No. 22-1232

United States Court of Appeals for the Sixth Circuit

KIMBERLY BEEMER; **ROBERT JOSEPH MUISE**,

Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan; **BRIAN L. MACKIE**, in his official capacity as Washtenaw County Prosecuting Attorney; **DANA NESSEL**, in her official capacity as the Attorney General for the State of Michigan,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
HONORABLE PAUL L. MALONEY
Civil Case No. 1:20-cv-00323

APPELLANTS' PRINCIPAL BRIEF

Robert Joseph Muise, Esq.
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756

David Yerushalmi, Esq.
American Freedom Law Center
2020 Pennsylvania Avenue NW
Suite 189
Washington, D.C. 20006
(646) 262-0500

Attorneys for Plaintiffs-Appellants

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiffs-Appellants state the following:

Plaintiffs-Appellants are individual, private parties.

There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this Court hear oral argument. This case ultimately presents for review important legal issues regarding the scope of a governor's authority to issue emergency executive orders that are constantly changing and that directly infringe fundamental constitutional rights.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutions

Rules

Statutes

Other

INTRODUCTION

Benjamin Franklin famously stated, "*Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety*." Make no mistake, the COVID-19 pandemic was as much a constitutional crisis as it was a public health crisis. For *years*, American citizens, specifically including those who were residents of Michigan during this current rein of Governor Whitmer, were subject to constantly changing, tyrannical orders that imposed extreme burdens on fundamental freedoms in a way that our nation has *never* experienced in its history. The cost of these burdens is incalculable. Unfortunately, many courts did nothing, abdicating their duty to say what the law is[1] and allowing this frontal assault on liberty to proceed largely unchecked. Why have the courts allowed this to happen? Justice Gorsuch provides a likely answer:

> In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way *in times of crisis*. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. *Things never go well when we do*.

Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring) (emphasis added).

Now that the dust has settled and the pandemic is largely over, most of the more

[1] "[I]t is the 'duty of the judicial department . . . to say what the law is.'" *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

egregious "emergency" executive orders, such as the one at issue here, have expired or have been rescinded without any court ruling on whether they were constitutional in the first instance. Unfortunately, this has now provided a convenient opportunity for the courts, including the lower court here, to remain in their shelters and to refuse to answer the constitutional questions raised by these orders, thus paving the way for this constitutional crisis to repeat itself once again. This is not only a sad state of affairs for our judiciary. It is a dangerous one.

STATEMENT OF JURISDICTION

On April 15, 2020, Plaintiffs filed this action, alleging violations arising under the United States Constitution, 42 U.S.C. § 1983, and the Michigan Constitution. (Compl., R.1, PageID.1-37). The district court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1343, and jurisdiction over the state law claim pursuant to 28 U.S.C. § 1367.

On April 28, 2020, Plaintiffs filed a First Amended Complaint, advancing similar claims. (First Am. Compl., R.25, PageID.394-440).

On May 20, 2020, Governor Whitmer and Attorney General Nessel filed a motion to dismiss. (Mot. to Dismiss, R.31, PageID.451-53). They amended the motion on May 21, 2020. (Am. Mot. to Dismiss, R.35, PageID.731-33).

On February 24, 2022, the district court dismissed the motion to dismiss and dismissed the lawsuit on mootness grounds. (Order, R.47, PageID.1333-37). That

same day, the district court entered judgment, terminating the case. (J., R.48, PageID.1338).

On March 23, 2022, Plaintiffs timely filed a notice of appeal, appealing the district court's February 24, 2022, order and subsequent judgment. (Notice of Appeal, R.53, PageID.1470-72).

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE FOR REVIEW

Whether the district court erred when it dismissed on mootness grounds this lawsuit challenging Governor Whitmer's executive order (EO 2020-42) issued under the Emergency Management Act—authority which exists today—when this executive order is capable of repetition, yet evading review, Governor Whitmer voluntarily ceased the enforcement of this order, and the order violates fundamental rights protected under the United States and Michigan Constitutions.

STATEMENT OF THE CASE

I. Procedural Background.

On April 15, 2020, Plaintiffs filed this action challenging Governor Whitmer's Executive Order 2020-42. Plaintiffs alleged violations of Equal Protection, Due Process, the Contract Clause, the Second Amendment, and the Right of Association under the United States Constitution, Article 1, § 6 of the Michigan Constitution, and 42 U.S.C. § 1983. (Compl., R.1, PageID.1-17).

Plaintiffs sought a temporary restraining order (Mot. for TRO, R.7), and the court set a hearing for April 30, 2020 (Order, R.14). The magistrate judge held a status conference on April 24, 2020, and that same day Governor Whitmer issued Executive Order 2020-59, which rescinded EO 2020-42. (Order at 2, R.47, PageID.1334).

"On April 26, the parties submitted a stipulation resolving Plaintiffs' request for a temporary restraining order and for a preliminary injunction, which the Court entered on April 27." (*Id.*; *see also* Stip. & Order, R.24, PageID.389-93).

