UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, et al.,

Plaintiffs,

v.

GRETCHEN WHITMER, et al.,

Defendants.

No. 1:20-cv-00323

Hon. Paul L. Maloney

Mag. Phillip J. Green

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

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INTRODUCTION

Plaintiffs' complaint raises only one issue specific to Defendant Brian L. Mackie, Washtenaw County Prosecuting Attorney ("WCPA"). Can a plaintiff sue to prevent the enforcement of a law that does not exist, merely because it once existed, and *some other* government authority might impose that law again? The answer is plainly "no." The fact that the Court's docket is not full of plaintiffs seeking to enjoin enforcement of the 55-miles-per-hour speed limit—or, perhaps more germane here, the former law requiring firearms dealers to keep a registry of their customers, *see* Mich. Comp. Laws § 750.232 (repealed 2017 P.A. 96 § 1)—ought to be proof enough to end the debate. To put the matter in doctrinal terms, however, Plaintiffs' claims against WCPA Mackie fail for at least four reasons.

First, Plaintiffs' claims against WCPA Mackie are moot because Executive Order 2020-42 has been rescinded and Plaintiffs are not entitled to prospective relief. *See Martinko v. Whitmer*, --- F. Supp. 3d ---, 2020 WL 3036342, *3 (E.D. Mich. 2020) ("*Martinko II*") (dismissing constitutional challenge to Executive Order 2020-42 as moot).[1] Any assertion that the same restrictions may be implemented again is "pure speculation" and cannot save Plaintiffs' claims. *Id.* And neither the "voluntary cessation" nor "capable of repetition, yet evading review" exceptions to the mootness doctrine apply. *See Speech First v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

Second, WCPA Mackie is entitled to Eleventh Amendment immunity. "[G]eneral authority to enforce the laws of the state" is not enough to make an official a proper party to litigation. *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1417 (6th Cir. 1996). Plaintiffs do not allege that WCPA Mackie has attempted or threatened to enforce

[1] *Martinko I* being *Martinko v. Whitmer*, No. 20-00062-MM (Mich. Ct. Cl. April 29, 2020). *See* ECF No. 34-7, PageID.713.

Executive Order 2020-42 against them—nor could they, since it has been rescinded. Thus, Plaintiffs have not overcome Eleventh Amendment immunity. *See id.*

Third, Plaintiffs' claims against WCPA Mackie fail on standing and ripeness grounds because, again, there are *no* allegations that WCPA Mackie took any act to enforce or threaten to enforce the challenged Executive Order 2020-42 against Plaintiff Muise. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Similarly, Plaintiffs have not and could not allege a credible threat of prosecution by WCPA Mackie because, as acknowledged by all parties, Executive Order 2020-42 has been rescinded. *See id.*

Fourth, were Plaintiffs to clear all these procedural hurdles, their claims would still fail. As the Court recently recognized, these are not normal times. *See League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, --- F. Supp. 3d ---, 2020 WL 3421229, at *4 (W.D. Mich. 2020) [hereinafter *LIFFT I*], *stay granted*, --- F.3d ---, 2020 WL 3469291 (6th Cir. 2020) [hereinafter *LIFFT II*]. And in light of the ongoing COVID-19 pandemic, public officials "may temporarily infringe on the liberties guaranteed by the constitution to individuals in favor of the common good." *LIFFT I*, 2020 WL 3421229 at *4. (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)). However keenly Plaintiffs may have felt the restrictions challenged here, the Constitution affords "great latitude" to state officials acting to combat a pandemic, and that latitude "'must be especially broad'" when those officials must grapple with "'medical and scientific uncertainties.'" *Id.* (quoting *S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)). Further, "[t]he measures put in place by Executive Orders 2020-21 and 2020-42 have been effective." Exec. Order 2020-59, ECF No. 25-2, PageID.430. After Executive Order 2020-42 was issued the daily count of new confirmed

cases started to drop. *Id.* Thus, the record amply demonstrates that the restrictions at issue had a "real or substantial relation" to fighting COVID-19. *See Jacobson*, 197 U.S. at 31.

