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

BAKER EVENTS, LLC; JAY CARLL; DAVID VANSOLKEMA; and KILEY STULLER,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan; DANA NESSEL**,** in her official capacity as Attorney General of the State of Michigan; and LISA STEFANOVSKY, in her official capacity as Health Officer, Ottawa County Department of Public Health,

Defendants.

No. 1:20-cv-00654

Hon. Paul L. Maloney

EXPEDITED CONSIDERATION REQUESTED

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

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INTRODUCTION

"Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety."
- Benjamin Franklin

Places of religious worship are exempt from the draconian restrictions imposed by Defendant Whitmer, and properly so. But not all places of religious worship, only those the government deems worthy. Additionally, "food service establishments," such as restaurants, are permitted to operate at 50% capacity under Defendant Whitmer's orders. But not "food service establishments" that are serving food as part of a wedding. As a result, the Ottawa Department of Public Health issued a "Cease and Desist Order" prohibiting Plaintiffs from holding weddings at the Baker Events' wedding property—the location chosen by Plaintiffs Vansolkema and Stuller (and many other couples to be married) to be their place of religious worship on their wedding day.

Defendants justify this disparate treatment by asserting that "[a] wedding reception is NOT a religious worship activity; it is a social gathering" and "[a] wedding ceremony—even if a minister is involved, is not a religious worship service as those terms are used by the Governor."

Accordingly, 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 application and enforcement of the Governor's executive orders that are being used to prohibit Plaintiffs from holding weddings at the Baker Events' wedding property. The enforcement of these orders is violating Plaintiffs' fundamental rights protected by the First and Fourteenth Amendments to the U.S. Constitution.

More specifically, Plaintiffs seek an order permitting weddings (ceremonies and receptions) inside the Baker Events' wedding property, subject to the conditions set forth below

and including the health and safety measures currently implemented by Baker Events that are outlined in the Statement of Facts:

- Baker Events will limit the maximum number of guests permitted in the main level space to 190 people (50% capacity). It will limit the maximum number of guests permitted in the second level space to 120 people (50% capacity). And it will limit the maximum number of guests permitted in the tent to 100 people.
- Baker Events will require guests to wear a face covering except when seated at their table (unless the guest is unable medically to tolerate a face covering) and except during the wedding ceremony itself for the pastor, the bride and groom, and the wedding party.
- Baker Events will ensure that all guests who access any common areas will maintain social distancing of six feet, unless accompanying members of the guest's household.
- Accordingly, Baker Events will follow all of the applicable workplace safeguards, including the provisions limiting capacity to 50% of normal seating and requiring six feet of separation between parties or groups at different tables as set forth in the Defendant Whitmer's Executive Order 2020-143 as it relates to "food service establishment[s]."
- Additionally, Baker Events will hold the "social gathering" aspects of the weddings (*e.g.*, dancing, receiving line, etc.) under the tent, limiting the number of guests in this area to 100 people and employing health and safety measures, such as social distancing of six feet, unless accompanying members of the guest's household.
- Finally, Baker Events will record the names and contact information of each of its guests, which would facilitate contact tracing should there be a COVID-19 outbreak in the County.[1]

[1] A proposed TRO has been submitted with this brief.

STATEMENT OF FACTS[2]

Plaintiff Baker Events, LLC ("Baker Events") is a family-operated Michigan limited liability company with its principal place of business in Ottawa County, Michigan. Baker Events leases and operates property located in Ottawa County that it uses for wedding ceremonies, which include wedding receptions (hereinafter referred to as the "wedding property."). Baker Events is licensed in Michigan to serve food and beverages at its wedding property. (Carll Decl. ¶¶ 3, 4).

Plaintiff Jay Carll is a resident of Michigan and a Christian. Plaintiff Carll is a Member of Baker Events. The company has only two Members: Plaintiff Jay Carll and Lisa Carll. Plaintiff Jay Carll is responsible for managing the business operations of Baker Events, including the use of the wedding property, and he has the authority to act on behalf of the company. (Carll Decl. ¶¶ 1, 4, 6).

Baker Events and Plaintiff Carll have dedicated Baker Events' wedding property for religious worship because it advances their religious belief and conviction that they should use all of their gifts, including their business interests, to advance the Kingdom. Thus, dedicating the wedding property for religious worship is a form of religious exercise for Baker Events and Plaintiff Carll. (Carll Decl. ¶¶ 5-6).