On April 28, 2020, Plaintiffs filed a First Amended Complaint. (R.25). Plaintiffs continued to assert their claims challenging EO 2020-42. However, they dropped the Contracts Clause claim and added a Free Exercise claim. (*See id.* ¶¶ 87-89, PageID.414). Plaintiffs argued that while the stipulation remedied the immediate harm, it did not resolve the underlying constitutional issues. (*See* Order at 2, R.47, PageID.1334).

On May 21, 2020, Defendants Whitmer and Nessel filed an amended motion to dismiss. (Am. Mot. to Dismiss, R.35). In their motion, Defendants argued, *inter alia*, that Plaintiffs claims were moot. (*See id.*, PageID.732).

On February 24, 2022, the district court issued its Order Dismissing Motion and Dismissing Lawsuit, concluding that Defendants' motion and Plaintiffs' claims in the amended complaint are moot. (Order at 3-5, R.47, PageID.1333-37). That same day,

the district court entered judgment, dismissing the case and terminating the action. (J., R.48, PageID.1338).

On March 23, 2022, Plaintiffs timely filed a notice of appeal, seeking review of the district court's order and judgment. (Notice of Appeal, R.54, PageID.1470). This appeal follows.

II. Decision Below.

In a relatively short opinion, the district court dismissed this case on mootness grounds. In its opinion, the district court relied heavily on the opinion issued by the Michigan Supreme Court in *In re Certified Questions from United States District Court*, 958 N.W.2d 1 (Mich. 2020). (*See* Order at 3-4, R.47, PageID.1335-36). In that case, the state's highest court held, in relevant part, (1) that the Emergency Management Act (EMA) did not permit Governor Whitmer to extend a declaration of a state of emergency or state of disaster beyond April 30, 2020, and (2) that the Emergency Powers of the Governor Act (EPGA) violated the nondelegation doctrine of Michigan's Constitution and was therefore unconstitutional. 958 N.W.2d at 9-11, 16-25.

Notably, the Michigan Supreme Court did *not* rule that the EMA was unconstitutional. That law, which served as the primary authority and basis for Governor Whitmer to issue EO 2020-42,[2] remains in effect. Additionally, the

[2] (*See* First Am. Compl., Ex. 1 [EO 2020-42], R.25-1, PageID.418-19).

Michigan Supreme Court did not hold that EO 2020-42 violated any provision of the Michigan Constitution. The court did not address the matter.

Nonetheless, the district court concluded as follows:

> The Court concludes Plaintiffs' claims and their requested remedies are moot. Whitmer rescinded EO 2020-42. The parties stipulated that EO 2020-59 did not prohibit Plaintiffs from doing what they alleged, in the initial complaint, they were prohibited from doing by EO 2020-42. And, the Michigan Supreme Court's ruling eliminated all reasonable possibilities that Whitmer could extend the state of emergency and reinstitute the restrictions about which Plaintiffs complain. The Court cannot enjoin Defendants from issuing and enforcing restrictions that they no longer have the authority [to] enact. And, following these events, there no longer exists a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

(Order at 4-5 [citation omitted], R.47, PageID.1336-37).

III. Statement of Facts.

On March 23, 2020, Governor Whitmer issued EO 2020-21, which was described as a "[t]emporary requirement to suspend activities that are not necessary to sustain or protect life." (First Am. Compl. ¶ 21, R.25, PageID.397). On April 9, 2020, Governor Whitmer issued EO 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 EO 2020-42 took effect, it rescinded EO 2020-21. (*Id*. ¶ 22, PageID.397).

By its own terms, EO 2020-42 was to remain in effect until April 30, 2020 at 11:59 pm. Though EO 2020-42 was rescinded by Governor Whitmer, today she

retains the power under the EMA to declare a state of emergency and to institute measures identical to those found in EO 2020-42 for at least 28 days. And a "willful violation" of such orders is a misdemeanor. (First Am. Compl. ¶¶ 23, 24, PageID.397).

EO 2020-42 put in place draconian measures that arbitrarily and unreasonably imposed restrictions and thus criminal sanctions on Plaintiffs' fundamental rights and liberty. (First Am. Compl. ¶ 25, PageID.398). The order stated, 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*.
>
> * * *
>
> 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.
>
> * * *
>
> 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.

(*Id*. ¶ 26, Ex. 1, PageID.398) (emphasis added).

Plaintiff Beemer and members of her household frequently travel to her cottage, property which she owns, located 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. (First Am. Compl. ¶ 27, PageID.399).

Under the measures set forth in EO 2020-42, if Plaintiff Beemer travelled to her cottage, she would have committed a criminal offense, subjecting her to prosecution for violating the executive order. As a result, Plaintiff Beemer ceased her travel and was thus denied the use and enjoyment of her private property by the government while this order was in effect. Plaintiff Beemer had no recourse for this deprivation of her property rights other than seeking redress in a court of law by bringing this action. (First Am. Compl. ¶ 28, PageID.399-400).

There is little to no chance that Plaintiff Beemer would have caused the spread of COVID-19 by travelling with members of her household from her residence in Saginaw, Michigan to her cottage in Charlevoix County. In fact, she and members of

her household are more isolated at the cottage than when they are at their home in Saginaw. (First Am. Compl. ¶ 29, PageID.400).