For these reasons and those stated in WCPA Mackie's opening brief, Plaintiffs' claims against WCPA Mackie must be dismissed.

ARGUMENT[2]

I. PLAINTIFFS' CLAIMS AGAINST WCPA MACKIE ARE MOOT.

A. The Rescission of Executive Order 2020-42 Rendered Plaintiffs' Claims Moot.

This case is moot because Executive Order 2020-42 is no longer in effect and the executive orders that replaced it permit Plaintiffs to engage in the activities that form the basis of the First Amended Complaint. *See Martinko II*, 2020 WL 3036342 at *3. In *Martinko II*, the plaintiffs challenged the travel and business restrictions in Executive Order 2020-42 as an unconstitutional taking under the Fifth Amendment and a violation of their substantive due process rights under the Fourteenth Amendment. The court dismissed the action, holding that the plaintiffs' requests for prospective injunctive and declaratory relief were moot because Executive Order 2020-42 and 2020-21, the executive orders that served the basis of the plaintiffs' complaint, had been rescinded. *Id.* at *2-3. With respect to mootness, there is no material difference between the facts in *Martinko II* and the facts here. Thus, dismissal is appropriate here, as well.

B. The "Voluntary Cessation" Exception Does Not Apply.

Plaintiffs invoke the "voluntary cessation exception" under *Speech First* (*see* ECF No. 40, PageID.968-969), but overlook that a government official's "burden in showing mootness is

[2] WCPA Mackie also relies upon and incorporates the arguments made by Governor Whitmer and Attorney General Nessel in their reply brief in support of their Motion to Dismiss. Again, if this Court dismisses Plaintiffs' claims against the State defendants, there can be no independent claim against WCPA Mackie.

lower" than that of a private defendant. *Speech First*, 939 F.3d at 767. Further, government officials are entitled to solicitude and a presumption "that the same allegedly wrongful conduct by the government is unlikely to recur." *Id.* "[B]are solicitude" may not be enough to show mootness where a single official could reimpose the challenged law, if the government's "self-correction . . . appears genuine," it "provides a secure foundation for dismissal based on mootness." *Id.* at 767.

Here, Plaintiffs would have the Court show *no* solicitude to the defendants. Indeed, they ask the Court ignore two critical points. First, all parties agreed that Executive Order 2020-59, which replaced Executive Order 2020-42, permitted Plaintiffs to engage in the activities at issue. *See* ECF No. 24, PageID.391. There is absolutely no indication that WCPA Mackie or the other defendants acted in bad faith or disingenuously. Second, as the state defendants have pointed out, Governor Whitmer has gradually but consistently loosened restrictions through a series of executive orders. *See* ECF No. 36, PageID.747. Plaintiffs' response is that the situation may worsen again. *See* ECF No. 40, PageID.970. But what matters under *Speech First* is what the government *intends*, not what it might do in some hypothetical factual scenario. *See* 939 F.3d at 768-69. The claims in *Speech First* were not moot because the defendant offered no evidence of its "future intentions." *Id.* at 769. Here, the governor's actions demonstrate that there is no intent to reimpose the challenged restrictions. And, although it hardly needs saying, WCPA Mackie does not intend to prosecute Plaintiff Muise for actions that are not unlawful. Plaintiffs' claims are moot. *See id.*

C. The "Capable of Repetition, Yet Evading Review" Exception Does Not Apply.

Plaintiffs state that the "nature and short duration" of Executive Order 2020-42 triggers the "capable of repetition, yet evading review" exception to the mootness doctrine. *See* ECF No.