Plaintiff David Vansolkema is a resident of Michigan and a Christian. Plaintiff Vansolkema is scheduled to marry Plaintiff Kiley Stuller on July 24, 2020, at 5 pm at the Baker Events' wedding property. Plaintiff Vansolkema entered into a contract with Baker Events on or

[2] Plaintiff Carll's declaration is attached to this brief as Exhibit 1. Plaintiff Vansolkema's declaration is attached to this brief as Exhibit 2. And Mr. Donald R. Sheff II's declaration is attached to this brief as Exhibit 3.

about May 29, 2019, for the purpose of holding his wedding at the Baker Events' wedding property. (Vansolkema Decl. ¶¶ 1-3).

As Christians, Plaintiffs believe that a wedding is a sacred event where Christ is present. Plaintiffs Vansolkema and Stuller want to exercise their rights to religious freedom and expressive association by having their wedding at the Baker Events' wedding property. This is their chosen place of religious worship for their wedding. (Vansolkema Decl. ¶ 5; *see also* Carll Decl. ¶ 6).

On June 1, 2020, Defendant Whitmer issued Executive Order 2020-110 ("EO 2020-110"), which was described as imposing a "[t]emporary restrictions on certain events, gatherings, and businesses." (Sheff Decl. ¶ 2, Ex. A).

On July 1, 2020, Defendant Whitmer issued Executive Order 2020-143 ("EO 2020-143"), which is described as "[c]losing indoor service at bars." (Sheff Decl. ¶ 2, Ex. B).

A willful violation of these executive orders is a misdemeanor. Also, a violation of these orders could result in civil citations and penalties and the suspension of a violator's business licenses. (*See* Sheff Decl., Exs. A & B).

Pursuant to EO 2020-110, "Indoor social gatherings and events among persons not part of a single household are permitted, but may not exceed 10 people." Pursuant to this order, "Outdoor social gatherings and events among persons not part of a single household are permitted, but only to the extent that: (a) The gathering or event does not exceed 100 people, and (b) People not part of the same household maintain six feet of distance from one another." (Sheff Decl., Ex. A).

Consistent with prior executive orders, EO 2020-110 expressly states that "nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances." (Sheff Decl., Ex. A).

Three days after she issued EO 2020-110, Defendant Whitmer promoted and even participated in an outdoor social gathering that far exceeded 100 persons. When questioned about her decision to march "shoulder to shoulder" with "hundreds of" protesters—conduct prohibited under EO 2020-110 even for outdoor gatherings—Defendant Whitmer's spokesperson explained that this social gathering did not violate the executive order because "[n]othing in th[e] order . . . abridge[s] protections guaranteed by the state or federal constitution." (Sheff Decl. ¶ 3).

Beyond her personal participation in these social gatherings, Defendant Whitmer allowed protestors to assemble in large groups of well over 100 persons for nearly the entire month of June. (Sheff Decl. ¶ 4).

Consequently, Defendant Whitmer is willing to allow spontaneous, uncontrolled, and large social gatherings promoting one type of message, while prohibiting Plaintiffs' organized weddings, even though the weddings, unlike the permitted protests, would be carried out with significant health and safety measures. (*See infra*).

Additionally, EO 2020-110 expressly states, "Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 19 of this order for allowing religious worship at such place. No individual is subject to penalty under section 19 of this order for engaging in religious worship at a place of religious worship, or for violating the face covering requirement of section 4(b) of this order." (Sheff Decl., Ex. A).

In prior litigation challenging provisions of Defendant Whitmer's executive orders, Defendant Whitmer stipulated to a court-signed order providing that the "place of religious worship" exception applies to religious gatherings by family members at a private residence. (Sheff Decl. ¶ 5, Ex. C).

The wedding property leased by Baker Events is principally a venue for holding weddings. A wedding is a form of religious worship and it is a form of religious expression. (Carll Decl. ¶¶ 5, 6, 23).

Baker Events has a food service license (license no. SFE4170078192). This license allows Baker Events to prepare and serve food on-site during the weddings. (Carll Decl. ¶ 7).

Baker Events subcontracts with Gilmore Collection for food and alcohol services. When patrons would like to have alcohol at their wedding, they may do so as Gilmore Collection has the right under its "catering permit," which is authorized by the Michigan Liquor Control Act, to serve alcohol. Accordingly, Baker Events' patrons contract with Gilmore Collection separately regarding the food and beverage. Baker Events requires this in its contract, as only Gilmore Collection is permitted to serve food and alcohol at Baker Events—Baker Events provides the space for the wedding. (Carll Decl. ¶ 8).