EO 2020-42 permitted individuals to travel from Saginaw to Charlevoix County to purchase pet food, gasoline, marijuana, Lotto tickets, and liquor, among other reasons. Under EO 2020-42, a Wisconsin or Ohio resident could have travelled from his State to his cottage in Charlevoix County, Michigan without violating the order. Thus, the order discriminated against individuals, including Plaintiff Beemer, based upon their State of residence, it impaired their right to travel, and it deprived them of the use and enjoyment of their property. Prohibiting individuals from traveling from one place of residence in the State to another place of residence or cottage within the State had no real or substantial relation to promoting the objectives of EO 2020-42, particularly in light of the exceptions permitted by the order. (First Am. Compl. ¶¶ 30-32, PageID.400).

Following the issuance of EO 2020-21, and reaffirmed in EO 2020-42 and EO 2020-59, Governor Whitmer refused to close abortion centers in Michigan even though abortion is an elective procedure and is contrary to the stated goal of the executive orders "to sustain or protect life." Moreover, it is impossible to practice social distancing in an abortion center due to the nature of the procedure. Governor Whitmer also permitted marijuana businesses to remain open during this pandemic, and she allowed these businesses "to sell or transfer marijuana" to a purchaser "who

has an expired driver license or government-issued identification card during home delivery and curbside sales." (First Am. Compl. ¶¶ 33, 34, PageID.400-01).

In contrast, there is little to no chance that a landscaping business, for example, will spread COVID-19. Yet, EO 2020-42 closed these businesses. Landscaping businesses could easily practice social distancing and other safety measures recommended by the CDC. There is far less likelihood of a landscaping business spreading COVID-19 than other businesses that Governor Whitmer permitted to remain open under her executive orders, specifically including hardware stores, convenience stores, grocery stores, gas stations, marijuana businesses, and abortion centers. (First Am. Compl. ¶ 35, PageID.401).

During her free time, Plaintiff Beemer enjoys boating on Lake Charlevoix. However, EO 2020-42 prohibited this activity. Under this executive order, Governor Whitmer permitted kayaking and canoeing, but arbitrarily prohibited the use of boats with motors. (First Am. Compl. ¶ 36, PageID.401).

Plaintiff Muise 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. 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. (First Am. Compl. ¶¶ 38, 39, PageID.402).

EO 2020-42 ordered all non-essential businesses and activities to cease. Though this order exempted "critical infrastructure," Governor Whitmer purposefully referenced an outdated list of such industries (issued March 19, 2020) rather than the more current federal guidelines (issued March 28, 2020) that designated firearm and ammunition retailers as critical. This deliberate action shut down gun stores[3] in order to deny citizens, including Plaintiff Muise, access to their Second Amendment rights. Thus, for reasons that can only be explained as political, Governor Whitmer considered Lotto, marijuana, liquor, and abortion to be essential but not firearms and ammunition. Consequently, the order also banned travel to gun stores but permitted individuals to travel to buy pet food, marijuana, liquor, and Lotto tickets, among other items. (First Am. Compl. ¶¶ 40-42, PageID.402-03).

Accordingly, EO 2020-42 prohibited Plaintiff Muise from traveling to gun stores to purchase firearms and ammunition and to travel to gun ranges to train with his firearms. Because he did not want to be subject to criminal or other sanctions for violating the executive order, Plaintiff Muise did not travel to any guns stores or ranges while EO 2020-42 was in effect. (First Am. Compl. ¶ 43, PageID.403).

[3] Governor Whitmer concedes in her brief that gun stores were closed because she considered them "non-essential." (Governor's Br. at 35, R.32, PageID.491).

Due to the panic caused by the pandemic and the uncertainty caused by Governor Whitmer's executive orders, owning and possessing firearms was critically important at this time. EO 2020-42 deprived Michigan residents, including Plaintiff Muise, of their fundamental right to use arms in defense of their "hearth and home." (First Am. Compl. ¶ 44, PageID.403).

Plaintiff Muise and his wife have been blessed with twelve children and eleven grandchildren (his family continues to grow).[4] 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. At the time this lawsuit was filed, his other seven children resided at his home in Superior Township. (First Am. Compl. ¶ 45, PageID.403).

On most Sundays, Holy Days, and other special events, the family would gather at Plaintiff Muise's home for a meal, fellowship, and prayer. The family's faith is the center of their family life. (First Am. Compl. ¶ 46, PageID.403).

Plaintiff Muise and his family are devout Catholics. Because of COVID-19, there were 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 wanted his family to gather together on Sundays, other Holy Days, and special events to associate for a meal, fellowship, and prayer, and thus gather as a family in

[4] (*See* Muise Decl. ¶ 5 at Ex. 1, R.40-1, PageID.992).

Christ's name. Such gatherings are religious worship for Plaintiff Muise. However, under the measures expressly set forth in EO 2020-42, it was a crime in Michigan to engage in such family associations and gatherings. EO 2020-42 stated that "a place of religious worship, when used for religious worship, is not subject to penalty." But there were no definitions or guidance within the executive order to explain how this exemption applied. EO 2020-59 stated that "neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place." But again, there were no definitions or guidance within the executive order to explain how this exemption applied. (First Am. Compl. ¶¶ 47-49, PageID.404). Moreover, per the order, "[s]ubject to [the exceptions in section 7], *all* public *and private gatherings of any number of people occurring among persons not part of a single household are prohibited*." (First Am. Compl. ¶ 26, R.25, PageID.398).