40, Page.ID 971. But establishing that the order was not in effect long enough to be fully litigated is only half Plaintiffs' burden. *See Chirco v. Gateway Oaks, LLC*, 384 F.3d 307, 309 (6th Cir. 2004). The exception only applies "in those *exceptional* cases where a plaintiff makes a reasonable showing that he or she will again be subjected to the sanction." *Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60, 62 (6th Cir. 1993) (emphasis added) (citation omitted). A mere "theoretical possibility" is not good enough. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (not reasonable to conclude respondent would "once again be in a position to demand bail before trial"); *see also Resnick v. Patton*, 258 F. App'x 789, 794 (6th Cir. 2007) (no reasonable expectation journalist would be denied access to court records a second time).

Here, for all the reasons discussed above and in the Defendants' opening briefs, Plaintiffs have not and cannot show that there is a "reasonable expectation" the restrictions at issue will be reimposed. *See Chirco*, 384 F.3d at 309. All they can do is speculate about a hypothetical chain of events that might lead to that outcome. As the Fifth Circuit explained in finding moot a challenge to a rescinded Louisiana COVID-19 restriction: "To be sure, no one knows what the future of COVID-19 holds. But it is speculative, at best, that the Governor might reimpose the ten-person restriction or a similar one." *Spell v. Edwards*, --- F.3d ---, 2020 WL 3287239, at *3 (5th Cir. June 18, 2020). And, as in another COVID-19-related case, Plaintiffs have given this Court "no reason to believe" that the restrictions at issue here will be reimposed, much less that WCPA Mackie will take action against them. *Cameron v. Beshear*, No. 3:20-cv-00023-GFVT, 2020 WL 2573463, *2 (E.D. Ky. May 21, 2020). There is no "actual, ongoing controvers[y]" between Plaintiffs and WCPA Mackie, and their claims against him must be dismissed. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988).

II. ELEVENTH AMENDMENT SOVEREIGN IMMUNITY SHIELDS WCPA MACKIE FROM PLAINTIFFS' SUIT.

WCPA Mackie is entitled to Eleventh Amendment sovereign immunity because the facts of this case do not fit within the exception set out in *Ex parte Young*, 209 U.S. 123 (1908).

First, WCPA Mackie does not have a connection with the enforcement of Executive Order 2020-42 within the meaning of *Ex parte Young*. As Sixth Circuit precedent makes clear, "the phrase 'some connection with the enforcement of the act' does not diminish the requirement that the official threaten and be about to commence proceedings.'" *Children's Healthcare*, 92 F.3d at 1416; *see also Ex parte Young*, 209 U.S. at 155-56. Here, Plaintiffs only allege that WCPA Mackie is "responsible for criminally prosecuting persons who violate Defendant Whitmer's executive orders in Washtenaw County." ECF No. 25, PageID.397 ¶ 19; *see* ECF No. 40, PageID.942. But that allegation is insufficient because "[g]eneral authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *Children's Healthcare*, 92 F.3d at 1416 (citation omitted). To hold that WCPA Mackie's Eleventh Amendment immunity is defeated by the mere fact that he has the general authority to prosecute crimes "would extend *Young* beyond what the Supreme Court has intended and held." *See id.*[3] WCPA Mackie "did not threaten to commence and was not about to commence proceedings against the plaintiffs," so "*Young* does not apply." *Id.* (footnote omitted).

[3] *See, e.g.*, *Weinstein v. Edgar*, 826 F. Supp. 1165, 1167 (N.D. Ill. 1993) (granting a governor's motion to dismiss based on Eleventh Amendment Sovereign Immunity because the governor's obligation to faithfully execute the laws was not a sufficient connection to enforcement); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute."); *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976) (holding that a state attorney general could not be a party to a suit based on his duty to support the constitutionality of the challenged state statutes alone).

