walking or training their dogs. In addition, metro parks are open and maintained to allow individuals to utilize the space for leisure and exercise. (*See* https://www.michigan.gov/coronavirus/0,9753,7-406-98810-523725--,00.html). Yet, private Michigan homeowners are not permitted to allow Plaintiff Cavanaugh to maintain their lawns for leisure and exercise.

In sum, Plaintiff Cavanaugh is suffering irreparable harm and is entitled to the injunctive relief sought here. *See generally Welch v. Brown*, 551 F. App'x 804 (6th Cir. 2014) (upholding the district court's grant of a preliminary injunction, concluding, in part, that the district court did not abuse its discretion in finding that the workers had demonstrated a likelihood of success on the merits of their Contract Clause claim because the defendants' modifications impaired provisions of their contracts and collective bargaining agreements; that the district court's

finding that the workers would suffer irreparable harm in the absence of a preliminary injunction was not clearly incorrect; and the district court did not abuse its discretion by issuing the preliminary injunction, even though factors of harm to others and public interest were split).

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

The loss of a constitutional right, "for even [a] minimal period[ ] of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). As stated by the Sixth Circuit, "when reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury *is mandated*." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (emphasis added); *see also 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*).

Because "a constitutional right is being threatened or impaired" in this case, "a finding of irreparable injury is mandated."

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

In this case, the likelihood of irreparable harm to Plaintiffs is substantial. In fact, such a finding is "mandated." *See supra*. Moreover, Plaintiffs are adhering to the social distancing measures recommended by the Centers for Disease Control and Prevention, thereby mitigating the harm to Defendants' objectives. Indeed, as noted above, it is the government that has the burden of justifying the challenged restrictions on Plaintiffs' fundamental liberties protected by the United States and Michigan Constitutions.

If Defendants are restrained from enforcing the challenged measures of Executive Order 2020-42, particularly as applied to Plaintiffs, neither Defendants nor the general public will

suffer harm because Plaintiffs' activities create less of a risk of spreading COVID-19 than other similar activities expressly permitted by the order. For example, Executive Order 2020-42 permits Plaintiffs Beemer and Cavanaugh to travel to Charlevoix County to buy groceries, purchase gas, purchase food for their pets, purchase marijuana, purchase Lotto tickets, order curbside takeout from a local restaurant, or walk on the public sidewalks. Yet, if they engage in similar travel to go to their cottages, property which they own, it is a crime. Similarly, Plaintiff Muise could travel to various businesses, including a pet store to buy food for a goldfish, but he couldn't travel to a gun shop to purchase a firearm or ammunition. The executive order permits businesses such as abortion centers, pet stores, and marijuana businesses to remain open, but prohibits Plaintiff Cavanaugh from operating his outdoor landscaping business, causing substantial and irreparable harm and financial loss to him and his employees.

In the final analysis, the irreparable harm to Plaintiffs outweighs the harm to Defendants' objectives.

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

As stated by the Sixth Circuit, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079; *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 . . .").

As noted previously, Defendants' enforcement of Executive Order 2020-42 criminalizes liberties protected by the United States and Michigan Constitutions. 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

I hereby certify that this brief contains 9,145 words, exclusive of the case caption, cover sheets, any table of contents, any table of authorities, the signature block, attachments, exhibits, and affidavits, and is thus within the word limit allowed under Local Civil Rule 7.2(b)(i). The word count was generated by the word processing software used to create this brief: Word for Microsoft Office 365, Version 1904.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

I further certify that a copy of the foregoing will be sent this day via email to the following parties or counsel who have yet to enter an appearance electronically:

Defendant Telgenhof via email to Attorney Bryan Graham at bgraham@upnorthlaw.com.

Defendant Vailliencourt via email to BVailliencourt@livgov.com

Defendant Mackie via email to Attorney Michelle Billard at billardm@washtenaw.org

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