In addition to criminal sanctions for violating an executive order, Plaintiffs also feared that they could jeopardize their Michigan law practices and related for-profit and non-profit business interests if they violated an executive order. Governor 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." (First Am. Compl. ¶ 51, PageID.404).

Governor Whitmer has expressly stated her willingness to "return to her old ways," stating that the State must "be nimble enough to go backward, on occasion." Indeed, new variants of COVID continue to emerge,[5] and each year there is a flu season. Some years are far worse than others. Consequently, restrictions like those challenged here will easily and predictably become the "new norm." (First Am. Compl. ¶¶ 57-60, PageID.408).

The public interest in determining the legality of the executive orders was on full display on April 15, 2020, when thousands of Michigan residents and other demonstrators descended upon the State Capitol in Lansing, Michigan in what was called "Operation Gridlock" to publicly protest Governor Whitmer's restrictions on their liberty. (First Am. Compl. ¶ 61, PageID.408).

LIFTING THE PANDEMIC VEIL

It is the government's burden to justify its restriction on a fundamental liberty; it is not a private citizen's burden to justify his freedom. The Bill of Rights is a brake on the power of government; it is not a conferring of rights by the government only to be withheld at the whim of a government official.

[5] Per the CDC, "New variants of the [COVID-19] virus are expected to occur." (https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html) (last visited Apr. 28, 2022).

Throughout this pandemic, government officials (including Governor Whitmer) kept moving the goal posts. They felt compelled to lord over nearly every detail of our lives, and they justified this power grab by relying on fear and a parade of horribles. For example, in their brief filed below, Governor Whitmer and Attorney General Nessel asserted, without supporting evidence or data, that "[a]s the virus ravaged southeastern Michigan, health systems were quickly at or above capacity. Medical supplies were dwindling, and beds in intensive care units were in short supply." (Governor's Br. at 22, R.32, PageID.478). The facts did not support this assertion.[6] Based on (widely considered inflated) data from the Michigan Department of Health and Human Services, the CDC, and USAfacts.org (which the CDC has cited and relied upon for some of its data), during the month of April 2020, the average weekly percentage of *available* ICU beds in Michigan ranged from 20.89% to 31.50%, and the average weekly percentage of *available* inpatient hospital beds in Michigan ranged from 36.17% to 39.54%. (Korkes Decl. ¶¶ 3-5, Ex. A, at Ex. 2,

[6] Plaintiffs requested that the district court take judicial notice of the adjudicative facts found in the documents attached to the declarations of Gabriella Korkes and Plaintiff Muise. (*See* Pls.' Resp. in Opp'n to Defs.' Mots. to Dismiss at 9, R.40, PageID.959). Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts. *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002); Fed. R. Evid. 201. Pursuant to Rule 201, "[p]ublic records and government documents are generally considered 'not to be subject to reasonable dispute.' This includes public records and government documents available from reliable sources on the Internet." *United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) (internal citation omitted) (citing cases). A court must take judicial notice "if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). Plaintiffs repeat that request here.

R.40-2, PageID.1010-13). During the first two weeks in May 2020, the average weekly percentage of *available* ICU beds in Michigan ranged from 31.80% to 33.93%, and the average weekly percentage of *available* inpatient hospital beds in Michigan ranged from 35.24% to 36.60%. (*Id*.). There *never* was a shortage of hospital capacity. And Governor Whitmer's ban on "elective" medical procedures (except, of course, abortion) was destroying Michigan's healthcare system.[7]

According to the "Official Website of Michigan.Gov," as of May 27, 2020, there were reportedly 55,608 confirmed COVID-19 cases and 5,334 deaths statewide. The City of Detroit and Wayne County accounted for 19,999 of the cases and 2,406 of the deaths. In comparison, Saginaw County, where Plaintiff Beemer resides, reported only 1,002 cases and 107 deaths, and Washtenaw County, where Plaintiff Muise resides, reported only 1,305 cases and 97 deaths. Charlevoix County, where Plaintiff Beemer's cottage is located, reported only 15 cases and 1 death. In fact, according to Michigan's statistics as of May 27, 2020, fifty-seven (57) out of the eighty (80) counties reporting had ten (10) *or fewer* deaths associated with COVID-19.[8] Indeed, the State's pandemic was largely confined to the City of Detroit (10,872 cases), the surrounding Wayne County (9,127 cases), and the suburbs of Oakland (8,260 cases) and Macomb (6,558 cases) counties, accounting for 34,817 reported cases as of May

[7] (*See* https://www.detroitnews.com/story/news/local/michigan/2020/05/05/university-michigan-health-system-lays-off-1400-health-care-workers/3084104001/ [last visited May 27, 2020]).
[8] (Muise Decl. ¶ 2, Ex. A at Ex. 1, R.40-1, PageID.991).

27, 2020. And the same jurisdictions reported 4,151 deaths during this time from COVID-19, which was nearly 78% percent of the statewide total of 5,334 deaths. The rest of Michigan had been relatively unaffected. Yet, Governor Whitmer's statewide restrictions took *no* account of regional differences.