Tellingly, Plaintiffs ignore *Children's Healthcare* entirely. Instead they point to *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), a case in which the plaintiffs sought to enjoin both the Minnesota Attorney General and several county attorneys from enforcing a state statute. *See* ECF No. 40, PageID.972. But the quoted portion of the opinion deals with standing, not Eleventh Amendment immunity. *See id.*; *281 Care Comm.*, 638 F.3d at 631. As it relates to Eleventh Amendment immunity, the case does not even address the county attorneys because the county attorneys *did not claim immunity*. *See id.* at 631-63; Br. of Appellee Cty Att'ys, *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011) (No. 10-1558), 2010 WL 2416247. Further, the court denied the attorney general Eleventh Amendment immunity because the attorney general had multiple responsibilities related to the statute at issue, beyond the general duty to enforce state law. *See 281 Care Comm.*, 638 F.3d at 631-33. In short, *281 Care Committee* is irrelevant here. And even if it were on point, the Court would still be required to follow *Children's Healthcare* and dismiss the claims against WCPA Mackie on the basis of Eleventh Amendment immunity.

Second, Plaintiffs overlook that *Ex parte Young* does not allow a party to seek "retrospective relief." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citations omitted). In *Green*, the plaintiffs challenged certain benefits calculations by a state official. *Id.* at 65. Before the case could be resolved, the statutory formula was changed, and there was no dispute that subsequent calculations followed the new formula. *See id.* The plaintiffs nevertheless sought "a declaration that respondent's prior conduct violated federal law." *Id.* But the Court rejected the idea, explaining that when "[t]here is no claimed continuing violation of federal law" and no threat of future violations, a declaratory judgment that merely addresses a dispute about the lawfulness of past actions is not appropriate in light of Eleventh Amendment concerns. *See id.* That same logic

should apply here. Plaintiffs do not claim WCPA Mackie did anything that violated the law, and they do not claim he is continuing to violate the law. So *Ex parte Young* does not apply. *See id.*

III. PLAINTIFFS DO NOT HAVE STANDING TO SEEK PRE-ENFORCEMENT REVIEW.

The best and simplest way to resolve the claims against WCPA Mackie is to dismiss them on the basis of mootness and Eleventh Amendment immunity. But Plaintiffs' claims against WCPA Mackie also fail because Plaintiffs lack standing to assert them in the first place. There is no allegation that WCPA Mackie took any act to enforce Executive Order 2020-42 against Plaintiff Muise, so Plaintiffs necessarily seek pre-enforcement review. Plaintiffs skip past the requirements for pre-enforcement review, however. To have standing, Plaintiffs must allege facts demonstrating (1) an intention to engage in proscribed activity, and (2) a credible threat of prosecution. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). But Plaintiffs did not sufficiently allege that Plaintiff Muise intended to engage in proscribed conduct. *See* ECF No. 34, PageID.669-670. And, for all of the reasons discussed above with respect to mootness and Eleventh Amendment immunity, Plaintiffs cannot establish a credible threat of prosecution by WCPA Mackie. Plaintiffs' claims against WCPA Mackie must therefore be dismissed on standing and ripeness grounds.

Plaintiffs' cases do not change the analysis. The plaintiff in *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), established a credible threat of prosecution because he had, in fact, been stopped by police and told he would "likely be prosecuted" if he continued handbilling. Neither WCPA Mackie nor anyone else has similarly threated to prosecute the Plaintiffs. And, *National Rifle Association of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997), actually mandates dismissal here. In *National Rifle Association*, the court found that "the *individual plaintiffs* d[id] not have standing to sue." *Id.* at 293. The "regulatory burden" analysis (relied upon Plaintiffs

here) was inapplicable to the individual plaintiffs *in National Rifle Association* because they did not face "significant economic harm." *Id.* The court further concluded that plaintiffs could not establish an injury-in-fact under Article III merely because they wished to engage in certain possibly prohibited activities (but were restrained or inhibited from doing so) or refused to engage in these activities because of serious threatened penalties. *Id.* (citation omitted). Plaintiff Muise allegations are no different than those in *National Rifle Association*: he wanted to travel to gun stores and have his family gather in his home for prayer while Executive Order 2020-42 was in effect, but did not out of fear of prosecution. *See* First Am. Compl., ¶¶ 43, 47, ECF No. 25, PageID.403-404.[4] This, however, is not enough to give him standing to pursue his claims in this Court. Under *National Rifle Association*, his claims should be dismissed.

