UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

KIMBERLY BEEMER, PAUL CAVANAUGH, AND ROBERT MUISE,

Plaintiffs,

v.

Case No. 1:20-cv-00323
Hon. Paul L. Maloney

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

Defendants.

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DEFENDANT WILLIAM J. VAILLIENCOURT JR.'S RESPONSE TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant, **WILLIAM J. VAILLIENCOURT, JR.,** by and through the undersigned counsel, and in support of their response to Plaintiff's Motion for Temporary Restraining Order, rely upon the attached Brief.

LOCAL RULE CERTIFICATION: I, T. Joseph Seward, certify that this document complies with Local Rule 7.2(b) and 10.1, including: double-spaced text (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; and type size that is no smaller than 12 point. I also certify that it is the appropriate length. The document contains 4935 words, *inclusive* of the caption, tables, indexes and attachments. The word count was generated by Microsoft Word, version 16.36.

Respectfully submitted,

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DATED: April 24, 2020

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BRIEF IN SUPPORT OF DEFENDANT WILLIAM J. VAILLIENCOURT'S, RESPONSE TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

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STATEMENT OF ISSUES PRESENTED

1. Whether the Court should issue a Temporary Restraining Order against Defendant Vailliencourt where Plaintiffs have shown only that he has general enforcement authority in Livingston County, have failed to allege or demonstrate actual or threatened enforcement of Executive Order 2020-42 against Plaintiffs, and have failed to show an exception to Immunity from suit in Federal Court against him under the 11th Amendment to the United States Constitution?

Defendant answers, "*No*."

Plaintiff presumably answers, "*Yes*."

STATEMENT OF MOST CONTROLLING OR APPROPRIATE AUTHORITY FOR THE RELIEF SOUGHT

1. *Ex parte Young*, 209 U.S. 123, 155–56 (1908):

> [I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

INTRODUCTION

Plaintiffs have filed this action against Defendant Vailliencourt, two other county prosecutors, and Governor Gretchen Whitmer, seeking declaratory and injunctive relief, as well as costs and attorney's fees. The action arises from Executive Order 2020-42 issued by Governor Whitmer in response to the COVID-19 public health emergency. Defendant Vailliencourt, the Livingston County Prosecuting Attorney, has been named based upon the residency of one Plaintiff, who alleges that he lives and works in Livingston County, and that protected rights are proscribed or deterred by the Executive Order through threat of criminal prosecution.

Plaintiffs now bring an expedited motion for temporary restraining order seeking to immediately enjoin the Defendants, including Defendant Vailliencourt, from enforcing the Executive Order. However, Plaintiffs have failed to allege or demonstrate any actual enforcement or imminent threat of enforcement of the Executive Order by Defendant Vailliencourt. Accordingly, Defendant Vailliencourt is entitled to 11th Amendment immunity from this suit and the motion should be denied.

STATEMENT OF FACTS AND ALLEGATIONS

1. On April 9, 2020, in response to the novel coronavirus SARS-Cov-2, and related respiratory disease caused by the virus (COVID-19), Governor Gretchen Whitmer enacted Executive Order 2020-42, under Michigan's Emergency Management Act, MCL 30.401, e*t seq*, and Emergency Powers Act, MCL 10.31, *et seq*., The Order provides that willful violations shall be punishable as a misdemeanor.

2. On April 15, 2020, Plaintiffs filed a Complaint for declaratory, injunctive, and other relief against the Livingston County Prosecutor William J. Vailliencourt, Jr. in his official capacity, along with two other county prosecutors and Michigan Governor, Gretchen Whitmer in their official capacities.

3. Plaintiffs' Complaint alleges that Paul Cavanaugh is a resident of Livingston County, who owns a cottage in Charlevoix, and is the owner of Cavanaugh's Lawn Care, LLC. [PageID.3] Plaintiff alleges that the Executive Order has affected his ability to travel between his residence in Brighton, and cottage in Charlevoix, to fish on a motorboat in Charlevoix, to associate with family members, and to operate his business. [PageID.7-9].

4. Plaintiff's Complaint alleges that Defendant Vailliencourt is the Livingston County Prosecuting Attorney. [PageID.4]. Plaintiffs allege that Mr.

Cavanaugh would be subject to prosecution were he to operate his business or to travel from his residence in Livingston County to his cottage. [PageID.7].

5. There is no allegation, indication, or evidence that Defendant Vaillencourt has enforced or threatened to enforce Executive Order 2020-42.

6. To the contrary, on April 16, 2020, Defendant Vaillencourt issued a press release announcing that his office has instead encouraged voluntary compliance as a result of sensitivity to, and support for, the rights of citizens. He announced further that he has not prosecuted any violation of Executive Order 2020-42 against the Plaintiffs, that his consistent message to law enforcement has been that criminal enforcement is not the answer to this health crisis, and that any prosecution or risk of prosecution would have to come through the Attorney General's office. [Exhibit 1 – Press Release, date April 16, 2020].

7. The April 16, 2020 press release was published by news media in Livingston County, and posted on their website.[1] [Exhibit 2 – WHMI Article].

8. On April 2, 2020 Michigan Attorney General Dana Nessel issued a public notice via Twitter, reminding the public that golf courses should not be open under the Governor's Executive Order. [Exhibit 3 – April 2, 2020 Tweet].

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[1] Available at: https://www.whmi.com/news/article/paul-cavanaugh-vailliencourt-lawsuit-whitmer

9. On April 14, 2020 Christina Grossi, Chief of Operations for the Department of the Attorney General issued a Cease and Desist Notice to Land Scape Supplies, LLC, a business in Muskegon, Michigan. The Notice advised Land Scape Supplies, LLC that it was in violation of Executive Order 2020-42 for their continued business operations and warned that continued violations would result in complaints being forwarded to local law enforcement agencies for enforcement action. [Exhibit 4 – April 14, 2020 Cease and Desist Letter].

10. On April 16, 2020, Ms. Grossi issued another Cease and Desist letter on behalf of the Attorney General's office, to Marc Landau and Marc Landau PLLC, instructing them to cease and desist delivery of demands for possession, to tenants of thie rental properties. The notice also threatened the filing of misdemeanor charges for each violation of Executive Order 2020-42. [Exhibit 5].

11. On April 20, 2020, Plaintiffs filed a Motion for Temporary Restraining Order, seeking to enjoin all defendants, including Defendant Vailliencourt from enforcing Executive Order 2020-42, by all D. [PageID.59-60, PageID.164]. The declarations of the parties attached in support of the Motion for Temporary Restraining Order do not state that Defendant Vailliencourt has enforced or threatened to enforce Executive Order 2020-42 against any of the Plaintiffs.

LAW & ANALYSIS

Plaintiffs' request for a Temporary Restraining Order should be denied by this Court because Defendant Vailliencourt is entitled to immunity under the 11th Amendment. Because sovereign immunity shields Defendant Vailliencourt, Plaintiffs do not have a likelihood of success on the merits or a showing of irreparable harm as to Defendant Vailliencourt. Therefore, they cannot satisfy the requirements of Federal Rule of Civil Procedure 65 such that this motion should be denied.