Additionally, when you evaluate the data based on age, 87% of the deaths occurred in people 60 or older (69% of which were 70 or older). The median age of death was 77 years.[9] Yet, Governor Whitmer's restrictions took *no* account of this difference.

Moreover, during the *peak period* of this pandemic (March through May 2020), *far more* people died in Michigan from cancer and heart disease (7,329) than from the virus (4,349).[10]

Fear mongering was used to justify unprecedented and overly broad (not to mention, unconstitutional) restrictions on personal liberty. In short, the facts do not support this frontal assault on freedom. And besides, the Constitution is a bulwark against it, but only if the courts are willing to say so.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision regarding mootness. *Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 930 (6th Cir. 2017).

[9] (Muise Decl. ¶ 2, Ex. A at Ex. 1, R.40-1, PageID.991, 994-1001).
[10] (Muise Decl. ¶ 3, Ex. B at Ex. 1, R.40-1, PageID.991, 1003-04).

SUMMARY OF THE ARGUMENT

This challenge to Governor Whitmer's emergency executive order EO 2020-42, which placed draconian restrictions on fundamental rights, is not moot as the authority to issue this order (the EMA) remains in force and the restrictions are capable of repetition, yet evading review.

Moreover, Governor Whitmer's voluntary cessation of this emergency executive order does not moot this case as the Governor is "free to return to [her] old ways," and the public has an interest "in having the legality of the practices settled," particularly in light of the important constitutional rights at issue.

ARGUMENT

I. Plaintiffs' Claims Are Not Moot.

A. Plaintiffs' Claims Are Not Moot as the Challenged Restrictions Are Capable of Repetition, yet Evading Review.

Plaintiffs' claims come within the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception applies "to situations where: '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)).

Plaintiffs satisfy both requirements for this exception. First, the challenged

executive order (EO 2020-42) was issued on April 9, 2020, and the EO stated that it would continue through April 30, 2020. (Order at 1, R.47, PageID.1333). This Order derived its authority from the EMA, which limits the emergency powers of a governor to 28 days unless additional authority is granted by the Legislature. "The EMA carries a 28-day limit on the amount of time in which the Governor can issue orders under a state of emergency before the act requires the Governor to declare an end to the emergency, unless both houses of the Legislature extend the period through a resolution." *House of Representatives v. Governor*, 943 N.W.2d 365, 371 n.8 (Mich. 2020) (citing Mich. Comp. Laws § 30-403(3)). Governor Whitmer had authority under the EMA to extend her emergency powers through April 30, 2020. *Id.* at 368 n.4 ("The Legislature approved an extension of the Governor's initial emergency declaration under the EMA until April 30."). Thus, the challenged executive order was valid under the EMA and not affected by the Michigan Supreme Court's ruling on the Emergency Powers of the Governor Act in *House of Representatives*.

The Supreme Court has found periods of up to two years to be too short to be fully litigated. *See, e.g., Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (holding that a procurement contract that expires in two years does not permit judicial review); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 390-91 (6th Cir. 2001) (holding that two years to challenge a local ordinance prohibiting individuals with a sex-crime history to work

for a sexually oriented business was too short in duration). Plaintiffs satisfy the first requirement.

Plaintiffs also satisfy the second requirement of the "capable of repetition, yet evading review" exception because this standard is a forgiving one. "Recurrence of the issue need not be more probable than not; instead, the controversy must be *capable* of repetition." *Barry v. Lyon*, 834 F.3d 706, 715 (6th Cir. 2016) (emphasis added). This standard provides that "the chain of potential events does not have to be air-tight or even probable to support the court's finding of non-mootness." *Id.* at 716. Consequently, because the Governor's executive order at issue here was "lawfully" issued pursuant to the EMA—a law which is alive and well in Michigan—it is "capable" of repetition. Under the EMA, the Governor could declare another state of emergency based upon a new COVID variant or some other asserted basis for invoking her emergency powers under the EMA *and issue precisely the same restrictions on constitutional freedoms*. There is no legislative action nor court decision preventing her from doing so.

In the final analysis, the challenged restrictions found in EO 2020-42 are capable of repetition, and these emergency executive orders by their very nature are short in duration, thus evading review. Plaintiffs' important constitutional challenge is not moot.

B. Governor Whitmer's Voluntary Cessation of EO 2020-42 Does Not Moot Plaintiffs' Claims.

When a party seeks to escape liability by claiming that it has voluntarily ceased the offending conduct, "the *heavy burden* of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party*" seeking to avoid liability. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal quotations and citation omitted) (emphasis added). As the Court noted, not only is a defendant "free to return to his old ways," *but also the public has an interest "in having the legality of the practices settled*." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (emphasis added); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10 (1982).

Consequently, "[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *W. T. Grant Co.*, 345 U.S. at 633. Thus, a claim for injunctive relief may be improper only "if the defendant can demonstrate that 'there is no *reasonable expectation* that the wrong will be repeated.' The [defendant's] burden is a *heavy one*." *Id.* (emphasis added). The Supreme Court has also instructed the lower courts to be particularly vigilant in cases such as this, warning that "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *Id*. at 632, n. 5. As the Court concluded, denying a plaintiff prospective relief "would

be justified only if it were *absolutely clear* that the litigant no longer had *any* need of the judicial protection that it sought." *Adarand Constructors, Inc.*, 528 U.S. at 224 (emphasis added).