IV. EXECUTIVE ORDER 2020-42 MUST BE UPHELD UNDER *JACOBSON*.

A. Under *Jacobson*, an Extremely Deferential Standard of Review Applies.

Plaintiffs would have this Court apply normal, everyday standards of constitutional scrutiny. But "it is abundantly clear that 'normal times' ended in early March when the coronavirus pandemic took hold in Michigan." *LIFFT I*, 2020 WL 3421229 at *4. It is equally clear that *Jacobson* governs the adjudication of constitutional challenges to COVID-19-related government actions. *See, e.g.*, *id.*; *LIFFT II*, 2020 WL 3468281 at *2; *S. Bay United*, 140 S. Ct. at 1613-14 (Roberts, C.J., concurring). And *Jacobson* permits state actors to "use their police power *with great latitude* to protect the health and safety of the general public." *LIFFT I*, 2020 WL 3421229 at *4; *see also S. Bay United*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) ("When . . . officials undertake to act in areas fraught with medical and scientific uncertainties,

[4] Plaintiffs' argument that violating Executive Order 2020-42 might have imperiled their law licenses is irrelevant. The practice of law in Michigan is regulated by the Michigan Supreme Court, not executive officials. *See generally* MCR 9.100, *et seq.* There is certainly no allegation that *WCPA Mackie* could deprive Plaintiffs' of their law licenses.

their latitude 'must be especially broad.") (quotation marks and citation omitted). Courts must uphold a law enacted to protect the public from COVID-19, unless it has "no real or substantial relation" to the public health or safety, "or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. In other words, *Jacobson* prevents federal courts from doing exactly what Plaintiffs ask this Court to do: second-guess the wisdom of Governor Whitmer's plan to combat COVID-19, "apply its own policy judgments to that plan," and "use hindsight to craft a 'better' plan." *Id.* at *6.

B. Executive Order 2020-42 Had a Real or Substantial Relation to Protecting the Public From COVID-19.

Under *Jacobson's* deferential standard, Executive Order 2020-42 must be upheld because, particularly at the time in which it was in effect, it had a real or substantial relation to protecting public health. The Defendants have already set forth in detail the emergence of the COVID-19 pandemic and the state's efforts to combat it. *See* ECF No. 34, PageID.660-662; ECF No. 36, PageID.739-744. Plaintiffs dismiss this gruesome history as nothing more than a "parade of horribles." *See* ECF No. 40, PageID.959. Plaintiffs' refusal to recognize the import of "115,484 deaths in the United States," and "5,792 deaths" in Michigan alone is difficult to understand. *See United States v. Queen*, No. CR 17-58 (EGS), 2020 WL 3447988, at *3 (D.D.C. June 24, 2020); Exec. Order 2020-127 (June 18, 2020) (Ex. A). But regardless of Plaintiffs' views, "[t]he measures put in place by Executive Orders 2020-21 and 2020-42 have been effective." Exec. Order 2020-59, ECF No. 25-2, PageID.430. After Executive Order 2020-42 was issued the daily count of new confirmed cases started to drop. *Id.* Thus, the record amply demonstrates that the restrictions at issue had a "real or substantial relation" to fighting COVID-19. *See Jacobson*, 197 U.S. at 31. This Court should follow the lead of numerous other courts in

this and other circuits that have upheld similarly reasonable COVID-19-related restrictions under *Jacobson*, and grant WCPA Mackie's Motion to Dismiss.[5]