I. DEFENDANT VAILLIENCOURT IS ENTITLED TO IMMUNITY FROM THIS SUIT UNDER THE 11TH AMENDMENT

A. Law

The 11th Amendment to the United States Constitution generally immunizes states and states officials from suit by citizens in the Federal Courts. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); The United States Supreme Court has consistently held that, absent the state's consent, a state is immune from suit in the Federal Courts in suits brought by "her own citizens as well as citizens of another state." *Id.* at 104; *Tennessee Student Assistance Corp. v. Hood*, See, e.g, 446 (2004). Once raised, questions of sovereign immunity must be decided before the Court proceeds to the merits of a case. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015).

The Supreme Court carved out an exception to 11th Amendment immunity in *Ex Parte Young* that allows for suits to enjoin enforcement of an unconstitutional law against officials:

> who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, **and who threaten and are about to commence proceedings**, either of a civil or criminal nature, **to enforce against parties affected an unconstitutional act**, violating the Federal Constitution[.]

Ex parte Young, 209 U.S. 123, 155–56 (1908) (emphases added). There, the Supreme Court concluded that the 11th Amendment did not prohibit suit against the Minnesota Attorney General to enjoin enforcement of a rate-setting statute, which authorized misdemeanor prosecutions in any county of the state. *Id*. at 128, 155-56. The Attorney General filed a *habeas* proceeding to collaterally attack an order of contempt, issued after he violated the District Court's injunction. *Id* at 129. The Supreme Court concluded that the injunction against him was proper because the Attorney General had the general authority to enforce the rate-setting statute, and there was evidence that he commenced proceedings to enforce the statute, immediately after the injunction was issued. *Id*. at 160. Therefore, he lost his immunity shield when he took action to enforce the statute.

Case law from the Supreme Court and the Sixth Circuit demonstrates that an official will only be stripped of their sovereign immunity under *Ex parte Young* if they *act* unconstitutionally. This action is required because the, as explained by the

Supreme Court in *Pennhurst*, the *Ex parte Young* exception rests upon the "fiction" that the State is not a real party in interest "notwithstanding the obvious effect on the State itself, [when the official is sued] because an official who **acts** unconstitutionally is 'stripped of his official or representative character.'" *Pennhurst State Sch.*, 465 U.S. at 104. (emphasis added). Therefore, officials are entitled to sovereign immunity as long as they remain within the bounds of the constitution, but once they move, i.e. take action, outside of those bounds, the immunity is lost. *Id.* Merely holding authority to do something, without the exercise or suggestion of exercise of that authority, is insufficient under *Ex parte Young*. The below discussed cases highlight the action requirement of the *Ex parte* Young *exception*.

The Sixth Circuit Court articulated the principle that some conduct or action is required before the individual officer is stripped of 11th Amendment immunity in *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996), when the Ohio Attorney General appealed an order denying dismissal on grounds of sovereign immunity. On appeal, the Sixth Circuit explained that *Ex parte Young's* use of the phrase "some connection with the enforcement of the act" still requires "that the official threaten and be about to commence proceedings." 92 F. 3d at 1416. The Court found that the Attorney General did not threaten to, and was not about to, commence proceedings. *Id.* The Court also distinguished the action (or, rather, the inaction) of the Ohio Attorney General from the "opposite" situation

where an Attorney General "had made clear that they would seek to enforce the challenged portions of the guidelines" at issue. *Id.* at 1416, n.8 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)). Holding that *Ex parte Young's* exception to sovereign immunity applies to "action, not inaction," the Court concluded that the suit was barred by sovereign immunity. *Id.*

The Sixth Circuit further developed the "action" requirement in 2015 in *Russell v. Lundergan-Grimes* when it held that a plaintiff must demonstrate "a realistic possibility" the official will take legal or administrative actions against the plaintiff's interests. 784 F.3d 1037, 1048 (6th Cir. 2015). The plaintiff, Russell, filed suit challenging, on First Amendment grounds, a statute that prohibited electioneering within 300 feet of a polling place. *Id.* at 1044. Russell owned an auto repair facility within 300 feet of a polling place and displayed and waved political signs on his property before elections in 2012 and 2014. *Id.* On multiple occasions the signs were removed from his property under the contested statute by unidentified sheriff's deputies. *Id.* Fearing that he would be prosecuted if his actions continued, Russel brought suit against the Attorney General, the Secretary of State, and the Ohio Board of Elections, claiming his First Amendment rights were unconstitutionally impaired by the statute. *Id.* The Defendants asserted they were entitled to sovereign immunity. *Id.* at 1045.

The Sixth Circuit ultimately rejected their claim to immunity. *Id.* at 1046-47. The Court determined that the Ohio Attorney General was a proper party because he had repeatedly fielded and investigated complaints of impermissible electioneering and promised the public that it would pursue possible criminal sanctions for violation of the law. *Id*. at 1047. The Secretary of State and State Board of Elections, who had concurrent jurisdiction over enforcement with the Attorney General, were also found to be proper parties because both admitted that they were actively involved in administering the statute and were regularly involved in its execution, including in cooperation with the Attorney General. *Id*. at 1048. Under the circumstances, the Court concluded that each Defendant had taken action to enforce the statute and, therefore, were not entitled to sovereign immunity. *Id*.

The requirement for a plaintiff to show something more than general enforcement authority was again recognized in *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 445 (6th Cir. 2019). That case involved "The Ultrasound Informed Consent Act," known as "House Bill 2," which required doctors to perform an ultrasound and display the images to their patient before performing an abortion, except in certain circumstances. *Beshear,* 920 F. 3d at 424. A doctor's failure to comply resulted in being fined and referred to the state medical-licensing board. *Id*. Plaintiff doctors brought suit against the Attorney General and Secretary of Health and Human Services, alleging that the statute violated their First Amendment Rights.

The Court examined the respective statutory duties given to the Attorney General and of the attorneys of the Commonwealth and counties. The Court determined that the Attorney General was only mandated to collect fines, including those imposed by House Bill 2, when directed to by the treasury, but otherwise retained discretion to take enforcement action. *Id*. at 445-46. The Court concluded that although an imminent threat of enforcement might come from the county or Commonwealth attorneys[2], there was no imminent threat of enforcement by the Attorney General, because there was no evidence that he had enforced or even threatened to enforce House Bill 2. *Id*. at 446.