This Court's ruling in *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), in which the Court found that the plaintiff's challenge to a university's speech restriction was not moot, is controlling here. A lengthy citation is in order. Per the Court:

> While all governmental action receives some solicitude, *not all action enjoys the same degree of solicitude*. Determining whether the ceased action "could not reasonably be expected to recur," . . . takes into account the totality of the circumstances surrounding the voluntary cessation, including the manner in which the cessation was executed.
>
> Where the government voluntarily ceases its actions by enacting new legislation or repealing the challenged legislation, that change will presumptively moot the case unless there are clear contraindications that the change is not genuine. . . .
>
> On the other hand, where a change is merely regulatory, the degree of solicitude the voluntary cessation enjoys is based on whether the regulatory processes leading to the change *involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions*.
>
> *If the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim*. . . .
>
> Here, the University notes that the new definitions were "approved by senior University officials, including the University's president." The University has not, however, pointed to any evidence suggesting that it would have to go through the same process or some other formal process to change the definitions again. Thus, the solicitude the University

> receives is the same as any *ad hoc* regulatory action would. *Which is to say that the solicitude does not relieve the University of much of its burden to show that the case is moot*. . . .
>
> The timing of the University's change also raises suspicions that its cessation is not genuine. The University removed the definitions after the complaint was filed. If anything, this increases the University's burden to prove that its change is genuine. . . .
>
> Significantly, the University continues to defend its use of the challenged definitions. Although not dispositive, *the Supreme Court has found whether the government "vigorously defends the constitutionality of its . . . program" important to the mootness inquiry*. . . .
>
> In sum, *the University has not put forth enough evidence to satisfy its burden to show that its voluntary cessation makes it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur*." . . . Therefore, Speech First's claim challenging the definitions of bullying and harassing behavior is not moot.

Id. at 767-70 (internal citations and quotations omitted) (emphasis added); *see also Johnson v. City of Cincinnati*, 310 F.3d 484, 490 (6th Cir. 2002) ("[W]e note that the City's assurance that it no longer enforces the Ordinance . . . does not render the present appeal moot. '[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'") (citations omitted).

Here, Governor Whitmer eased her restrictions just days before the Court was to hold a hearing on Plaintiffs' motion for a preliminary injunction. (*See* Order at 2, R.47, PageID.1334). Governor Whitmer has also expressed her willingness to "return to her old ways," stating that the State must "be nimble enough to go backward, on

occasion." (First Am. Compl. ¶ 57, R.25, PageID.408). Moreover, each year there is a flu season. Some years are far worse than others. Consequently, restrictions like those challenged here will easily and predictably become the "new norm," resulting in the loss of liberty. (*Id*. ¶ 60, R.25, PageID.408). In sum, Governor Whitmer is free to return to her old ways, and the public has a very strong interest in having the legality of the practices settled, as evidenced by the protests. (*Id*. ¶ 61, R.25, PageID.408). This case is not moot, and a federal court should decide the important constitutional claims advanced in this case.

II. Plaintiffs Have Advanced Important Constitutional Claims that a Court of Law Should Decide.

A. Right to Association.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). This Court 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. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (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).

"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." *Anderson v. City of LaVergne*, 371 F.3d 879, 881 (6th Cir. 2004); *see id*. ("[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 omitted).

It cannot be gainsaid that the right of family members to associate and to further their religious beliefs is fundamental, and it is protected by the First *and* Fourteenth Amendments.[11] *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."). And this association should be afforded its greatest protection in one's private 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

[11] Plaintiff Muise advances his right to association claim under the First and Fourteenth Amendments. (First Am. Compl. ¶¶ 83-86, R.25, PageID.413-14).

home . . . and have recognized that preserving the sanctity of the home . . . is surely an important value.") (internal quotations and citations omitted).

The government's total ban of this right under the challenged measures must satisfy 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."); *Anderson*, 371 F.3d at 882 ("A direct and substantial interference with intimate associations is subject to strict scrutiny. . . ."") (internal quotations and citation omitted).

Due to the numerous exceptions, the challenged restriction fails this highest level of scrutiny. *See Church of the Lukumi Babalu Aye, Inc. 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.") (hereinafter "*Lukumi*") (internal quotations and citation omitted). For example, the challenged measures expressly exempted "a place of religious worship, when used for religious worship," which was later modified to state that "neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place," but the executive orders *never* expressly exempted a private

home from being used by immediate family members (not of the same household, as in the case of Plaintiff Muise) to gather for fellowship and worship as a family. Per the order, "[s]ubject to [the *exceptions* in section 7], *all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited*." (First Am. Compl. ¶ 26, R.25, PageID.398). Accordingly, private home gatherings for fellowship and religious worship were prohibited. Yet, individuals were permitted to associate to engage in sporting, recreational, and other activities such as shopping at a grocery store—activities that are *not* protected by the Constitution. (*See id.*). Also, no reasonable person (or law enforcement officer) reading the executive orders would conclude that a private residence was a place of religious worship and thus exempt from the criminal proscriptions of the order. Indeed, the law is otherwise.[12] This last point further highlights the vagueness problems with the challenged measures. (*See infra* sec. II.D.1.).

[12] Plaintiffs are aware of no legal basis for concluding that a "place of religious worship" is a private residence *absent a specific definition stating as such*—which, of course, the challenged order did not include. *See, e.g.,* Mich. Comp. Laws § 205.94m(2)(a) ("Regularly organized church or house of religious worship" means a religious organization qualified under section 501(c)(3) of the internal revenue code of 1986); Mich. Comp. Laws § 205.54p(2)(a) (same); Mich. Comp. Laws § 211.7s ("Houses of public worship includes buildings or other facilities owned by a religious society and used predominantly for religious services or for teaching the religious truths and beliefs of the society."); *see also* Superior Twp. Zoning Ordinance Art. 17 § 32 ("Church, Temple, Place of Worship or Religious Institution. A type of institutional use or site used for the regular assembly of persons, for the conducting of religious services, and for related accessory uses . . .").

B. Free Exercise of Religion.

"The principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Lukumi*, 508 U.S. at 523. In *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015), the *en banc* court stated:

> 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. . . . The government cannot prohibit an individual from engaging in religious conduct that is protected by the First Amendment. . . .

Id. at 255-56. Here, Plaintiff Muise wanted his family to gather together to associate for a meal, fellowship, and prayer, and thus gather as a family in Christ's name. Such gatherings are religious worship for Plaintiff Muise. However, under the challenged restriction, it was a crime to do so. Our Constitution does not permit such a direct infringement of personal liberty secured by the First Amendment. *Id*. Additionally, in light of the numerous exceptions permitted, the restriction fails strict scrutiny. Per the order, individuals not residing in the same household could gather to engage in secular activities, such as recreational sports or shopping at grocery or hardware stores, but they could not gather together to pray in their homes. The restriction is unlawful. *See Lukumi*, 508 U.S. at 547.

C. 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. U.S.

Const. amend. II; Mich. Const. art. I § 6. The Second Amendment is fully applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chi.*, 561 U.S. 742, 791 (2010); *Meeks v. Larsen*, 611 F. App'x 277, 286 (6th Cir. 2015).

"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.").

This Court 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 (the purchase of firearms and ammunition and training with them) that *categorically* 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*); *see also 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."); *GeorgiaCarry.Org, Inc. v. Ga.*, 687 F.3d 1244, 1259 (11th Cir. 2012) ("The [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."). 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.

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). Incidental burdens on the right, however, are subject to intermediate scrutiny. *See Stimmel*, 879 F.3d at 206-07 ("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 the 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).

Because the closing of gun stores (and restricting travel to gun stores) substantially and directly burdens the core right of self-defense, the restriction must satisfy strict scrutiny. That is, the restriction must be narrowly tailored to serve a compelling government interest. *See generally Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000) ("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."). Defendants cannot satisfy this highest level of scrutiny under the law, particularly in light of the exceptions permitted under the challenged executive orders, as noted in the text above and discussed further below. *See Lukumi*, 508 U.S. at 547. Indeed, the restriction is not narrowly tailored, as the below discussion under intermediate scrutiny further illustrates.

"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 207 (internal quotation marks omitted). The challenged restriction fails this level of scrutiny as

well. While curbing the spread of a virus may well qualify as "a significant, substantial, or important objective" of the government 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. *Id*. It is this latter burden that the government fails to satisfy. *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 challenged restriction deemed pet stores, grocery stores, convenience stores, liquor stores, and stores that sell marijuana, among others, as "essential," but gun stores were "non-essential" and thus closed. The restriction permitted individuals to travel to pet stores to purchase cat litter, 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 were 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.

Finally, Defendants argued below that the order closing gun stores and ranges as "non-essential" (but permitting, for example, pet stores to remain open) was a lawful, neutral law of general applicability. (*See* Governor's Br. at 36-37, R.32,

PageID.492-93). Defendants are mistaken. In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), for example, 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. *Id*. Because the ordinance permitted as "necessary" conduct that did not implicate a fundamental right (such as purchasing goldfish food at a pet store in this case) but prohibited as "unnecessary" conduct that did implicate a fundamental right (such as purchasing ammunition or a firearm at a gun store), the law was not a neutral law of general applicability. The Court struck it down. Here, the restriction on Plaintiff Muise's rights secured by the Second Amendment should receive the same fate as the ordinance at issue in *Lukumi*.

D. Fourteenth Amendment.

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:

> 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 but is *subject to supervision by the courts*.

Id. at 399-400 (emphasis added).

1. Due Process—Arbitrary, Irrational, and Vague.

As stated by this Court:

> 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. . . . 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." . . . . 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." . . . .
>
> The Court has also held that "the degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." . . . . 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. . . . .