The lone case cited by Plaintiffs in support of their position, *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), is easily distinguishable. There, the Sixth Circuit concluded that plaintiffs were likely to prevail on their claim that Kentucky's ban on mass gatherings violated the free exercise clause of the United State Constitution because the ban only included "four pages of exceptions" for secular gatherings, *see id.* at 413-14, and failed to allow *any* religious gatherings. This fact removed the order "from the safe harbor for generally applicable laws." *Id.* at 411, 413. Executive Order 2020-42, on the other hand, treated religious and secular organizations equally, *see* Exec. Order 2020-42 §§ 7(a)(11), 9(d), ECF No. 25-1, PageID.422, 424, and explicitly provided that "a place of religious worship, when used for religious worship, is not subject to penalty" under the order, *id.* § 13, ECF No. 25-1, PageID.427. Executive Order 2020-42, therefore, applied "not only to worship services but also to the most comparable types of secular

[5] *See, e.g.*, *In re Abbott*, 954 F.3d 772 (5th Cir. 2020); *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2011 WL 2517093, at *1 (7th Cir. May 16, 2020); *LIFFT II*, --- F.3d ---, 2020 WL 3468281, at *2 (6th Cir. 2020); *Geller v. de Blasio*, --- F. Supp. 3d ---, 2020 WL 2520711, at *3 (S.D.N.Y. 2020); *McGhee v. City of Flagstaff*, No. cv-20-08081-PCT-GMS, 2020 WL 2308479, *5 (D. Ariz. May 8, 2020); *Calvary Chapel of Bangor v. Mills*, --- F. Supp. 3d ---, 2020 WL 2310913, at *7 (D. Maine 2020); *Bayley's Campground Inc. v. Mills*, --- F. Supp. 3d ---, 2020 WL 2791797, *10 (D. Maine 2020); *Best Supplement Guide, LLC v. Newsom*, No. 2:20-cv-00965, 2020 WL 2615022, *8 (E.D. Cal. May 22, 2020); *Givens v. Newsom*, No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224, at *10 (E.D. Cal. May 8, 2020); *Cross Culture Christian Ctr. v. Newsom*, --- F. Supp. 3d ---, 2020 WL 2121111, at * (E.D. Cal. 2020); *SH3 Health Consulting, LLC v. Page*, --- F. Supp. 3d ---, 2020 WL 2308444, at *4 (E.D. Mo. 2020); *Gish v. Newsom*, No. EDCV 20-755 JGB, 2020 WL 1979970, at *7 (C.D. Cal. 2020); *McCarthy v. Cuomo*, No. 20-cv-2124, 2020 WL 3286530, *6 (E.D.N.Y. June 18, 2020); *Taylor v. Grisham*, No. 1:20-cv-00267, 2020 WL 3256873, *8 (D.N.M. June 16, 2020); *Calvary Chapel Lone Mountain v. Sisolak*, No. 2:20-cv-00907, 2020 WL 3108716, *4 (D. Nev. June 11, 2020); *Prof'l Beauty Fed'n of California v. Newsom*, No. 2:20-cv-4275, 2020 WL 3056126, *8 (C.D. Cal. June 8, 2020); *Tallywhacker, Inc. v. Cooper*, --- F. Supp. 3d ---, 2020 WL 3051207, at *13 (E.D.N.C. 2020); *Martinko v. Whitmer*, --- F. Supp. 3d ---, 2020 WL 3036342 (E.D. Mich. 2020); *Martinko v. Whitmer*, No. 20-00062-MM (Mich. Ct. Cl. April 29, 2020).

gatherings." *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020) (affirming denial of preliminary injunction in part on that basis). And because Executive Order 2020-42 exempted places of worship from *any* enforcement action, it did not treat secular activities more favorably than religious activities, and would be upheld even under the standards applicable in more mundane times. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993).