The line delineating the bounds of who is entitled to 11th Amendment immunity was most recently clarified by the Sixth Circuit in *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991 (6th Cir. 2019). *McNeil* involved allegations by multiple criminal defendants (the plaintiffs) that their due process rights were violated by the method that Tennessee used to set bail amounts in misdemeanor cases. *McNeil,* 945 F.3d at 993. The plaintiffs sued the county responsible for their prosecution and the sheriff in that county because under Tennessee law the sheriff enforced "probation-violation warrants and the bail amounts [were] established by state law and set by a local judge." *Id.* The plaintiffs were granted a preliminary injunction that prohibited

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[2] The county and commonwealth attorneys were not parties to the action, and as such their conduct was not examined by the Court.

enforcement of the bail requirements by the county and sheriff. *Id.* The county and sheriff appealed. *Id.*

On appeal, the sheriff and county argued that the district court erred because the sheriff was not the proper party to be enjoined in that situation. *Id.* They argued that it was the judges who issue the disputed orders that should be the proper party. *Id.* The Sixth Circuit held that the answer to the proper party debate was found in the 11th Amendment immunity doctrine. *Id.* at 994. The Court rejected the sheriff's argument that he lacked the required "connection to enforcement" for the contested policy to be liable under the principle enunciated in *Children's Healthcare*. *Id.* at 995-96. The Court held that another official's illegal actions under the contested policy did not negate the sheriff's role in the illegal conduct; the sheriff was also taking illegal action by detaining probationers under the illegal orders. *Id.* Thus, where the sheriff also took illegal action, he too could be enjoined from taking such action.

B. Application

Defendant Vailliencourt is entitled to sovereign immunity from this suit under the 11th Amendment because he has not committed any act that would strip him of sovereign immunity and make him a proper party. The above discussed cases of *Ex parte Young, Russell*, *Beshear*, and *McNeil*, all highlight why Defendant Vailliencourt is entitled to 11th Amendment immunity in this suit.

Here, Plaintiffs allege and provide evidence that Plaintiff Cavanaugh is a resident of Livingston County whose business, travel and familial relationship are affected by Executive Order 2020-42. [PageID.3; PageID.7-10; PageID.95-97]. However, as to Defendant Vailliencourt, Plaintiffs allege only that he is the Livingston County Prosecutor, with responsibility to enforce Executive Order 2020-42 in Livingston County. [PageID.4]. There is no allegation of past enforcement, ongoing enforcement, or a threat of imminent enforcement of the Executive Order against Plaintiffs. Nor does Mr. Cavanaugh's declaration provide any evidence of actual or threatened enforcement by Defendant Vailliencourt against him or nay other Plaintiff. [Page ID.95-97].

Defendant Vailliencourt is charged with the duty to prosecute civil and criminal matters in the name of the state of the People of the State of Michigan within Livingston County. MCL 14.23. However, like other state constitutional officers, he is also sworn to support the constitutions of Michigan and of the United States. MI CONST Art 11 § 1. Consistent with his duties and his oath, Defendant Vailliencourt retains discretion as to what action his office should take, if any. See, e.g., *United States v. Oldfield*, 859 F.2d 392, 398 (6th Cir. 1988). Unlike the plaintiffs in *Russell* or, *McNeil*, Plaintiffs have not shown past enforcement of the Executive Order by Defendant Vailliencourt. Rather, just as in *Beshear*, Plaintiffs have shown nothing more than a general authority to enforce Executive Order 2020-42, which is

insufficient to justify naming him as a party, or the enforcing the jurisdiction of the Federal Court over him.

Nor can Plaintiff's rely on Defendant Vailliencourt's concurrent authority with the Attorney General to prosecute crimes in the name of the people of the state of Michigan. The issue is not a "close call" as existed in *Russell,* 784 F.3d 1037. Here, there is neither allegation nor evidence from any of the Plaintiff's declarations that Defendant Vailliencourt has taken enforcement action or threatened enforcement action. Instead, publicly available information shows that on April 16, 2020 – four days before the expedited Request for Temporary Restraining Order against Defendant Vailliencourt was filed – he publicly announced that: no enforcement action had been taken by his office; that the policy of his office was to encourage voluntary compliance; and, that he did not believe that criminal prosecution was necessary to confront the public health crisis underlying the Governor's order. [Ex. 1]. Defendant Vailliencourt's statement was publicly disseminated by the news media in Livingston County. [Ex. 2].

By contrast, other nonparties to this action with jurisdiction to enforce the Executive Order 2020-42, have actually commenced enforcement actions, and demonstrated an imminent threat of future enforcement action. Michigan law requires the Attorney General to prosecute criminal matters when requested by the governor, or when in the Attorney General's own judgment, the interests of the state

require it. MCL 14.28. The Attorney General is required to, at the request of the governor, the secretary of state, the treasurer or the auditor general, to prosecute and defend all suits relating to matters connected with their departments. MCL 14.29. The Attorney General is also authorized to intervene in any action commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state. MCL 14.101.

On April 2, 2020, the Michigan Attorney General made a public statement via Twitter indicating an intent to enforce the Governor's orders against golf courses and golfers [Ex. 3]. On April 14, 2020, the Michigan Attorney General's office, issued a cease and desist letter to a landscaping company in Muskegon, and threatened to refer future complaints to law enforcement for enforcement action. The Muskegon County prosecutor jointly signed the April 14, 2020 Cease and Desist letter. [Ex. 4]. And, on April 16, 2020, the Michigan Attorney General's office issued another cease and desist letter threatening to file criminal charges and issue fines for future violations of the Executive Order, and the Cease and Desist Notice. [Ex. 5].

Plaintiffs' claim against Defendant Vailliencourt is no different than the claim at issue in *Children's Healthcare*, 92 F.3d at 1412, which found that inaction is no basis to name a state official as a party under the 11th Amendment. As a result,

Plaintiffs have not shown any action by Defendant Vailliencourt that would strip him 11th Amendment immunity from suit or make him a proper party to this case.

II. PLAINTIFFS DO NOT HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS AGAINST DEFENDANT VAILLIENCOURT

A. Law

A preliminary injunction is an extraordinary measure that has been characterized as "one of the most drastic tools in the arsenal of judicial remedies." *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001). In deciding whether to grant an injunction, the Court must balance four factors:

> (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.

Lorenzo, 241 F.3d at 809. When a party seeks an injunction based upon a claim that a right is being *threatened* or *impaired*, the Court must first determine whether the movant has demonstrated irreparable harm. *Id*. (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

When the Defendant is entitled to immunity under the 11th Amendment, an injunction is improper because the plaintiff has no likelihood of success on the merits. This was illustrated in *Hoover v. Michigan Dep't of Licensing & Regulatory Affairs*, No. 19-CV-11656, 2019 WL 3229137, at *1 (E.D. Mich. July 18, 2019)[attached as Exhibit 6], where a plaintiff filed suit against the Michigan

Department of Licensing and Regulatory Affairs (LARA), to obtain an extension of Emergency Rules promulgated by the Governor, that would allow Plaintiff to continue to purchase untested marihuana. *Id*. at 4. The Court determined that LARA was entitled to immunity under the 11th Amendment, and that no exception to immunity applied. *Id*. at 6. The Court concluded that it could not grant preliminary injunctive relief, because the plaintiff had no likelihood of success on the merits, and that single factor was dispositive. *Id*.

Furthermore, Federal Rule of Civil Procedure 65 governs Motions for Preliminary Injunction and Temporary Restraining Orders (TRO). The Court must make specific findings with respect to each of the traditional four factors, unless the Court finds that fewer than all four are dispositive. Fed. R. Civ. P. 65(d)(1)(A)-(C).

An injunction or temporary restraining order may be issued only if the movant provides security in an amount the Court considers proper to pay the costs and damages sustained by any party found to be wrongfully enjoined or restrained. Fed. R. Civ. P. 65(c).

B. Application

Plaintiffs do not have a likelihood of success on the merits or a showing of irreparable harm as to Defendant Vailliencourt. Plaintiffs argue that there exists an "executive order that is currently in effect and being enforced to criminalize and thus restrict fundamental freedoms," and that there is "nothing hypothetical about

Plaintiff's challenge." [PageID.69]. However, as to Defendant Vailliencourt, Plaintiffs have shown no likelihood of success on the merits. As demonstrated in Section I, *supra*, Plaintiffs have failed to allege or demonstrate any actual or imminent enforcement activity taken by Defendant Vailliencourt. And, as a result he is entitled to immunity from suit pursuant to the 11th Amendment to the United States Constitution. The exception to 11th Amendment immunity does not go so far as to allow Plaintiffs to strip the prosecuting attorney of immunity from suit in the Federal courts based upon the residency of one party to the lawsuit, and that Prosecutor's general authority to take actions in the interest of the state.

An injunction against Defendant Vailliencourt would be wrongfully entered due to the lack of actual enforcement or a threat of enforcement against Plaintiffs. Moreover, Defendant Vailliencourt and the residents of Livingston County would be harmed by the necessity of incurring costs and attorney's fees. Therefore, under Rule 65(c), Defendant asks that any injunction against Defendant Vailliencourt be conditioned upon Plaintiffs providing security in an amount equal to the anticipated costs and attorney's fees of Defendant Vailliencourt and the residents of Livingston County, incurred in defense of this action.

CONCLUSION AND RELIEF REQUESTED

For the above reasons, Defendant requests that this Court deny Plaintiff's Motion for Temporary Restraining Order.

Should the Court determine that issuance of a Temporary Restraining Order is appropriate at this time, Defendant Vailliencourt asks that the Court require Plaintiffs to post a bond equal to his anticipated cost and attorney's fees incurred by the defense of this action.

Respectfully submitted,

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Dated: April 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing and this Certificate of Service with the Clerk of the Court, using the Court's E-filing system that will send notification to all counsel of record, on **April 24, 2020**.

/s/ Alyssa Schwarcz
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Exhibit 1 - April 16, 2020 Statement re Whitmer Federal Lawsuit

Exhibit 2 - April 17, 2020 WHMI Article

Exhibit 3 - April 2, 2020 Tweet

Exhibit 4 - April 14, 2020 Cease and Desist Letter

Exhibit 5 - April 16, 2020 Cease and Desist Letter

Exhibit 6 - Hoover v Michigan Department of Licensing and Regulatory Affairs

Exhibit 1

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STATEMENT OF PROSECUTOR WILLIAM VAILLIENCOURT
April 16, 2020

A federal action was filed this week challenging the constitutionality of Governor Whitmer's stay-at-home Executive Order. Because one of the parties challenging the Executive Order is a Livingston County resident, I have been included as a party in my capacity as Livingston County Prosecutor. Prosecutors from other counties have also been included as parties. The federal action asks the federal court to rule on the constitutionality of the Governor's actions and she will now have the opportunity to defend the scope and validity of her order.

We are experiencing an unprecedented health emergency where hundreds of Livingston County residents have been infected and some have died. The people of Livingston County have gone above-and-beyond to protect themselves and our community. I encourage that continued vigilance.

In Livingston County, we have approached this crisis with common sense by encouraging voluntary compliance. We want people to remain safe and healthy, but we are also extraordinarily sensitive to and supportive of the rights and civil liberties of our citizens.

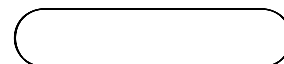
We have not issued any criminal charges for violating the Executive Orders. Criminal enforcement is not the answer to this health crisis and that has been my consistent message to law enforcement. Consistent with that priority and in the exercise of my discretion as Prosecutor, none of the individuals in this lawsuit have been at risk of being prosecuted by my office. Any prosecution in those instances would have to come through the Attorney General's office.

The rule of law is paramount in this country, especially in times such as these. The bottom line is that the issues raised in this action are with the Governor and the Executive Order, not my office. The Governor will have the opportunity to be heard and make her case, and the federal court will decide.

# # #

Exhibit 2

LISTEN LIVE!
Died In Your Arms
Cutting Crew



Local Landscaper Included In Suit Filed Against Governor, Prosecutors

April 17, 2020

A local landscaping company is among those suing Governor Gretchen Whitmer and several county prosecutors challenging certain provisions of a recent executive order.

The lawsuit was filed by the conservative American Freedom Law Center in the U.S. District Court for the Western District of Michigan on behalf of three Michigan residents. They include Paul Cavanaugh of Brighton who owns a local landscaping business and two attorneys - Kimberly Beemer of Saginaw and Robert Muise of Superior Township. Both Cavanaugh and Beemer own cottages in Charlevoix County. In addition to Governor Whitmer, the lawsuit names Livingston County Prosecutor Bill Vailliencourt, Charlevoix County Prosecutor Allen Telgenhof and Washtenaw County Prosecutor Brian Mackie. Those three are being sued in their official capacities.

The complaint states that Cavanaugh would be subject to prosecution for violating the executive order if he were to visit his cottage. It states the executive order discriminates against individuals, including Plaintiffs Beemer and Cavanaugh, impairs their right to travel, and deprives them of the use and enjoyment of their property. The complaint states under the order, a Wisconsin resident could travel to their cottage in Michigan without violating the order and there is no reasonable justification for restricting Michigan residents from traveling to cottages that they own or rent during the current pandemic. That's despite public health officials and

northern Michigan leaders saying such movement could spread the virus to those communities in a way that would overwhelm their health care systems.

The complaint says Cavanaugh has worked hard to develop and expand his landscaping business but his company came to an abrupt halt due to the Governor's order. It goes on to say the lost revenue is impossible to replace and there is far less likelihood of Plaintiff Cavanaugh's business spreading COVID-19 than other businesses currently permitted such as hardware stores, grocery stores, gas stations and health centers.

The complaint states the "case seeks to protect and vindicate fundamental liberties that citizens of the United States enjoy free from government interference. These liberties are not conferred or granted by government to then be rescinded at the will and whims of government officials." The lawsuit alleges that various provisions of the Governor's latest executive order violate the First Amendment regarding freedom of association, the Second Amendment regarding the right to bear arms, and the Fourteenth Amendment regarding due process and equal protection.

A copy of the complaint is attached below.

In response to the lawsuit, Livingston County Prosecutor Bill Vailliencourt issued a statement, which read in part;

"We are experiencing an unprecedented health emergency where hundreds of Livingston County residents have been infected and some have died. The people of Livingston County have gone above-and-beyond to protect themselves and our community. I encourage that continued vigilance.

In Livingston County, we have approached this crisis with common sense by encouraging voluntary compliance. We want people to remain safe and healthy, but we are also extraordinarily sensitive to and supportive of the rights and civil liberties of our citizens.

We have not issued any criminal charges for violating the Executive Orders. Criminal enforcement is not the answer to this health crisis and that has been my consistent message to law enforcement. Consistent with that priority and in the exercise of my discretion as Prosecutor, none of the individuals in this lawsuit have been at risk of being prosecuted by my office. Any prosecution in those instances would have to

come through the Attorney General's office."

His full statement is posted below.

Attachment:	Complaint-Cavanaugh-v-Whitmer-Filed.pdf
Attachment:	Whitmer Federal Lawsuit - Statement.pdf

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Exhibit 3

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Michigan Attorney General
@MIAttyGen

The weather is nice today, but @MIAttyGen @dananessel is here to remind you that golf courses should not be open at this time under @GovWhitmer's Stay Home, Stay Safe Executive Order.

Can we please reopen golf courses?
AG Nessel answers why golf courses remain closed under the Governor's order.
youtube.com

3:56 PM · Apr 2, 2020 · Twitter Web App

15 Retweets **54** Likes

Alex Brantigan @skeezeball · Apr 2

Replying to @MIAttyGen @dananessel and @GovWhitmer
Government overreach

2 7

Brandon Pierce @bspierce7 · Apr 2

Replying to @MIAttyGen @migov and 2 others
This is ridiculous. People should be golfing. It's hard enough to stay inside all winter and if there's one thing that complies with social distancing its Golf!!! People have lost their minds.

1 2 5

1 more reply

Ray Wert @raywert · Apr 2

Replying to @MIAttyGen @dananessel and @GovWhitmer
Can we sneak on to closed golf courses to play a few holes by ourselves?

3 3

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1 more reply

StickyBeast @SlowDownBud · Apr 2
Replying to @MIAttyGen @migov and 2 others
China getting what it wants...communism in America/Michigan, our government is acting like dictators

1 3

Matt @EGBERTH13 · Apr 9
Replying to @MIAttyGen @dananessel and @GovWhitmer
@gary_basile when are re-elections?

1 1

Gary Basile @gary_basile · Apr 9
Not soon enough

1

Rob McCreary @mccreary_rob · Apr 2
Replying to @MIAttyGen @dananessel and @GovWhitmer
Can we extend the 28 days to file unemployment due to unable to file a claim? #helpunemployeedmichigan

1

John Madincea @jmadincea · Apr 3
Replying to @MIAttyGen @dananessel and @GovWhitmer
Ill take a mulligan.

Kim @heretoresisthim · Apr 2
Replying to @MIAttyGen @migov and 2 others
Same should be said about landscaping companies

1

Jed the (angry) Lawyer @omegavol · Apr 3
The same has been said about landscaping companies. On the Governor's website.

Stephanie Duncan @swartzendruberz · Apr 3
Replying to @MIAttyGen @dananessel and @GovWhitmer
Who should be called when a large group of kids is seen skateboarding

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Nakerbocker Please @towenz · Apr 2

Replying to @MIAttyGen @nwarikoo and 2 others

Show more replies

Case 1:20-cv-00323-PLM-PJG ECF No. 18-4 filed 04/24/20 PageID.325 Page 5 of 5

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Exhibit 4

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30212
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

April 14, 2020

Land Scape Supplies, LLC
3770 Airline Road
Muskegon, MI 49442

Hand Delivered

Re: Cease & Desist Notice (Executive Order of the Governor 2020-42)

To Whom It May Concern,

On March 10, 2020, Governor Gretchen Whitmer issued Executive Order 2020-4 declaring a state of emergency across the State of Michigan under sec. 1, art. 5 of the Michigan Constitution of 1963, the Emergency Management Act, MC 30.401, *et seq*., and the Emergency Powers of the Governor Act of 1945, MCL 10.31, *et seq*.

Pursuant to those authorities, she subsequently issued Executive Order 2020-42, which temporarily suspends activities that are not necessary to sustain or protect life. The Order is to be "construed broadly to prohibit in-person work that is not necessary to sustain or protect life." See EO 2020-42, ¶1.

The Governor has posted "Guidance for Business" on the State's website (www.michigan.gov/cornoravirus) to help assist businesses in determining if their on-site operations are "necessary to sustain or protect life." This page also has a Frequently Asked Questions (FAQ) section to address specific questions of interpretation related to the Executive Orders issued by the Governor. These FAQs can be viewed by clicking Executive Order 2020-42 FAQS at the top of the Governor's Covid-19 Webpage. (https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-525278--,00.html).

The Governor has posted the following guidance relevant to:

Q: May landscaping, lawncare, tree service, irrigation, and related outdoor maintenance companies operate under this order?

A: In nearly all cases, no. A business cannot designate workers to perform these services unless the service is necessary to maintain the safety, sanitation, and essential operations of a residence. This is a narrow exception that only permits in-person work that is strictly necessary to address a circumstance that immediately

and genuinely impairs the habitability of a home during the emergency; the exception will be satisfied, at most, rarely. Routine concerns, such as about longer grass increasing insects, pests, or allergies, do not qualify. Nor can workers leave the home to perform these services at business facilities: the exception applies only to residences. Any necessary in-person work that is permitted under the order must be done in accordance with the mitigation measures required under section 10 of the order. The order does not prohibit homeowners from tending to their own yards as they see fit.

Despite this clear guidance, Land Scape Supplies, LLC is still open and is maintaining on-site operations in violation of the Governor's Executive Order 2020-42. Accordingly, in cooperation with the Muskegon County Prosecutor we request that you take immediate action to ensure that your business is closed in compliance with the Governor's Order. The failure to voluntarily comply with this request will result in these complaints being forwarded to local law enforcement agencies for enforcement action.

We appreciate your prompt attention to this matter.

Sincerely,

/s/ Christina Grossi
Christina M. Grossi
Chief of Operations
Department of Attorney General

DJ Hilson
Prosecuting Attorney
Muskegon County

Exhibit 5

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30212
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

April 16, 2020

Mr. Marc Landau
Marc Landau PLLC
30100 Telegraph Rd Ste 120
Bingham Farms, MI 48025-4515

Delivered via email

Re: Notice to Cease & Desist
Executive Order of the Governor 2020-19

Dear Mr. Landau,

It's my understanding that you represent the management company for the Jeffersonian, an apartment complex near downtown Detroit, and that you've been contacted by attorneys from this office to discuss the issuance of Demands for Possession to approximately 80 residents there. Since that discussion, our office has also been contacted by a deputy counsel for the 36th District Court seeking that we take immediate action to investigate and/or prevent any evictions that would be in violation of the Governor's Executive Order 2020-19, based on the issuance of those demands.

As you know, on March 10, 2020, Governor Whitmer issued Executive Order 2020-4 declaring a state of emergency across the State of Michigan under sec. 1, art. 5 of the Michigan Constitution of 1963, the Emergency Management Act, MCL 30.401, *et seq.*, and the Emergency Powers of the Governor Act of 1945, MCL 10.31, *et seq*. Pursuant to those authorities, she subsequently issued Executive Order 2020-19 which prohibits any person or entity from removing a tenant from a leased residential premises except when the person poses a substantial risk to another person or an imminent and severe risk to the property. See EO 2020-19, ¶1. The Order is to be "construed broadly to effectuate that purpose." *Id.*

Though section 3 of the order preserves a landlord's right to receive rental payments due under a residential lease, the section cannot be read in a manner that thwarts the ultimate purpose of the Executive Order – keeping people in their homes during the state of emergency. In other words, any demand for rent cannot also include demand for possession.

As you know, the Demand for Possession issued by your client states, in relevant part, "If you owe this rent, *you must do the following* within seven days after receiving this notice: Pay the rent owed or *Move out or vacate the premises*." The plain language of your client's demand violates EO 2020-19 in that it requires a tenant to leave their home in the absence of payment. That the law requires a court to issue an order to evict someone who doesn't voluntarily comply with this demand is immaterial. The Governor's order was violated upon the delivery of the Demands for Possession to the tenants of the Jeffersonian.

Accordingly, you and your client are instructed to immediately cease and desist the issuance and delivery of Demands for Possession to tenants in the Jeffersonian. Moreover, you are immediately instructed to cease and desist any and all other actions that will result in the eviction of tenants from their homes during the pendency of Governor's Executive Order. Failure to abide by this demand will result in additional legal action being taken against your client and any agent engaging in conduct in violation of the Governor's Order, including, but not limited to, the filing of misdemeanor charges and/or the issuance of fines, for each violation.

Thank you for your prompt attention to this matter.

Sincerely,

/s/ *Christina Grossi*

Christina M. Grossi
Chief of Operations
Department of Attorney General

Exhibit 6

2019 WL 3229137
Only the Westlaw citation is currently available.
United States District Court, E.D.
Michigan, Southern Division.

Sherry HOOVER, Plaintiff,
v.
MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, Defendant.

Case No. 19-cv-11656
|
Signed 07/18/2019

Attorneys and Law Firms

Michelle R.E. Donovan, Butzel Long, Bloomfield Hills, MI, for Plaintiff.

Joshua O. Booth, Michelle M. Brya, State of Michigan Department of Attorney General, Lansing, MI, for Defendant.

OPINION AND ORDER DENYING PLAINTIFF'S EMERGENCY MOTION FOR *EX PARTE* TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND DECLARATORY RELIEF (ECF NO. 2)

PAUL D. BORMAN, UNITED STATES DISTRICT JUDGE

***1** On June 5, 2019, Plaintiff filed her Verified Complaint for Declaratory Judgment and Injunctive Relief. (ECF No. 1.) On that same date, Plaintiff filed an Emergency Motion for *Ex Parte* Temporary Restraining Order, Preliminary Injunction, and Declaratory Relief. (ECF No. 2.) The Court held a telephonic status conference with all parties on June 11, 2019, and established a briefing schedule on Plaintiff's Emergency Motion. Defendant filed a Response on June 21, 2019. (ECF No. 8.) Plaintiff filed a Reply on July 12, 2019. (ECF No. 14.) The Court held a hearing today, July 17, 2018. For the reasons that follow, the Plaintiff's Emergency Motion is DENIED.

INTRODUCTION

In this action, Plaintiff asks this Court to require the Defendant Michigan Department of Licensing and Regulatory Affairs ("LARA") to "modify and extend" certain temporary and now-expired Emergency Rules that were previously put in place under the Medical Marihuana Facilities Licensing Act ("MMFLA").[1] Plaintiff seeks an extension of these expired Emergency Rules so that she can continue to purchase untested marihuana from a licensed dispensary. In short, under Michigan law, licensed provisioning centers were permitted to sell only safety-tested marihuana and to purchase product only from licensed growers and processors. Under the expired Emergency Rules, which expired on March 31, 2019, licensed provisioning centers were able to purchase untested product outside the regulated system (as pertinent here from "caregivers" who purchase and supply untested product) without facing disciplinary action. With the expiration of the Emergency Rules, licensed provisioning centers are no longer able to purchase and sell untested marihuana outside the regulatory system. As a result, according to the Plaintiff's Complaint, the caregivers have no market for the product they obtain and the provisioning centers are unable to keep up with demand if required to sell only tested product from licensed processors and growers. As a consequence, Plaintiff alleges, she has been without access to her medical marihuana medication since May 15, 2019. (ECF No. 16, July 17, 2019 Affidavit of Sherry Hoover ¶ 8.)

Plaintiff claims that as a consequence of the expiration of the Emergency Rules, she is unable to obtain the marihuana products she needs to treat the symptoms of her cancer. Plaintiff argues that "allowing the Emergency Rules to expire is a clear violation of Plaintiff's due process rights." (Pl.'s Aff. ¶¶ 5-9; Pl.'s Mot. 14, PgID 44.) Plaintiff argues that she has a license to obtain medical marihuana and her right to obtain medical marihuana is now being impeded by LARA. Plaintiff also suggests that her due process rights have been violated because her inability to obtain medical marihuana "constitutes a deprivation of life, quite literally." (Pl.'s Mot. 14, PgID 44.)

***2** The State responds that Plaintiff has no likelihood of success on the merits of her claims because: (1) LARA is absolutely immune to suit under the Eleventh Amendment, (2) the Court lacks subject matter jurisdiction because the Complaint fails to allege a colorable federal question, (3) the Plaintiff lacks standing, (4) Plaintiff's claims lack substantive merit, and (5) the Court should abstain from reviewing her claims. The State also asserts that Plaintiff has not established a threat of irreparable injury and the public interest weighs against granting an injunction.

I. FACTUAL BACKGROUND [2]

Marihuana is an illegal Schedule 1 controlled substance under federal law. 21 U.S.C. § 812(c). Marihuana is also listed as a schedule 1 controlled substance under Michigan law, Mich. Comp. Laws § 333.7212, with the exception that the drug is categorized in schedule 2 "only for the purposes of treating a debilitating medical condition." Mich. Comp. Laws § 333.7214(e).

In 2008, voters passed the Michigan Medical Marihuana Act ("MMMA"), Mich. Comp. Laws § 333.26421 *et seq.*, by ballot initiative. The MMMA did not create an affirmative right to use or possess marihuana but created protections under state law for medical use to qualifying patients and their caregivers who comply with the MMMA's requirements. Mich. Comp. Laws §§ 333.26422(b); 333.26424. LARA was charged with administering the MMMA and maintaining a cardholder registry. Mich. Comp. Laws § 333.26426.

In 2016, the Michigan Legislature enacted the Medical Marihuana Facilities Licensing Act ("MMFLA") "to license and regulate medical marihuana [facilities]." Mich. Comp. Laws § 333.27101 *et seq.* The Medical Marihuana Licensing Board ("the Board") was created within LARA and charged with implementing and enforcing the MMFLA. Mich. Comp. Laws § 333.27301(1). The MMFLA provides protections for those granted a license and engaging with activities within the scope of the MMFLA. Mich. Comp. Laws § 333.27201. Under the MMFLA, licensed provisioning centers are authorized to purchase safety-tested marihuana only from licensed growers and processors and are authorized to sell it in limited quantities to patients and caregivers who are registered under the MMMA.

In March 2019, Governor Gretchen Whitmer issued an executive order abolishing the Board and LARA's Bureau of Marihuana Regulation ("BMR") effective April 30, 2019. Mich. Comp. Laws 333.27001(1)(b), (e). The Governor's Executive Order transferred all powers, duties, functions and responsibilities of LARA, BMR, and the Board to a newly created Marijuana Regulatory Agency ("MRA"). Mich. Comp. Laws § 333.27001(1). The MRA was "created as a Type I agency within the Department of Licensing and Regulatory Affairs." Mich. Comp. Laws § 333.27001(1)(a), and all of LARA's "authorities, powers, duties, functions, and responsibilities ... under the [MMA, MMFLA]" among other statutes were transferred to the new MRA. Mich. Comp. Laws § 333.27001(1)(d). The MRA exercises its powers and duties independent of LARA's direction. "When any board, commission, or other agency is transferred to a principal department under a type I transfer, that board, commission or agency shall be administered under the supervision of that principal department. Any board, commission or other agency granted a type I transfer shall exercise its prescribed statutory powers, duties and functions of rule-making, licensing and registration including the prescription of rules, rates, regulations and standards, and adjudication independently of the head of the department. Under a type I transfer all budgeting, procurement and related management functions of any transferred board, agency or commission shall be performed under the direction and supervision of the head of the principal department." Mich. Comp. Laws § 16.103.

***3** LARA issued a series of Emergency Rules beginning in late 2017 and continuing through a final set of Emergency Rules which expired in March, 2019. The Emergency Rules provided that licensed provisioning centers were able to purchase and sell untested product outside the regulated system without facing disciplinary action. With the expiration of the Emergency Rules, licensed provisioning centers are no longer able to purchase and sell untested marihuana outside the regulatory system. This, Plaintiff claims, has resulted in her inability to access her medical marihuana medications.

A different plaintiff seeking the same relief that Plaintiff seeks here previously filed suit in the Michigan courts, but was denied relief. In *The Curing Corner, LLC v. Mich. Dept. Of Licensing and Reg. Affairs*, No. 19-000052-MZ (Mich. Ct. Of Claims, Apr. 30, 2019), Judge Stephen L. Borello explains in his opinion that the Curing Corner was asking that court to "essentially require LARA to extend previous iterations of now-expired emergency rules." (ECF No. 9-1, Def.'s Resp. Appendix Ex. 1, April 30, 2019 Opinion and Order at 10, PgID 240.) In his opinion Judge Borello states: "[T]he Court is without authority to grant the relief plaintiff Curing Corner requests and it will not dictate to LARA procedures for the sale of marijuana." (*Id.* at 10-11, PgID 240-41.) Plaintiff the Curing Corner was represented by the same counsel representing Plaintiff here, Ms. Donovan. No appeal was ever taken from Judge Borello's opinion denying the very relief sought here. Instead, Plaintiff brought her claims to this Court and sued LARA – a state agency.

II. LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted).

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Plaintiff bears the burden of demonstrating entitlement to preliminary injunctive relief. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Such relief will only be granted where "the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't,* 305 F.3d 566, 573 (6th Cir. 2002). When considering a motion for injunctive relief, the Court must balance the following factors: (1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury absent preliminary injunctive relief, (3) whether granting the preliminary injunctive relief would cause substantial harm to others, and (4) whether the public interest would be served by granting the preliminary injunctive relief. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007). "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion...." *Leary*, 228 F.3d at 739. Plaintiff must do more than just "create a jury issue," and must persuade the court that it has a likelihood of succeeding on the merits of its claims. *Id.* "This is because the preliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it." *Id.* (internal quotation marks and citation omitted) (alteration in original). These same factors are considered in evaluating whether to issue a temporary restraining order. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008).

***4** "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Medical Examiners*, 225 F.3d 620, 625 (6th Cir. 2000). "While, as a general matter, none of these four factors are given controlling weight, a preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997). *See also Monsanto Co. v. Manning*, 841 F.2d 1126, at *4 (6th Cir. 1988) (table case) ("It is error to grant a preliminary injunction if the party has no chance or a very slight chance of prevailing on the merits, no matter how strong the balance of irreparable harms may incline in favor of the party seeking the injunction."); *Fialka-Feldman v. Oakland University Bd. of Trustees*, No. 08-cv-14922, 2009 WL 275652, at *1, *5 (E.D. Mich. Feb. 5, 2009) (denying preliminary injunction sought against a state university that was a state agency entitled to Eleventh Amendment immunity and observing that "a preliminary injunction may not issue where there is "simply no likelihood of success on the merits....") (citing *Michigan State AFL–CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997)).

III. ANALYSIS

Plaintiff alleges that depriving the licensed provisioning centers of the ability to sell untested caregiver-produced medical marijuana without facing possible discipline under the Michigan regulatory system has disrupted the supply chain of medical marijuana in Michigan and resulted in a chaotic shortage of available medical marijuana for patients like the Plaintiff who have been granted a license to purchase medical marijuana. According to the Plaintiff, with the expiration of the Emergency Rules, in order for caregivers to continue to sell their product to licensed facilities, the caregiver products must first be tested at a licensed grow or processing center, of which there are only four in Michigan, and then transported back to the licensed provisioning center, resulting in unacceptable and "immoral" delay of delivery of marijuana products to patients such as the Plaintiff. (Mot. 4, ¶¶ 9-15, PgID 34-36.) Plaintiff places the blame on LARA, asserting that it is a "dereliction of duty," and "inappropriate and cavalier" of LARA, "to continue to prohibit the sale of caregiver-products directly to licensed provisioning centers in Michigan," which has caused "a gap in the supply chain which has resulted in an almost immediate and lengthy shutdown of most provisioning centers in Michigan" that are unable to obtain enough tested product to keep up with demand. (Mot. 7, ¶ 19, PgID 37.) Plaintiff asserts that she is forced to "choose between going without medical marijuana and purchasing it through the black market." (Mot. 8, ¶ 20, PgID 38.) According to Plaintiff, patients like her are currently willing to sign waivers when purchasing untested marijuana from a licensed facility and want to be able to continue purchasing marijuana this way.

More specifically, in her Complaint Plaintiff alleges that she has Stage 4 cancer and has been prescribed medical marijuana by her doctor. Her medical marijuana medicines include CBD/THC gummy cubes, THC extreme medicated pain balm, cannabis flower Sunshine Kush, Purple Punch Rick Simpson Oil ("RSO") and specialty ribbon chews 200mg THC chill mediated lozenges. Plaintiff alleges that the lack of access to her medical marijuana regimen affects her health and well-being by failing to alleviate her pain, nausea, insomnia and decreased appetite from chemotherapy treatments. She alleges that her health and quality of life are deteriorating. (Compl. ¶¶ 8-11.) Plaintiff alleges that the now-expired Emergency Rules allowed licensed

provisioning centers to obtain and sell untested medical marijuana products, with patient waivers, until March 31, 2019. (Compl. ¶ 15.) Plaintiff alleges that the "de minimus" number of grower, processor, transport, and testing facilities that have been approved by LARA to operate in Michigan are insufficient to create supply to meet existing demand for medical marijuana products. Plaintiff alleges that without an immediate increase in supply of untested product, "the medical marijuana industry will die." (Compl. ¶¶ 18-23.)

***5** Plaintiff alleges that "medical marijuana continues to be sold to unlicensed facilities, who are currently unregulated and need not purchase tested marijuana under the MMFLA." Plaintiff alleges that "under LARA's regulations, Plaintiff's purchase from, or even presence in, an unlicensed marijuana operation could risk her losing her medical marijuana card." Plaintiff states that "LARA can cure the issue for Plaintiff by simply modifying and extending the Emergency Rules to December 31, 2019, to allow for Plaintiff to purchase untested medical marijuana product from licensed caregivers in Michigan directly from licensed provisioning centers." (Compl. ¶¶ 31-33.) Plaintiff asserts three Counts in her Complaint: Count I – Violation of the Constitutional Right to Due Process (Declaratory Judgment); Count II – Violation of the State Right to Due Process (Declaratory Judgment); Count III – Violation of the Michigan Medical Marihuana Act).

The two pages of Plaintiff's brief in support of her motion for preliminary injunction addressing the most significant prong of the preliminary injunction analysis – the likelihood of success on the merits of her claims against LARA – are devoted largely to recitations of the harm that is flowing from LARA's refusal to extend the emergency rules so that Plaintiff can continue to purchase untested marijuana from licensed provisioning centers. The *one* conclusory paragraph of her brief that addresses the critically important issue of the right that she claims to have been procedurally (or perhaps substantively – it is unclear and she offers no elucidation) deprived of cites no authority for the proposition that Plaintiff has a protected property right "to obtain medical marijuana." (Mot. 14, PgID 44.) She implies that her medical marijuana card gives her a "lawful right to obtain medical marijuana, which is now being impeded by LARA." (*Id.*) She also suggests, in a single conclusory, unsupported sentence that her "due process rights have been violated as the inability to purchase medical marijuana constitutes a deprivation of life, quite literally." (*Id.*) Plaintiff closes this brief discussion of this most important prong of the preliminary injunction analysis with the equally conclusory statement that she has "certainly" raised serious questions going to the merits of her claims to make them a "fair ground for litigation." (*Id.*)

Defendant offers several responses to Plaintiff's claims: (1) Plaintiff's claims are barred because LARA is immune from suit; (2) the Court lacks subject matter jurisdiction over Plaintiff's claims because they fail to allege a colorable federal question; (3) Plaintiff lacks standing to bring this action because her injuries are not traceable to or redressableby LARA; and (4) the Court should abstain from interfering in a complex state regulatory scheme. In her Reply, which the Court had to request from the Plaintiff after she missed the deadline for filing a Reply brief in support of her request for the extraordinary remedy of preliminary injunctive relief, Plaintiff does not address a single one of the Defendant's arguments. The Reply is devoted entirely to the issue of irreparable harm which, for the reasons discussed *infra*, the Court need not address. Plaintiff offered additional argument at the July 18, 2019 hearing that was not presented in any of her briefs, none of which rebutted the undisputed and dispositive fact that LARA is a state agency entitled to Eleventh Amendment immunity, making it impossible for Plaintiff to establish a likelihood of success on the merits of her claims against LARA.

It is undisputed that LARA is a state agency entitled to absolute immunity from suit under the Eleventh Amendment. The Sixth Circuit long ago acknowledged the breadth of this immunity in *Thiokol Corp. v. Department of Treasury, State of Mich., Revenue Div.*, 987 F.2d 376 (6th Cir. 1993):

> The Eleventh Amendment provides:
>
> > The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of a Foreign State.
>
> ***6** U.S. Const. amend. XI. This immunity is far reaching. It bars *all* suits, whether for injunctive, declaratory or monetary relief, against the state and its departments, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100–01, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984), by citizens of another state, foreigners or its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

987 F.2d at 381 (emphasis added). *See Proctor v. Board of Medicine*, 718 F. App'x 325, 327 (6th Cir. 2017) (holding that the Michigan Department of Licensing and Regulatory Affairs and the Board of Medicine were "clearly agencies or departments of the State of Michigan" and were "entitled to immunity under the Eleventh Amendment"); *Williams v. Mich. Bd. of Dentistry*, 39 F. App'x 147, 148-49 (6th Cir. 2002) (observing that "unless immunity is expressly waived, a state and its agencies are immune from an action for damages and injunctive relief, and in some cases even declaratory relief, in federal court" and that "the Eleventh Amendment forbids federal courts from intruding upon state sovereignty by dictating the manner in which state officials should comply with state law") (internal quotation marks and citations omitted). "There are three exceptions to a state's sovereign immunity." *Puckett v. Lexington-Fayette Urban County Government*, 833 F.3d 590, 598 (6th Cir. 2016) (noting the three narrow exceptions to Eleventh Amendment immunity as "(1) when the state has consented to suit; (2) when the exception set forth in *Ex parte Young*, applies; and (3) when Congress has clearly and expressly abrogated the state's immunity.") (internal citations omitted). None of these exceptions is claimed to or does apply here.

Because Plaintiff has *no* likelihood of success on the merits of her claims against LARA, the Court cannot grant preliminary injunctive relief and need not examine the remaining preliminary injunction factors. Indeed, it would be error for the Court to issue a preliminary injunction in the face of an impossibility of success on the merits: "While, as a general matter, none of these four factors are given controlling weight, a preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed." *Miller*, 103 F.3d at 1249.

IV. CONCLUSION

Because Plaintiff has no likelihood of success on the merits of her claims because the Defendant LARA is a state agency entitled to absolute Eleventh Amendment immunity, the Court must and does DENY the motion for preliminary injunctive relief.

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 3229137

Footnotes

1 "Marihuana" is the spelling most commonly used in the Michigan statutes and regulations. The Court will use that spelling unless a specific alternate spelling is indicated.

2 The facts in this background section have been taken directly from the Defendant's responsive brief, which gives a detailed history of the background of the Michigan medical marihuana regulatory scheme. Plaintiff has registered no disagreement with the undisputed historical facts in this background section. In any event, because the Plaintiff has no likelihood of success on the merits of her claims based upon a purely legal question not dependent in any manner on any factual disputes, any disagreement with these facts would not alter the Court's determination.

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