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

Here, the challenged measures 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. The challenged measures are not simply suggestions—they are mandates that carry criminal penalties. There is no rational basis for permitting individuals to travel to purchase pet supplies, Lotto

tickets, marijuana, or liquor, but then prohibiting 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 Michigan 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 landscaping businesses. There is no rational basis for permitting "places of worship" to operate or permitting individuals to gather for recreational purposes or for shopping at a hardware store but prohibiting immediate family members to meet at their private homes to pray or gather as a family. There is no rational basis for the "stay at home" order—which felt like a house arrest.[13] Indeed, these restrictions, which carry criminal penalties, are exceedingly vague and the below stated exceptions "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.
>
> * * *

[13] For these reasons, the restrictions also violate the Equal Protection Clause of the Fourteenth Amendment. (*See infra* sec. II.D.4.).

> 6. To *obtain necessary services or supplies* for themselves, their family or household members, *their pets*, and their vehicles.

As recently stated by this Court:

> [W]e agree that no one, whether a person of faith or not, has a right "to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). But restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom. Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers.

Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020).

In the final analysis, the challenged measures are arbitrary, irrational, and vague in violation of the Fourteenth Amendment.

2. Due Process—Right to Travel.

Travel bans are not immune from challenge during a pandemic. *See, e.g., Roberts v. Neace*, 457 F. Supp. 3d 595 (E.D. Ky. 2020); *Roberts*, 958 F.3d at 416 (preliminarily enjoining the Kentucky governor's travel ban). "[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*, 310 F.3d at 495). 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*, 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 was 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 *Johnson*, 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 level of scrutiny under the law, particularly in light of the exceptions permitted. *See Lukumi*, 508 U.S. at 547. As noted, Plaintiff Beemer could travel to Charlevoix to purchase a Lotto ticket or alcohol, but she couldn't travel to her own property (her cottage). Plaintiff Muise could travel to purchase goldfish food, but

it was a crime for him to travel to a gun store to purchase a firearm or ammunition. On its face, the travel restriction was exceedingly broad and disturbingly close to house arrest. Per the challenged restriction, excluding the few exceptions, "[a]ll other travel is prohibited." (First Am. Compl. ¶ 26, R.25, PageID.398). Under the challenged restriction, persons were not able to travel between residences within the State (*e.g.,* children living on their own couldn't visit their parents and vice versa). Yet, individuals could travel from Toledo, Ohio and cross the entire State to go to their cottages in the Upper Peninsula, and individuals could travel from New York City, the epicenter of the virus in the United States, and go to their cottages in Charlevoix. The restriction was broad, irrational, and clearly fails to satisfy strict scrutiny.

The restriction fails intermediate scrutiny as well. This Court's ruling in *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011), illustrates the 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*.

Id. at 740-41 (emphasis added); *see also McCullen v. Coakley*, 573 U.S. 464, 495 (2014) ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier.").

The challenged restrictions fail intermediate scrutiny because they do not serve a substantial government interest as evidenced by Governor Whitmer's willingness to make numerous and irrational exceptions to the restrictions and by, *inter alia*, failing to consider alternatives that would have taken into account regional differences.

3. Due Process—Right to Property.

Plaintiff Beemer owns real property in Michigan—her cottage in Charlevoix County. *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law."). The challenged measure prohibiting Plaintiff Beemer from travelling from her home in Saginaw, Michigan to her cottage deprived her of her cognizable property interest in the quiet use and enjoyment of her 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); *cf. Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 412 (6th Cir. 2002) ("'Deprive' in the due process clause cannot just mean 'destroy.' If the state prevents

you from entering your house it deprives you of your property right even if the fee simple remains securely yours. A property right is not bare title, but the right of exclusive use and enjoyment.") (citation omitted).

4. 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 Believer,* 805 F.3d at 256 (internal quotations and citation omitted) (emphasis added). "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 above, the challenged measures burden fundamental rights under the First (expressive association and free exercise of religion), Second (right to bear arms), and Fourteenth (right to association and right to travel) Amendments in violation of the equal protection guarantee of the Fourteenth Amendment. As just one example of disparate treatment, pet owners could travel to a pet store (an "essential" business) to purchase cat litter, but Plaintiff Muise could not travel to a gun store (a "non-essential" business) to purchase a firearm or ammunition. That same pet owner could travel from Saginaw to Charlevoix to purchase goldfish food, but Plaintiff

Beemer could not travel from Saginaw to Charlevoix to use and enjoy her own private property—her cottage. The Equal Protection Clause does not permit such disparate and irrational treatment that burdens Plaintiffs' fundamental rights (and there is no fundamental right to purchase pet supplies, Lotto tickets, alcohol, or marijuana). In sum, the challenged measures lacked any rational basis, and they harmed Plaintiffs' protected interests in violation of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Based on the foregoing, the Court should reverse the district court, declare the restrictions unlawful, and enjoin them.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

/s/ *David Yerushalmi*
David Yerushalmi, Esq.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 10,493 words, excluding those sections identified in Fed. R. App. P. 32(f).

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise (P62849)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

No.	Page ID	Description
R.1	1-17	Complaint
R.25	394-416	First Amended Complaint
R.25-1	417-27	Exhibit 1: EO 2020-42
R.32	454-96	Governor's Brief in Support of Motion to Dismiss
R.40	942-89	Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss
R.40-1	990-1008	Exhibit 1: Declaration of Robert J. Muise
R.40-2	1009-13	Exhibit 2: Declaration of Gabriella Korkes
R.47	1333-37	Order
R.48	1338	Judgment
R.53	1470-72	Notice of Appeal