CONCLUSION

WCPA Mackie does not belong in this lawsuit. Plaintiffs' claims are moot because Executive Order 2020-42 is no longer in effect and no exception to the mootness doctrine helps their claims. Further, WCPA Mackie is shielded from suit under the Eleventh Amendment because Plaintiffs have not alleged that he enforced or threatened to enforce Executive Order 2020-42 against them, and general authority to prosecute crimes in Washtenaw County is insufficient to overcome Eleventh Amendment immunity. Similarly, Plaintiffs' claims fail on standing and ripeness grounds because Plaintiffs have not alleged an intention to engage in proscribed activity or established a credible threat of enforcement. They are therefore not entitled to pre-enforcement review. Finally, setting the jurisdictional defects aside, Defendants are entitled to "great latitude" under *Jacobson* to deal with the public health crisis caused by the COVID-19 pandemic. It is not this Court's (or Plaintiffs') role to second-guess the wisdom of Executive Order 2020-42, apply their own policy judgments, and/or craft a different plan. For all these reasons, this Court should grant WCPA Mackie's Motion to Dismiss.

Respectfully submitted,

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

By: */s/ Sonal Hope Mithani*

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Dated: June 29, 2020

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief contains 4,027 words and therefore complies with Local Civil Rule 7.2(b)(i). This word count was generated using Microsoft Word 2010.

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

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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

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EXHIBIT A

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-127

Declaration of state of emergency and state of disaster related to the COVID-19 pandemic

Rescission of Executive Order 2020-99

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus had spread across Michigan. As of April 1, 2020, the state had 9,334 confirmed cases of COVID-19 and 337 deaths from the disease, with many thousands more infected but not yet tested. Exactly one month later, this number had ballooned to 42,356 confirmed cases and 3,866 deaths from the disease—a tenfold increase in deaths. The virus's rapid spread threatened to overwhelm the state's health care system: hospitals in multiple counties were reportedly at or near capacity; medical personnel, supplies, and resources necessary to treat COVID-19 patients were in high demand but short supply; dormitories and a convention center were being converted to temporary field hospitals.

On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan. Like Executive Order 2020-4, this declaration was based on multiple independent authorities: section 1 of article 5 of the Michigan Constitution of 1963; the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq.; and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq. On April 7, 2020, the Michigan legislature adopted a concurrent resolution to extend the states of emergency and disaster declared under the Emergency Management Act until April 30, 2020.

On April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order

2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

Those executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v Whitmer*. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings have been appealed; the Court of Appeals has ordered oral argument to be held in August.

Since I first declared an emergency in response to this pandemic, my administration has taken aggressive measures to fight the spread of COVID-19, prevent the rapid depletion of this state's critical health care resources, and avoid needless deaths. The best way to slow the spread of the virus is for people to stay home and keep their distance from others. To that end, and in keeping with the recommendations of public health experts, I issued orders restricting access to places of public accommodation and school buildings, limiting gatherings and travel, and requiring workers who are not necessary to sustain or protect life to remain at home. I also issued orders enhancing the operational capacity and efficiency of health care facilities and operations, allowing health care professionals to practice to the full extent of their training regardless of licensure, and facilitating the delivery of goods, supplies, equipment, and personnel that are needed to combat this pandemic. And I took steps to build the public health infrastructure in this state that is necessary to contain the spread of infection.

My administration also moved to mitigate the economic and social harms of this pandemic. Through my orders, we placed strict rules on businesses to prevent price gouging, put a temporary hold on evictions, expanded eligibility for unemployment benefits, provided protections to workers who stay home when they or their close contacts are sick, and created a structure through which our schools can continue to provide their students with the highest level of educational opportunities possible under the difficult circumstances now before us.

These statewide measures have been effective. A report released by the Imperial College COVID-19 Response Team, for example, shows that my actions have significantly lowered the number of cases and deaths that would have occurred had the state done nothing.