Baker Events' wedding property is located at 217 East 24th Street in Holland, Michigan, and it consists of two indoor spaces: one on the main level and one on the second level. The space on the main level of the building is 5,800 square feet. There is an additional 2,000 square feet of kitchen and service area space. The capacity for the main level space is 380 people. There is also a 1,500 square foot outdoor patio that is connected to the main level space. The second level space is 4,600 square feet and has a capacity of 240 people. (Carll Decl. ¶¶ 9-11).

Baker Events has installed three air purifiers in the main level space and two air purifiers in the second level space. The air purifiers are the recommended size to purify the air in the space seven times an hour. (Carll Decl. ¶ 12).

Baker Events has installed multiple sanitation stations throughout each space. It has eliminated buffet style dinners, and all of its staff wear gloves and face masks, and they undergo temperature checks prior to working. (Carll Decl. ¶ 13).

Baker Events has implemented social distancing and mask-wearing protocols consistent with the guidance issued by the Centers for Disease Control and Prevention (CDC), and they communicate these requirements to those who attend the wedding events. The Baker Events' staff enforces these requirements at all weddings. (Carll Decl. ¶ 14).

Prior to having their indoor events shut down by the Ottawa County Department of Public Health, Baker Events operated at 50% capacity, which is the guideline for "restaurants . . . and like places" under the operative executive orders. Under these guidelines, Baker Events could host a wedding with 190 people in the main level space and a wedding of 120 people in the second level space. (Carll Decl. ¶ 15).

Additionally, Baker Events has erected a tent outside of its building, and Plaintiff Carll was informed by the Ottawa County Department of Public Health that they can have 100 people under the tent for weddings, including ceremonies and receptions. The tent is less than ideal because it greatly limits the number of persons who can attend the wedding, and it does not protect the wedding guests from adverse weather, including driving rain and hot and cold temperatures. (Carll Decl. ¶ 16).

On July 1, 2020, the Ottawa Department of Public Health issued guidance on the enforcement of Defendant Whitmer's executive orders titled, "Social Gatherings and Event Limitations" ("ODPH Guidance"). (Sheff Decl. ¶ 6, Ex. D).

Pursuant to the ODPH Guidance:

> Social gatherings and organized events include any organized events among persons not part of the same household (e.g. weddings, rehearsal dinner, charity dinners, dances, etc.). These are organized events traditionally held at banquet halls, event spaces, or other locations within the community. They are considered social gatherings and are not regular bar and restaurant operations. Holding banquets and events does not align with the Phase 4 requirements of small gatherings to prevent the spread of COVID-19.

(Sheff Decl. ¶ 6, Ex. D).

On or about July 2, 2020, Andrew Priest, Environmental Health Specialist at the Ottawa Department of Public Health, contacted Baker Events to inform it that no weddings (ceremonies or receptions) could take place on the wedding property if there were more than 10 people present. At around the same time, Mr. Priest emailed a copy of a Cease and Desist Order ("Order") issued by the Ottawa Department of Public Health to Baker Events. (Carll Decl. ¶ 17, Ex. A).

The Order states, in part, that "[y]our facility may not operate as a restaurant/bar. Events indoors that do not meet the Governor's Executive Orders, such as large indoor weddings and parties are not permitted at this time. The 50% limit for operations only applies to seating at restaurants and bars." (Carll Decl., Ex. A).

The Order warns that "[f]ailure to comply will result in civil citations and/or the suspension of your food service license until you can demonstrate compliance with Executive Orders." (Carll Decl., Ex. A).

Consequently, restaurants and bars, which are not engaging in religious worship, are being treated more favorably than Baker Events' weddings. Indeed, even though places engaging in religious worship are exempt from the executive orders, Baker Events' weddings could nonetheless comply with the requirements for secular "food service establishments" as set forth in paragraph 2 of EO 2020-143, but the Order prohibits Baker Events' weddings even if they complied with these requirements. (*See* Sheff Decl., Ex. B).

Upon receiving the Order, Baker Events' General Counsel, Mr. Donald R. Sheff II, called Ms. Adeline Hambley, Environmental Health Manager at the Ottawa Department of Public Health, to discuss the Health Department's interpretation of the executive orders and the application of these orders to Baker Events' weddings. Ms. Hambley informed Mr. Sheff that the Order was issued without review by the County's Corporation Counsel, and she agreed that Baker Events could hold its one wedding event scheduled for July 3, 2020, and that the Order would not apply to this event. Ms. Hambley said that she would review the issue with Corporation Counsel and get back with Baker Events the following week. (Sheff Decl. ¶ 8, Ex. E).

On or about July 7, 2020, Mr. Douglas W. Van Essen, Ottawa County Corporation Counsel, contacted Mr. Sheff via telephone, informing Mr. Sheff that the Ottawa Department of Public Health was prohibiting Baker Events' weddings because they were "indoor social gatherings" under paragraph 5 of EO 2020-110. He said that any of Baker Events' outdoor activities would be regulated under paragraph 6 of EO 2020-110. Mr. Sheff asked Mr. Van Essen to square that with paragraph 13 of EO 2020-110 (the regulations for "restaurants . . . and like places") and paragraph 2 of EO 2020-143 (the regulations for "food service

establishments"). Mr. Van Essen could not reconcile the apparent contradiction and simply responded by stating that Baker Events was engaging in "social gatherings." (Sheff Decl. ¶ 9).

On or about July 7, 2020, Mr. Sheff contacted Mr. Van Essen via telephone, asking if he could follow up with more detailed questions so that Baker Events could better understand the Ottawa Department of Public Health's interpretation of the executive orders. Mr. Van Essen agreed, so Mr. Sheff sent him an email in an effort to seek further clarification. (Sheff Decl. ¶ 10).

Mr. Van Essen responded to Mr. Sheff via email in relevant part as follows:

> 2. A wedding reception is NOT a religious worship activity; it is a social gathering.
> 3. A wedding ceremony—even if a minister is involved, is not a religious worship service as those terms are used by the Governor. While Catholic weddings may involve a mass, which is a worship service, Catholic weddings must take place in a sanctified church and could not be held at Baker Events. [I graduated from ND Law School].

(Sheff Decl. ¶ 11, Ex. F).

Frustrated by Ottawa County's demonstrably false view of what constitutes religious worship, Baker Events and Plaintiff Carll, through Baker Events' General Counsel, proposed a resolution ("Freedom of Worship Resolution") to the Ottawa County Board of Commissioners in order to protect religious freedom within the County. The resolution was sent to the Board on or about July 13, 2020, for the Board to consider at its next meeting scheduled for July 14, 2020. The Chairman of the Board refused to place the proposed resolution on the Board's agenda. (Carll Decl. ¶ 21, Ex. B).

Contrary to Ottawa County's view, weddings are religious worship. Baker Events' wedding property is, properly understood, a place of religious worship, particularly when it is

hosting the celebration of the sacrament of marriage. (*See* Carll Decl. ¶¶ 5, 6, 20, 23; Vansolkema Decl. ¶¶ 5, 6).

Christians believe that God himself is the author of marriage. The vocation to marriage is written in the very nature of man and woman as they came from the hand of the Creator. Marriage is not a purely human institution; it is divinely inspired. (Vansolkema Decl. ¶ 6).

The sacred and thus religious aspect of a wedding is not limited to just the exchange of vows between the bride and the groom. While the ceremony itself is obviously the central focus of a wedding, the wedding banquet is an integral component of this religious event. (Carll Decl. ¶ 25; Vansolkema Decl. ¶ 8).

Sacred Scripture often uses the image of a wedding banquet to describe the Kingdom of heaven. Sacred Scripture begins with the creation of man and woman in the image and likeness of God and concludes with a vision of "the wedding-feast of the Lamb." In Matthew 22:1-14, Jesus compares the Kingdom of heaven to a wedding feast. Revelation 19:7-9 refers to the "wedding day of the Lamb," stating further, "Blessed are those who have been called to the wedding feast of the Lamb." (Carll Decl. ¶¶ 26-28; Vansolkema Decl. ¶¶ 9, 10).

On the threshold of His public life, Jesus performs His first miracle (turning water into wine for the guests)—at His mother's request—during a wedding feast. The Christian community attaches great importance to Jesus' presence at the wedding at Cana. Christians see it as the confirmation of the goodness of marriage and the proclamation that henceforth marriage will be an efficacious sign of Christ's presence. (Carll Decl. ¶ 29; Vansolkema Decl. ¶ 11).

Since marriage establishes the couple in a public state of life in the Church, it is fitting that its celebration be public. (Carll Decl. ¶ 30; Vansolkema Decl. ¶ 12).

Jesus taught that where two or more gather in His name, He is present. (Matthew 18:20). At a Christian wedding, individuals gather in the name of Christ, thereby blessing the gathering with His presence. (Carll Decl. ¶ 31; Vansolkema Decl. ¶ 13).

Indeed, a wedding is not merely a "social gathering," such as attending a sporting event, going to a bar or restaurant with friends, watching a movie at a theater, or engaging in some other form of entertainment. A wedding is a sacred event that is protected by the First Amendment. Those who attend a wedding are more than spectators—they are witnesses who solemnize this public event by their presence and are thus expressing their approval of this event by attending. Consequently, those who are present at a wedding, particularly the bride and groom, are engaging in a form of expressive association that is grounded in religious belief and Sacred Scripture. (*See* Vansolkema Decl. ¶¶ 14-16).

Additionally, weddings are different from other public "social gatherings" in that the majority of the guests are typically family and friends. Consequently, and as just one example, Plaintiffs Vansolkema and Stuller currently have 170 guests that plan on attending their wedding at the Baker Events' wedding property (which is currently prohibited, whether indoors or outdoors). These 170 guests, however, consist of only 50 households. (*See* Vansolkema Decl. ¶ 15). Social distancing requirements apply by household, not simply by individuals. (*See* Sheff Decl., Ex. A). Under the Ottawa Department of Public Health's enforcement of the executive orders, 100 unrelated individuals from separate households are permitted to gather socially outdoors for a secular event, but Plaintiffs Vansolkema and Stuller are not permitted to have 50 households at their religious event.

Currently, Baker Events has 134 weddings booked for the remainder of the year. There have been approximately 24 weddings cancelled and 51 postponed to date. Should Defendants

continue to impose their restrictions and prohibition on the weddings hosted at Baker Events' wedding property, the cancellations will increase exponentially, causing serious harm to Baker Events and Plaintiff Carll. (Carll Decl. ¶ 36).

Plaintiffs Vansolkema and Stuller want to hold their wedding ceremony and reception indoors at the wedding property, as was their desire and plan when Plaintiff Vansolkema entered into the contract with Baker Events in May 2019. Plaintiffs Vansolkema and Stuller also want to have their 170 guests present as witnesses to this sacred event. However, as a result of Defendant Whitmer's executive orders and the application and enforcement of these orders by the Ottawa Department of Public Health, Plaintiffs Vansolkema and Stuller are unable to do so, causing them irreparable harm. (Vansolkema Decl. ¶¶ 15-16).

Baker Events and Plaintiff Carll want to continue providing their wedding property as a place of religious worship for those seeking a venue for their weddings. However, as a result of Defendant Whitmer's executive orders and the application and enforcement of these orders by the Ottawa Department of Public Health, Baker Events and Plaintiff Carll are unable to do so, causing them irreparable harm. (Carll Decl. ¶ 37).

ARGUMENT

There is no pandemic exception to the fundamental liberties guaranteed by the Constitution. And *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), does not provide one. As recently stated by the Sixth Circuit, "While the law may take periodic naps during a pandemic, we will not let it sleep through one." *See Roberts v. Neace*, 958 F.3d 409, 414-15 (6th Cir. 2020) (granting an injunction to enjoin the Kentucky governor's restriction on the free exercise of religion during the current pandemic).

Indeed, *Jacobson* affirms the crucially important role of the judiciary (this Court) to

ensure that such an exception *never* exits. Per the Supreme Court: "[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.*" *Jacobson*, 197 U.S. at 31 (emphasis added). If this Court were to accept Defendants' position, then it is the fiat of the Governor and Public Health Officials, and not the Constitution, that is the supreme law of the land. *Cf. Sterling v. Constantin*, 287 U.S. 378, 397–98 (1932) ("If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases[.]"); *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"); *see generally United States v. Nat'l Treasury Emples. Union*, 513 U.S. 454, 475 (1995) ("Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women.") (internal quotations and citation omitted); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. . . .").

Moreover, nothing in *Jacobson* supports the view that an emergency *displaces* normal constitutional standards. Rather, *Jacobson* provides that an emergency may justify temporary

constraints *within* those standards.[3] As the Second Circuit observed, *Jacobson* merely rejected what would now be called a "substantive due process" challenge to a compulsory vaccination requirement, holding that such a mandate "was within the State's police power." *Phillips v. City of New York*, 775 F.3d 538, 542-43 (2d Cir. 2015) (observing that "*Jacobson* did not address the free exercise of religion because, at the time it was decided, the Free Exercise Clause of the First Amendment had not yet been held to bind the states") (citing *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940)). *Jacobson* does not give license to government officials to broadly suspend the Constitution during a public health crisis. *See Roberts*, 958 F.3d at 414-16 (acknowledging *Jacobson*, applying a traditional free exercise analysis in a challenge to the Kentucky governor's executive order issued during the pandemic, and enjoining the challenged provision).

[3] The Supreme Court's denial of an injunction in *South Bay United Pentecostal Church v. Newsom*, No. 19-A1044, 590 U.S. ___ (May 29, 2020), is not to the contrary. Under extant free exercise jurisprudence, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). The *principal* difference between the Chief Justice's concurrence and Justice Kavanaugh's dissent was the Chief Justice's conclusion that the restriction was a valid and neutral law of general applicability:

> Although California's guidelines place restrictions on places of worship, *those restrictions appear consistent with the Free Exercise Clause of the First Amendment*. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently *only dissimilar activities*, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

(Roberts C.J. at 2) (emphasis added). As a result, deference to California was in order. Justice Kavanaugh, however, concluded that the restriction *discriminated* against religion (*i.e.*, it was not a neutral law of general applicability). Therefore, California had to satisfy strict scrutiny, which it could not, *even in light of the current pandemic*:

> What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap. California has not shown such a justification.

(Kavanaugh, J., at 2).

I. Standard for Issuing a TRO/Preliminary Injunction.

"The standard for issuing a temporary restraining order is logically the same as for a preliminary injunction. . . ." *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)); *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (same factors apply in "determining whether to issue a TRO or preliminary injunction").

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). And "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (citation omitted); *Connection Distrib. Co.*, 154 F.3d at 288 ("When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.").

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

A. Plaintiffs' Likelihood of Success on the Merits.

1. Free Exercise of Religion.

We begin by noting that EO 2020-110 states that "nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution," including the First Amendment, "under these emergency circumstances." The term "abridge" means "to reduce in

scope" or to "diminish." *Abridge*, Merriam-Webster.com Dictionary. In fact, Defendant Whitmer invoked this very provision of her order to defend her participation in the Black Lives Matter protests—protests that far exceeded the 100-person limitation and which failed to employ social distancing or mask wearing protocols.

Additionally, paragraph 16 of EO 2020-110 states, without exception, the following:

> Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 19 of this order for allowing religious worship at such place. No individual is subject to penalty under section 19 of this order for engaging in religious worship at a place of religious worship, or for violating the face covering requirement of section 4(b) of this order.

There are no definitional sections of the executive order that exclude Baker Events' wedding property from this definition when used for religious worship (nor could there be as a matter of law, *see infra*). In fact, Defendant Whitmer previously stipulated in a court filing (with this Court) that a private residence was a place of religious worship for family members from different households. There is no basis for asserting that Baker Events' wedding property, when used for religious worship, such as a wedding, should be excluded from this exception.

The "exercise of religion" embraces two concepts: the freedom to believe and the freedom to act. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). Accordingly, "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). "The principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

As confirmed by the Supreme Court, "Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within [the definition of 'exercise of religion']. Thus, a law that 'operates so as to make the practice of . . . religious beliefs more expensive' in

the context of business activities imposes a burden on the exercise of religion." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014).

For Plaintiffs, weddings, including the associated "wedding feast," are religious worship. And because Plaintiffs choose to exercise their religion at Baker Events' wedding property and not in an old, brick church doesn't change this fact. Defendants have *no* authority to declare some weddings (or portions of weddings) religious worship and others not. As stated by the Supreme Court, "Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

For example, in *United States v. Lee*, 455 U.S. 252 (1982), Mr. Lee claimed he could not pay social security taxes without violating an obligation under his Amish faith to care for fellow church members. The Supreme Court refused to consider the government's argument that paying social security taxes did not actually interfere with exercise of this belief, as the Amish would remain free to care for their own community if they paid social security taxes but did not collect benefits. *Id.* at 257. Instead the Court simply accepted Mr. Lee's "contention that both payment and receipt of social security benefits is forbidden by the Amish faith," explaining "[c]ourts are not arbiters of scriptural interpretation." *Id.* (quoting *Thomas*, 450 U.S. at 716). The same is true here. Neither Defendants nor this Court are the arbiters of scriptural interpretation. Consequently, there is no question that the challenged restriction on weddings burdens Plaintiffs' religious exercise by restricting both the wedding ceremony and its associated feast.

When evaluating a free exercise claim, a neutral and generally applicable law that incidentally burdens religious practices usually will be upheld. *See Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990). However, a law that discriminates against religious practices usually will be invalidated because it is the rare law that can be "justified by a compelling interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 553 (1993) ("*Lukumi*"). In *Lukumi*, for example, the Court struck down on free exercise grounds a law that prohibited animal sacrifice. The challenged law made distinctions between necessary and unnecessary animal killings. The law permitted some animal killings as "necessary," but deemed the ritual, religious killing of an animal as unnecessary and thus criminal, in violation of the Free Exercise Clause. *Id*.

Plaintiffs want to be treated equally, but they are not. As the Sixth Circuit observed in *Roberts v. Neace*:

> Keep in mind that the Church and its congregants just want to be treated equally. They don't seek to insulate themselves from the Commonwealth's general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social distancing. They are willing to follow any hygiene requirements. They do not ask to share a chalice. The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.
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> * * *
>
> Some groups in some settings, we appreciate, may fail to comply with social-distancing rules. If so, the Governor is free to enforce the social-distancing rules against them for that reason and in that setting, whether a worship setting or not. What he can't do is assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings. We have plenty of company in ruling that at some point a proliferation of unexplained exceptions turns a generally applicable law into a discriminatory one.

Roberts, 958 F.3d at 414.

Under the operative orders, some "places of religious worship" are exempt from the restrictions, but others (including Baker Events' wedding property) are not. Under the operative orders, there is nothing that would prohibit a youth baseball team and associated family members, for example, from reserving multiple tables at a local restaurant to celebrate their latest victory. They could all arrive at the restaurant simultaneously. The number of celebrants is limited only by the capacity of the restaurant (50%). And they will be seated and served using the required safety protocols, including social distancing. Indeed, this same baseball team could have shown up at the same restaurant incidentally (it was the closest restaurant to the ball park). There is nothing that would prevent them from being served under the executive orders. However, per Defendants, if this same group of people were to engage in precisely the same conduct but did so because they were celebrating a wedding and not a baseball victory, the activity is prohibited. Accordingly, it does matter "what kind of event" is planned—the restriction is not a neutral law of general applicability.

Consequently, because the orders exempt some places of religious worship and not others (including the Baker Events' wedding property) and it excludes some reasons for associating for a meal and not others (including religious reasons, such as weddings), the restriction fails strict scrutiny as a matter of law. *See Lukumi*, 508 U.S. at 547 ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.").

2. Right to Expressive Association / Freedom of Speech.

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

Courts routinely hold that organized group assemblies, including ceremonies, are expressive conduct. Parades are a well-known example. *Hurley v. Irish-Am. Gay*, 515 U.S. 557, 569-70 (1995). Protests, which communicate not merely by language but also by conduct, are another. *See Brown v. La.*, 383 U.S. 131, 141-42 (1966) (group sit-in protesting segregation in library); *Tx. v. Johnson*, 491 U.S. 397, 405-06 (1989) (burning American flag during group protest). Likewise, in-person ceremonies (particularly religious ceremonies) are also "protected expression under the First Amendment," not only because of their "symbols and rituals," such as, in some weddings, the breaking of a plate or the lowering of the bride's veil, but also because they "reflect" and convey "the[] beliefs and personal commitments" of the participants, including "important messages" about "their relationship to each other and to their community." *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012); *see also Jaffe v. Alexis*, 659 F.2d

1018, 1020 (9th Cir. 1981) ("[R]eligious ritual known as 'Sankirtan,'" which "consists of the dissemination of religious tracts and small gifts to the public and the solicitation of funds to support the religion" is "undoubtedly constitutionally protected speech."); *A.N.S.W.E.R. Coal. v. Jewell*, 153 F. Supp. 3d 395, 412 (D.D.C. 2016), *aff'd in part sub nom.*, 845 F.3d 1199 (D.C. Cir. 2017) ("[T]he United States government has used the Presidential Inauguration Ceremony and its attendant celebrations to 'speak to the public.'") (citation omitted); *c.f. Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448 (2015) (describing animal-sacrifice ritual as "speech").

A wedding is unquestionably a form of expression. Those who attend a wedding are more than spectators—they are witnesses who solemnize this public event by their presence and are thus expressing their approval of this event by attending. Consequently, those who are present at a wedding, particularly the bride and groom, are engaging in a form of expressive association that is grounded in religious belief and Sacred Scripture. Indeed, those who attend a wedding are expressing a message by their conduct and presence at least as much as a participant in a parade. In short, a wedding is both a form of expression and an expressive association protected by the First Amendment.

The First Amendment disapproves of content-based speech restrictions, which are subject to strict scrutiny. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002); *see also Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994) ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."). "Government regulation of speech is content based if a law applies to

particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). In *Reed*, the Supreme Court explained that while laws with "facial distinctions based on a message" are plainly content based, there is a "separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech." *Id.* This category includes "laws that cannot be 'justified without reference to the content of the regulated speech.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). It follows that "[a] law *need not draw explicit distinctions* to be content-based." *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226 (9th Cir. 2019) (emphasis added); *see also March v. Mills*, 867 F.3d 46, 61 (1st Cir. 2017) (explaining that facially neutral provision "would be subject to a serious as-applied challenge" if "enforced in an entirely content-dependent way"); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 913 (Ariz. 2019) ("[A] facially content-neutral law may, as applied to a particular plaintiff, operate as a content-based law.") (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28 (2010)); *Ruffino v. City of Puyallup*, 377 F. Supp. 3d 1205, 1215 (W.D. Wash. 2019) ("A policy that is content neutral on its face may still be unconstitutional because the City's policy or custom is to enforce it based on the content of speech.").

As noted above, there is nothing in the executive orders that would prohibit a youth baseball team and associated family members, for example, from reserving multiple tables at a local restaurant to celebrate their latest victory. However, per Defendants, if this same group of people were to engage in the same conduct but did so because they were celebrating a wedding and not a baseball victory, the activity is prohibited. *See 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."). Indeed, how does the County regulator determine whether a particularly large crowd at a restaurant (at 50% capacity) is a "social gathering" and thus prohibited or an incidental gathering which is not prohibited without considering the basis for the association? Thus, the basis for the association—which is the "content" of the association—is the reason for the disparate treatment. *Compare CH Royal Oak, LLC v. Whitmer*, No. 1:20-cv-570, 2020 U.S. Dist. LEXIS 127296, at *11-13 (W.D. Mich. July 16, 2020) (finding the restriction neutral and stating that "[i]t does not matter what kind of event Emagine had planned to throw: a Juneteenth film festival, a Fourth of July festival, or a regular re-opening. . . . There is no allowance for theaters to show certain movies but not others distinguished by their content").

Accordingly, the challenged restriction is content based, requiring Defendants to satisfy strict scrutiny. *Reed*, 135 S. Ct. at 2226 ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.") (citation omitted). However, as discussed above, because the orders exempt some places of religious worship and not others (including the Baker Events' wedding property) and it excludes some reasons for associating for a meal and not others (in particular, religious reasons such as a wedding), the restriction fails strict scrutiny as a matter of law. *Lukumi*, 508 U.S. at 547.

3. Equal Protection.

It is axiomatic that the constitutional guarantee of equal protection embodies the principle that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Skinner v. Okla.*, 316 U.S. 535, 541 (1942) ("The guaranty of equal protection of the laws is a pledge of the protection of equal laws.") (internal quotations and

citation omitted). And this constitutional guarantee applies to administrative as well as legislative acts. *Raymond v. Chi. Union Traction Co.*, 207 U.S. 20, 35-36 (1907).

Supreme Court equal protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others." *McGowan v. Md.*, 366 U.S. 420, 425 (1961); *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Equal Protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.").

Consequently, 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 above, Plaintiffs are being treated disparately as compared with other places of religious worship and as compared with other food service establishments, and this disparate treatment is burdening their fundamental rights to the free exercise of religion, expressive association, and freedom of speech, triggering the application of strict scrutiny. *See generally Holder v. City of Allentown*, 987 F.2d 188, 197 (3d Cir. 1993) ("[I]t has long been established that discriminatory enforcement of a statute or law by state and local officials is unconstitutional."). As noted above, Defendants cannot satisfy strict scrutiny, which is "the most

demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

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 CDC as well as numerous other health and safety measures—measures that *exceed* those required by the Governor for entities that are permitted to engage in religious worship services or serve food on their premises.

If Defendants are restrained from enforcing the restriction on Plaintiffs' weddings neither they nor the general public will suffer harm because Plaintiffs' activities create less of a risk of spreading COVID-19 than other similar activities permitted by the executive orders. For example, other "places of religious worship" are exempt from capacity limitations and mask

wearing. They are not required to have air purification systems. And they are not required to employ contact tracing protocols. Additionally, secular restaurants are permitted to serve food and beverages at 50% capacity without all of the safety measures put in place by Baker Events, but Baker Events is not permitted to do so simply because their patrons are wedding guests.

In the final analysis, the irreparable harm to Plaintiffs outweighs the harm to Defendants or the general public.

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 . . ."); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest."). Moreover, "[a]s for the public interest, treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees." *Roberts*, 958 F.3d at 416. The public interest is served by granting the requested 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 8,301 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 July 21, 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:

Defendants Whitmer and Nessel via email to Attorney Joseph T. Froehlich and associated attorneys (per Mr. Foehlich's request) at FroehlichJ1@michigan.gov; Booth, Joshua O. (AG) BoothJ2@michigan.gov; Allen, Christopher (AG) AllenC28@michigan.gov; Restuccia, Eric (AG) RestucciaE@michigan.gov; Fedynsky, John (AG) FedynskyJ@michigan.gov; Barranco, Kyla (AG) BarrancoK@michigan.gov;

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