With the steep reduction in our case counts, I have moved progressively in recent weeks to relax restrictions on business activities and daily life. On June 1, I announced that most of the state would move to Phase 4 of my Safe Start plan, thereby allowing retailers and restaurants to resume operations. Hair salons and other personal care services followed two weeks later. And on June 10, I moved the Upper Peninsula and the region surrounding Traverse City to Phase 5, allowing for the reopening of movie theaters, gyms, bowling alleys, and other businesses. If current trends persist, I hope to move the rest of the state to Phase 5 by July 4.

But this global pandemic is far from over. Though its pace of growth has slowed, the virus remains aggressive and persistent: to date, there have been 60,393 confirmed cases of COVID-19 in Michigan, and 5,792 deaths from the disease. There is still no treatment for the virus and it remains easy to transmit. A second wave poses an ongoing threat. States in

the South and West are already seeing sharp upticks in cases; just two days ago, Arizona, Florida, and Texas all reported record highs in their daily case counts. Michigan could easily join them if we relax our vigilance.

The concern is especially acute because Michigan's more rural counties will see an increasing number of out-of-town visitors this summer. The residents of these rural counties are among the most vulnerable to COVID-19, with older populations and rates of chronic illness among the highest in the state. Twenty-one of Michigan's eighty-three counties—all rural—have a median age over 50, and nearly 30% of Michigan's rural population is 65 or older. These rural areas tend to be miles away from larger hospitals with the personnel, beds, and equipment to fight this virus.

Whatever happens with COVID-19 in the future, the state has already suffered immense economic damage. Between March 15 and May 30, Michigan received 2.2 million initial unemployment claims—the fifth-highest nationally, amounting to more than a third of the Michigan workforce. During this crisis, Michigan has often processed more unemployment claims in a single day than in the most painful week of the Great Recession, and the state already saw its highest unemployment rate since the Great Depression (22.7% in April). Between March 15 and May 21, Michigan paid out over $7 billion in benefits to eligible Michiganders. The Michigan Department of Treasury predicts that this year the state will lose between $1 and $3 billion in revenue. As a result, local governments will be hard-pressed to provide essential services to their communities and many families in Michigan will struggle to pay their bills or even put food on the table.

So too will the pandemic continue to disrupt our homes and our educational, civic, social, and religious institutions. Transitioning almost overnight to a distance-learning environment has placed strain on educators, students, and parents alike. Performance and indoor sporting venues remain closed across most of the state, limiting people's ability to enrich themselves or interact with their community. And curtailing gatherings has left many seeking new ways to connect with their friends and families. Life will not be back to normal for some time to come.

The health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster. Though local health departments have some limited capacity to respond to cases as they arise within their jurisdictions, state emergency operations are necessary to bring this pandemic under control in Michigan and to build and maintain infrastructure to stop the spread of COVID-19, trace infections, and quickly direct additional resources to hot-spots as they emerge. State assistance to bolster health care capacity and flexibility also has been, and will continue to be, critical to saving lives, protecting public health and safety, and averting catastrophe. Moreover, state disaster and emergency recovery efforts remain necessary not only to support Michiganders in need due to the economic effects of this pandemic, but also to ensure that the prospect of lost income does not impel workers who may be infected to report to work.

Statewide coordination of these efforts is crucial to creating a stable path to recovery. Until that recovery is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and

welfare of this state have been neutralized, statewide disaster and emergency conditions will exist.

With this order, Executive Order 2020-99 is rescinded.

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

1. The COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan.

2. This order constitutes a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. Subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act of 1976 when emergency and disaster conditions exist yet the legislature has not granted an extension request, this order constitutes a state of emergency and state of disaster declaration under that act.

3. This order is effective immediately and continues through July 16, 2020 at 11:59 pm. I will evaluate the continuing need for this order.

4. Executive Order 2020-99 is rescinded. All previous orders that rested on that order now rest on this order.

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

Date: June 18, 2020

Time: 1:55 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE