

STATE OF MICHIGAN
IN THE SUPREME COURT

In re CERTIFIED QUESTIONS FROM THE
UNITED STATES DISTRICT COURT, WESTERN
DISTRICT OF MICHIGAN, SOUTHERN
DIVISION

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a
GRAND HEALTH PARTNERS, WELLSTON
MEDICAL CENTER, PLLC, PRIMARY HEALTH
SERVICES, PC, and JEFFERY GULICK,
Plaintiffs,

v

GOVERNOR OF MICHIGAN,
MICHIGAN ATTORNEY GENERAL, and
MICHIGAN DEPARTMENT OF HEALTH AND
HUMAN SERVICES DIRECTOR,
Defendants.

**The appeal involves a ruling
that a statute or other state
governmental action is
invalid.**

**APPENDIX VOLUME I FOR THE BRIEF OF
DEFENDANT MICHIGAN ATTORNEY GENERAL DANA NESSEL**

ORAL ARGUMENT REQUESTED

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Dated: August 6, 2020

**INDEX TO APPENDIX FOR BRIEF OF
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VOLUME I	Page No.
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Attorney General Dana Nessel’s Motion to Dismiss , R 26, 06/02/20	1c–4c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Defendant Attorney General Dana Nessel’s Brief in Support of Motion to Dismiss , R 27, 06/02/20	5c–61c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Attorney General Dana Nessel’s Supplemental Briefing on Certification , R 34, 06/05/20	62c–77c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Defendants’ Whitmer, Nessel, And Gordon’s Joint Notice of Supplemental Authority Regarding their Motions to Dismiss , R 37, 06/11/2020	78c–82c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Exhibit A, Martinko v Whitmer , Case No. 20-cv-10931, Opinion and Order Granting Defendant’s Motion to Dismiss (ED Mich June 5, 2020) to Defendants’ Whitmer, Nessel, And Gordon’s Joint Notice of Supplemental Authority Regarding their Motions to Dismiss, R 37-1, 06/11/2020	83c–89c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Defendants Whitmer, Nessel, and Gordon’s Joint Motion for Reconsideration Regarding Certification , R 38, 06/11/20	90c–98c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Exhibit A, Barachkov v Davis , 580 Fed Appx 288 (6th Cir 2014) to Defendants Whitmer, Nessel, and Gordon’s Joint Motion for Reconsideration Regarding Certification, R 38-1, 06/11/20	99c–110c
<i>Cassell v Snyders</i> , 2020 WL 2112374 (ND Ill, May 3, 2020)	111c–124c
<i>Colvin v Inslee</i> , 2020 WL 4211571, opinion of the Washington Supreme Court, issued July 23, 2020 (Case No. 98317-8)	125c–137c

VOLUME II	Page No.
Executive Order 21 (03/23/2020) (COVID-19) Temporary requirement to suspend activities that are not necessary to sustain or protect life	138c–145c
Executive Order 59 (04/24/2020) (COVID-19) Temporary requirement to suspend activities that are not necessary to sustain or protect life Rescission of Executive Order 2020-42	146c–157c
Executive Order 70 (05/04/2020) (COVID-19) Temporary requirement to suspend activities that are not necessary to sustain or protect life Rescission of Executive Order 2020-59	158c–171c
Executive Order 77 (05/07/2020) (COVID-19) Temporary requirement to suspend certain activities that are not necessary to sustain or protect life Rescission of Executive Order 2020-70	172c–188c
Executive Order 91 (05/18/2020) (COVID-19) Safeguards to protect Michigan's workers from COVID-19	189c–200c
Executive Order 92 (05/18/2020) (COVID-19) Temporary requirement to suspend certain activities that are not necessary to sustain or protect life Rescission of Executive Orders 2020-77 and 2020-90	201c–213c
Executive Order 110 (06/01/2020) (COVID-19) Temporary restriction of gatherings, events and businesses. Rescission of Executive Order 2020-69 and 2020-96	214c–220c
Executive Order 114 (06/05/2020) (COVID-19) Safeguards to protect Michigan's workers from COVID-19 Rescission of Executive Order 2020-97pdf document	221c–236c
Executive Order 115 (05/05/2020) (COVID-19) Temporary restrictions on certain events, gatherings, and businesses	237c–242c
Executive Order 143 (07/02/2020) (COVID-19) Closing indoor service at bars	243c–247c

Executive Order 145 (07/09/2020) (COVID-19) Safeguards to protect Michigan's workers from COVID-19 Rescission of Executive Order 2020-114	248c–265c
Executive Order 153 (07/17/2020) (COVID-19) Rescission of Executive Order 2020-147	266c–270c

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a
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MEDICAL CENTER, PLLC, PRIMARY HEALTH
SERVICES, PC, AND JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as
Governor of the State of Michigan, DANA NESSEL,
in her official capacity as Attorney General of the
State of Michigan, and ROBERT GORDON, in his
official capacity as Director of the Michigan
Department of Health and Human Services,

Defendants.

No. 1:20-cv-414

HON. PAUL L. MALONEY

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**ATTORNEY GENERAL
DANA NESSEL'S
MOTION TO DISMISS**

**ORAL ARGUMENT
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**ATTORNEY GENERAL'S MOTION TO DISMISS
ORAL ARGUMENT REQUESTED**

Michigan Attorney General Dana Nessel moves to dismiss all the claims
against her in Midwest Institute of Health, PLLC, D/B/A Grand Health Partners,

Wellston Medical Center, PLLC, Primary Health Services, PC, and Jeffery Gulick's complaint and states as follows:

1. Plaintiffs filed their complaint on May 12, 2020, raising various federal constitutional claims including vagueness, procedural and substantive due process, and the dormant Commerce Clause, as well as state-law claims involving the authority of the Governor to issue certain executive orders under two state statutes: The Emergency Powers of the Governor Act and the Emergency Management Act.

2. Plaintiffs request declaratory and injunctive relief and money damages.

3. Plaintiffs claims are moot because the challenged Executive Orders have been rescinded and no exception to the mootness doctrine applies here.

4. This Court should decline to exercise supplemental jurisdiction under 42 U.S.C. § 1367 over the state-law claims, which involve novel legal issues regarding the interpretation of state statutes and arise in the extraordinary context of the COVID-19 pandemic and the State's response to the pandemic.

5. This Court should decline to exercise its discretion to grant declaratory relief as to Count I because the *Grand Trunk* factors counsel against such relief. *See Grand Trunk W. R. Co. v. Consol. Rail Corp.*, 746 F.2d 323 (6th Cir. 1984)

6. Additionally, the well-established factors for the extraordinary relief of a permanent injunction do not weigh in Plaintiffs' favor.

7. On the merits, Plaintiffs' claims against the Attorney General fail to state a claim under Federal Rule of Civil Procedure 12(b)(6) and the Attorney

General should be dismissed from the case. Attorney General Nessel is entitled to qualified immunity as to the money damages claims against her, and the remainder of the claims are not viable.

8. Consistent with Local Rule 7.1(d), the undersigned contacted the lead counsel for Plaintiffs, Mr. James Peterson, on May 27, 2020, to ask whether Plaintiffs would concur in Defendant Attorney General Dana Nessel's motion to dismiss and explaining the grounds to be raised in support of the motion. Mr. Peterson indicated that Plaintiffs did not concur in the motion, thus necessitating the filing of the motion and brief in support. A separate certification accompanies this motion.

For these reasons, and the reasons stated more fully in the accompanying brief in support of this motion, Michigan's Attorney General Dana Nessel respectfully requests that this Honorable Court grant this motion to dismiss, dismiss all claims against her, and dismiss her from the case.

Respectfully submitted,

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Dated: June 2, 2020

Certificate of Service

I hereby certify that on June 2, 2020, I electronically filed this ATTORNEY GENERAL DANA NESSEL'S MOTION TO DISMISS with the Clerk of the Court using the ECF system which will send notification of such filing.

A courtesy copy of the aforementioned document was placed in the mail directed to:

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DANA NESSEL'S
BRIEF IN SUPPORT OF
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**DEFENDANT ATTORNEY GENERAL DANA NESSEL'S
BRIEF IN SUPPORT OF MOTION TO DISMISS**

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	iii
Concise Statement of Issues Presented	x
Controlling or Most Appropriate Authority	xi
Introduction	1
Statement of Facts	3
Argument	10
I. Plaintiffs' claims are moot.	10
II. This Court should decline to exercise supplemental jurisdiction over Plaintiffs' state-law authority issue.	13
III. This Court should not grant the requested declaratory or injunctive relief.	15
A. This Court should not grant declaratory relief on the state-law issues.	15
B. Plaintiffs are not entitled to permanent injunctive relief because they do not meet the well-established factors for such extraordinary relief.	17
1. Plaintiffs cannot succeed on the merits.	17
2. The lack of a permanent injunction will not result in irreparable injury to Plaintiffs.	18
3. The balance of harms weighs in the Attorney General's favor, and an injunction is contrary to the public interest.	20
IV. This Court should dismiss all claims against the Attorney General because Plaintiffs have failed to state a claim on which relief can be granted.	21
A. Plaintiffs' allegations are sparse as to the Attorney General.	22
B. Attorney General Nessel is entitled to qualified immunity as to the request for money damages.	23

C.	The challenged executive orders were reasonable under the EPGA (Count II).....	25
D.	The challenged Executive Orders were not vague (Count III).....	28
E.	The Attorney General’s enforcement of the challenged Executive Orders did not violate procedural or substantive due process.....	34
1.	The challenged Executive Orders did not violate procedural due process (Count IV).....	34
2.	The Attorney General’s enforcement of Executive Orders 2020-17 and 2020-77 did not violate substantive due process (Count V).....	37
F.	The Attorney General’s enforcement of the challenged Executive Orders did not violate the dormant Commerce Clause (Count VI).	41
	Conclusion and Relief Requested.....	44
	Certificate of Service.....	45

INDEX OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Abney v. Amgen, Inc.</i> , 443 F.3d 540 (6th Cir. 2006)	18
<i>Albrecht v. Treon</i> , 617 F.3d 890 (6th Cir. 2010)	21
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987)	23
<i>Ashcroft v. al-Kidd</i> , 567 U.S. 731 (2011)	23, 24
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	21, 23
<i>Basicomputer Corp. v. Scott</i> , 973 F.2d 507 (6th Cir. 1992)	19
<i>Bell Atlantic v. Twombly</i> , 550 U.S. 544 (2007)	21, 23
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975)	12
<i>Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.</i> , 476 U.S. 573 (1986)	42
<i>Cafeteria & Restaurant Workers v. McElroy</i> , 367 U.S. 886 (1961)	35
<i>Certified Restoration Dry Cleaning Network v. Tenke Corp.</i> , 511 F.3d 535 (6th Cir. 2007)	18
<i>City of Mesquite v. Aladdin's Castle</i> , 455 U.S. 283 (1983)	11
<i>Collins v. Harker Heights</i> , 503 U.S. 115 (1992)	38

Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health,
 186 U.S. 380 (1902) 34, 44

County of Sacramento v. Lewis,
 523 U.S. 833 (1998) 38

Doe v. Sundquist,
 106 F.3d 702 (6th Cir. 1997) 13

E. Kentucky Res. v. Fiscal Court of Magoffin Cty., Ky.,
 127 F.3d 532 (6th Cir. 1997) 42

Erie R. Co. v. Tompkins,
 304 U.S. 64 (1938) 13

Gilbert v. Homar,
 520 U.S. 924 (1997) 35

Globe Newspaper Co. v. Superior Court for Norfolk Cty.,
 457 U.S. 596 (1982) 11

Grand Trunk W. R. Co. v. Consol. Rail Corp.,
 746 F.2d 323 (6th Cir. 1984) 16

Grayned v. City of Rockford,
 408 U.S. 104 (1972) 29, 33

Hall v. Beals,
 396 U.S. (1969) 10

Hankins v. The Gap, Inc.,
 84 F.3d 797 (6th Cir. 1996) 15

Hodel v. Virginia Surface Min. & Reclamation Ass’n, Inc.,
 452 U.S. 264 (1981) 35

In re Abbott,
 954 F.3d 772 (5th Cir. 2020) 34, 44

Int’l Dairy Foods Ass’n v. Boggs,
 622 F.3d 628 (2010) 41, 42

Jacobson v. Commonwealth of Massachusetts,
 197 U.S. 11 (1905) passim

Johnson v. Cincinnati,
 310 F.3d 484 (6th Cir. 2002) 38

<i>Jolivette v. Husted</i> , 694 F.3d 760 (6th Cir. 2012)	17
<i>Kentucky Right to Life, Inc. v. Terry</i> , 108 F.3d 637 (6th Cir. 1997)	10, 11, 12
<i>Kremens v. Bartley</i> , 431 U.S. 119 (1977)	10, 12
<i>Lewis v. BT Inv. Managers, Inc.</i> , 447 U.S. 27 (1980)	41
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	35
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986)	24
<i>Martinko v. Whitmer</i> , Michigan Court of Claims Docket No. 20-000062-MM.....	14
<i>Matthews v. Eldridge</i> , 424 U.S. 319 (1976)	35
<i>Mazurek v. Armstrong</i> , 520 U.S. 968 (1997)	17
<i>Mich. House and Senate v. Whitmer</i> , Michigan Court of Claims Docket No. 20-000079-MZ.....	14, 24
<i>Mich. United for Liberty v. Whitmer</i> , Michigan Court of Claims Docket No. 20-000061-MZ.....	14
<i>Michigan Bell Telephone Co. v. Engler</i> , 257 F.3d 587 (6th Cir. 2001)	19
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972)	35
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972)	35
<i>Mosley v. Hairston</i> , 920 F.2d 409 (6th Cir. 1990)	12
<i>Muhammad v. Paruk</i> , 553 F. Supp. 2d 893 (E.D. Mich. 2008).....	16

<i>NDSL, Inc. v. Patnoude</i> , 914 F. Supp. 2d 885 (W.D. Mich. 2012)	18
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	20
<i>North Carolina v. Rice</i> , 404 U.S. 244 (1971)	10
<i>Overstreet v. Lexington–Fayette Urban County Gov’t</i> , 305 F.3d 566 (6th Cir. 2002)	18
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986)	21
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009)	23
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	42
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	10
<i>Public Service Comm’n of Utah v. Wycoff</i> , 344 U.S. 237 (1952)	16
<i>Saenz v. Roe</i> , 526 U.S. 489 (1999)	38
<i>S-Cent. Timber Dev., Inc. v. Wunnicke</i> , 467 U.S. 82 (1984)	41
<i>Scottsdale Ins. Co v. Flowers</i> , 513 F.3d 546 (6th Cir. 2008)	16
<i>Siegel v. Shinnick</i> , 219 F. Supp. 789 (E.D.N.Y. 1963).....	41
<i>Soap & Detergent Ass’n v. Natural Resources Comm</i> , 330 N.W.2d 346 (Mich. 1982).....	7
<i>Steffel v. Thompson</i> , 415 U.S. 452 (1974)	28
<i>Terminiello v. City of Chicago</i> , 337 U.S. 1 (1949)	26

Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield,
552 F.3d 430 (6th Cir. 2008) 21

Traverse Bay Area Intermediate Sch. Dist. v. Michigan Dep’t of Educ.,
615 F.3d 622 (6th Cir. 2010) 21

*United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l
Transit Auth.*,
163 F.3d 341 (6th Cir. 1998) 29

United Mine Workers of Am. v. Gibbs,
383 U.S. 715 (1966) 13

Village of Hoffman Estates v Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 29

Washington v. Glucksberg,
521 U.S. 702 (1997) 38

Wilton v. Seven Falls Co.,
515 U.S. 277 (1995) 15

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008) 18

Wisc. Legislature v. Palm,
__ N.W.2d __, No. 2020AP765-OA, 2020 WL 2465677 (Wisc. May 13, 2020)..... 44

Wolff v. McDonnell,
418 U.S. 539 (1974) 38

Statutes

1945 P.A. 302 3

1976 P.A. 390 4

28 U.S.C. § 1367(c)..... 13

28 U.S.C. § 1467(c)(4) 15

28 U.S.C. § 2201..... 16

Mich. Comp. Laws § 10.31..... 3

Mich. Comp. Laws § 10.31 *et seq.*..... passim

Mich. Comp. Laws § 10.31(2) 26

Mich. Comp. Laws § 30.401 *et seq.*..... 3, 7, 14

Mich. Comp. Laws § 30.403(1) 4

Mich. Comp. Laws § 30.417(d) 4

Other Authorities

38 Am. Jur. 2d, Governor 3

6A Moore’s Federal Practice ¶ 57.08[2] (1983)..... 16

Executive Order 2010-77 25

Executive Order 2020-110 passim

Executive Order 2020-17 passim

Executive Order 2020-17 § 1 20

Executive Order 2020-21 8

Executive Order 2020-33 7

Executive Order 2020-4 7

Executive Order 2020-42 8

Executive Order 2020-59 8

Executive Order 2020-66 8

Executive Order 2020-67 9

Executive Order 2020-68 8, 9

Executive Order 2020-70 8

Executive Order 2020-77 passim

Executive Order 2020-77 § 4 26

Executive Order 2020-77 § 8 32

Executive Order 2020-92 2, 8, 26

Executive Order 2020-96 7, 8, 11
Executive Order 2020-96 § 19 11
Executive Order 2020-96 § 8(a)(6) 11
Executive Order 2020-99 9

Rules

Fed. R. Civ. P. 12(b)(6)..... 21

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3..... 41
U.S. Const. art. V, § 2 7

CONCISE STATEMENT OF ISSUES PRESENTED

1. Does this Court lack jurisdiction to hear Plaintiffs' claims, which are moot?
2. Should this Court decline to exercise supplemental jurisdiction over Plaintiffs' state law authority claim challenging Michigan's Emergency Powers of the Governor Act and its Emergency Management Act, especially where this issue is already squarely before Michigan's highest court?
3. Should this Court decline to issue the requested declaratory relief where the *Grand Trunk* factors counsel against such relief, and should this Court deny the request for permanent injunctive relief where the well-established factors weigh in favor of the Attorney General?
4. Should this Court dismiss Plaintiffs' claims against the Attorney General, where they fail to state a claim upon which relief may be granted because the Attorney General is entitled to qualified immunity as to Plaintiffs' claim for money damages, and the underlying claims are not viable as to the Attorney General?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Collins v. Harker Heights, 503 U.S. 115 (1992)

Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380 (1902)

Grand Trunk W. R. Co. v. Consol. Rail Corp., 746 F.2d 323 (6th Cir. 1984)

Grayned v. City of Rockford, 408 U.S. 104 (1972)

In re Abbott, 954 F.3d 772 (5th Cir. 2020)

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Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905)

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Overstreet v. Lexington–Fayette Urban County Gov't, 305 F.3d 566 (6th Cir. 2002)

Powell v. McCormack, 395 U.S. 486 (1969)

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341 (6th Cir. 1998)

Village of Hoffman Estates v Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)

INTRODUCTION

These are unprecedented times. Michigan, like the rest of the world, is at war. But not with an enemy it knows. Not with an enemy it can see. Michigan is at war with an invisible foe. A foe so stealthy that it took us by surprise and, as the battle rages on, continues to surprise us with its pervasiveness and reach. A foe so wily that we do not know who has been exposed to it, who is doing the exposing, and how we will ultimately arm ourselves against its pernicious attacks. A foe so deadly that it has taken the lives of thousands of Michiganders and sickened tens of thousands more in mere months. While our foe has no face, it has a name: SARS-CoV-2, or COVID-19.

This public health battle has presented many challenges, and our key leaders have risen to meet them. The Governor, through her broad authority under the Emergency Powers of the Governor Act, declared a statewide emergency and issued reasonable executive orders consistent with that authority. Most notably, she has ensured that Michiganders employ the best, if not only, available weapon in this deadly fight: social distancing. The Governor's swift, decisive action has saved, and is saving, countless lives. And the Attorney General has worked to enforce these important orders, exercising her constitutional role as the State's chief law enforcement officer.

Yet, on the heels of these victories, Plaintiffs challenge the Attorney General in her enforcement role, raising various claims related to 2020-17 and Executive Order 2020-77—neither of which remain in effect today—on various grounds, including that: (1) the Governor lacked the authority to issue the orders; (2)

vagueness; (3) procedural and substantive due process; and (4) the dormant Commerce Clause. These claims fail for three reasons.

First, and as a threshold matter, because the challenged Executive Orders no longer remain in effect and the capable-of-repetition-but-evading-review exception does not apply, Plaintiffs' claims are moot and the complaint should be dismissed in its entirety. *Second*, even looking past the mootness question, this Court should decline to exercise its discretion to issue declaratory relief and should not grant the requested permanent injunction because the factors required to grant those extraordinary relief are not met. *Third* and finally, the Attorney General should be dismissed from this case because Plaintiffs have failed to state a claim against her—she is entitled to qualified immunity on the money damages claims, and none of the claims are viable. Throughout this war with COVID-19, the Attorney General has properly overseen enforcement of Executive Orders 2020-17 and 2020-92 in her role as Michigan's chief law enforcement officer.

STATEMENT OF FACTS

Sources of Michigan gubernatorial authority during an emergency.

As a general rule, “[e]mergencies do not create power or authority in a governor, as the executive, but they may afford occasions for the exercise of powers already existing.” 38 Am. Jur. 2d, Governor, § 4. The Michigan Constitution does not mention any gubernatorial emergency powers. Therefore, although the Governor has inherent constitutional authority to protect the health and welfare of the People of Michigan, her authority during an emergency largely stems from one of two statutes: either the Emergency Powers of the Governor Act, Mich. Comp. Laws § 10.31 *et seq.* (EPGA), or the Emergency Management Act, Mich. Comp. Laws § 30.401 *et seq.* (EMA).¹

The Legislature enacts the EPGA.

In 1945 in the midst of World War II, the Michigan Legislature enacted the EPGA, which authorizes “the governor to proclaim a state of emergency, and to prescribe the powers and duties of the governor with respect thereto.”² 1945 P.A. 302; *see also* Mich. Comp. Laws § 10.31.

¹ The Governor may also work with the Michigan Department of Health and Human Services to implement provisions of the Public Health Code. *See* Mich. Comp. Laws § 333.1101 *et seq.*

² Since its promulgation, the EPGA has not been substantively amended. *See* 2006 P.A. 546 (containing minor, facial amendments).

The Legislature enacts the EMA.

Later, in 1976, the Legislature enacted the EMA, which, among other things, is designed to “provide for planning, mitigation, response, and recovery from natural and human-made disaster within and outside this state.” 1976 P.A. 390. The EMA delegates the responsibility of “coping with dangers to this state or the people of this state presented by a disaster or emergency” to the Governor. Mich. Comp. Laws § 30.403(1). It also specifically references and recognizes the Governor’s broad powers under the EPGA and provides that the Governor may exercise those powers “independent of” the EMA. Mich. Comp. Laws § 30.417(d).

The world is hit with a pandemic: COVID-19.

The coronavirus disease 2019 (COVID-19) is a severe acute respiratory illness caused by SARS-CoV-2—a highly contagious virus that has quickly spread across the globe, killing tens of thousands and infecting millions more. The virus is thought to spread mainly through close, person-to-person contact³ via “respiratory droplets,”⁴ and experts say that coming within six feet of an infected person puts

³ Center for Disease Control, *How COVID-19 Spreads*, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

⁴ World Health Organization, Modes of transmission of virus causing COVID-19, available at <https://www.who.int/news-room/commentaries/detail/modes-oftransmission-of-virus-causing-covid-19-implications-for-ipc-precautionrecommendations>.

one at a high risk of contracting the disease.⁵ That is, when a person is within six feet of an infected person, infected respiratory droplets can land in or around the healthy person's mouth, nose, or eyes, and can even be inhaled into the lungs, thus infecting that person with the virus.⁶ Moreover, some people experience only mild symptoms of infection,⁷ and could spread the disease before they even realize they are infected. And, perhaps most troubling, some of those infected with COVID-19 are asymptomatic, yet still spread the virus.⁸

Social distancing is currently the only solution.

The virus that causes COVID-19 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is “novel,” *i.e.*, never-before-seen in humans.⁹ Accordingly, there is no approved vaccine or treatment. Since there is no way to prevent or treat COVID-19, the CDC has

⁵ Centers for Disease Control, *Social Distancing, Quarantine, and Isolation*, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/socialdistancing.html>.

⁶ Center for Disease Control, *How COVID-19 Spreads*, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

⁷ World Health Organization, *Q & A, What are the Symptoms of Covid-19?*, available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses>

⁸ Center for Disease Control, *How COVID-19 Spreads*, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

⁹ CDC, *Coronavirus Disease 2019 Basics*, available at <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics>.

indicated that “[t]he best way to prevent illness is to avoid being exposed.”¹⁰ Therefore, experts recommend that the public engage in “social distancing,” that is, the practice of avoiding public spaces and limiting movement. A main objective of social distancing is “flattening the curve,” *i.e.*, reducing the speed at which COVID-19 spreads. Without a flattening of the curve, the disease will spread too quickly, overwhelm our healthcare system, and wipe out our already scarce healthcare resources—including staff, medical equipment, and personal protective equipment.

As a result of these expert recommendations, jurisdictions across the globe have imposed sweeping measures to stem the viral tide that has overwhelmed healthcare systems worldwide. In the United States alone, all 50 states and the District of Columbia have had emergency orders in place to fight the war against COVID-19.

Michigan’s Governor responds to COVID-19.

Since Michigan has been among the states hardest hit by COVID-19, the Governor has instituted aggressive measures in an effort to address Michigan’s staggering statistics and protect the health and safety of Michigan residents. Despite these aggressive efforts, COVID-19 remains present and pervasive in Michigan: As of May 21, 2020, at least 57,532 have been confirmed infected and 5,516 have died—all in under three months.¹¹

¹⁰ CDC, *How to Protect Yourself and Others*, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

¹¹ Michigan.gov, *Coronavirus*, available at: <https://www.michigan.gov/coronavirus/> (last accessed June 6, 2020 at 9:30 AM).

The Governor’s containment efforts have included issuing various executive orders¹² aimed at curbing the spread of COVID-19 as well as protecting Michiganders from the economic, social, and other ramifications of the crisis. In her first executive order related to COVID-19, issued on March 10, 2020, the Governor declared a state of emergency under both the EMA and the EPGA. EO 2020-4. The March 10, 2020 declaration was rescinded and replaced by an expanded declaration of emergency and disaster under both the EMA and the EPGA on April 1, 2020. EO 2020-33.

In the interim, on March 20, 2020, the Governor issued Executive Order 2020-17, which was rescinded on May 21, 2020, and replaced by Executive Order 2020-96 and subsequently, Executive Order 2020-110. EO 2020-17; EO 2020-96; EO 2020-110. Executive Order 2020-17 required the temporary postponement of all non-essential medical and dental procedures, EO 2020-17, and was imposed “[t]o mitigate the spread of COVID-19, protect the public health, provide essential protections to Michiganders, and ensure the availability of healthcare resources,” including personal protection equipment, ventilators, and hospital beds. Preamble to EO 2020-17. Another order—Executive Order 2020-21, *i.e.*, Michigan’s “Stay Home, Stay Safe” Order—issued on March 23, 2020, and later replaced by other

¹² An executive order is a directive handed down from the executive branch of government—in this case, the Governor—generally without input from the legislative or judicial branches. *See* U.S. Const. art. V, § 2; *Soap & Detergent Ass’n v. Natural Resources Comm*, 330 N.W.2d 346 (Mich. 1982). All of the Governor’s Executive Orders are available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

orders with varying degrees of restrictiveness (including Executive Order 2020-77, Executive Order 2020-92, and Executive Order 2020-96), imposed temporary restrictions on activities that are not necessary to sustain or protect life. *See* EO 2020-21; EO 2020-42; EO 2020-59; EO 2020-70; EO 2020-77; EO 2020-92; EO 2020-96. On June 1, 2020, Michigan's existing Stay Home, Stay Safe Order was ultimately rescinded and replaced by Executive Order 2020-110, which imposes temporary restrictions on certain events, gatherings, and businesses only, rather than on Michiganders as a whole. EO 2020-110.

The Governor requests extensions of the state of emergency under the EMA.

The state of emergency initially declared on March 10, 2020, under the EMA was set to expire on April 7, 2020, so the Governor requested a 70-day extension from the Legislature. In response to this request, the Legislature extended the declaration under the EMA for 23 days, or until April 30, 2020.¹³

The Governor subsequently requested a second extension under the EMA, but on April 30, 2020—the date the legislatively-extended state of emergency was set to expire—the Legislature declined. Therefore, the Governor, after terminating the existing state of emergency under the EMA, *see* EO 2020-66, issued an executive order declaring a new 28-day state of emergency under that Act. EO 2020-68. Via a separate order, the Governor extended the previously declared state of emergency

¹³ *See* Senate Concurrent Resolution 2020-24, [http://www.legislature.mi.gov/\(S\(id4mutkghmrbux0ojtc0br1c\)\)/mileg.aspx](http://www.legislature.mi.gov/(S(id4mutkghmrbux0ojtc0br1c))/mileg.aspx).

under the EPGA to May 28, 2020. EO 2020-67. The Governor did the same in Executive Order 2020-99. *See* EO 2020-99. In each order, the Governor explicitly stated that all executive orders that rested on the previously declared states of emergency now rested on Executive Order 2020-67 and Executive Order 2020-68. *See* EO 2020-67; EO 2020-68; EO 2020-99.

On May 21, 2020, the Governor issued Executive Order 2020-96, which lifted some previous restrictions—for example, by permitting social gatherings of groups of ten or fewer people, and by allowing retail businesses to re-open with some social-districting measures in place. The Governor subsequently issued Executive Order 2020-110, which rescinds Executive Order 2020-96 and imposes even further lessened restrictions—for example, permitting many businesses that were previously closed to start to re-open, and allowing outdoor gatherings of 100 or fewer people. EO 2020-110. As they relate to this case, both EO 2020-96 and EO 2020-110 permit the non-essential medical procedures that EO 2020-17 had temporarily postponed.

Plaintiffs file suit.

On May 12, 2020, Plaintiffs filed the instant action, and then filed a motion for preliminary injunction, which they later withdrew. (Dkt. 1, 9, 10, 21.) The Attorney General now files this motion to dismiss because: (1) Plaintiffs' claims are moot; (2) this Court should decline to issue the requested declaratory relief on the state-law authority issue; (3) Plaintiffs are not entitled to the extraordinary relief of a permanent injunction; (4) the Attorney General is entitled to qualified immunity

on the money damages claims; and (5) Plaintiffs have failed to state a claim upon which relief may be granted.

ARGUMENT

I. Plaintiffs' claims are moot.

As a threshold matter, because the Governor has rescinded and replaced the Executive Orders at issue in this case with a new, less restrictive Executive Order that does not contain the restrictions that Plaintiffs now challenge, Plaintiffs' claims are moot.

Mootness is a question of jurisdiction, which “derives from the requirement of Article III of the [United States] Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.” *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quotations omitted). “Simply stated, a case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Relevant here, repeal of a statute while a case is pending routinely renders an issue moot. *See, e.g., Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997). That is because, as this Court has explained, “a statute must be analyzed by the appellate court in its present form.” *See id.* at 644 (citing *Kremens v. Bartley*, 431 U.S. 119, 129 (1977); *Hall v. Beals*, 396 U.S. (1969)).

In this case, on May 21, 2020, the Governor issued a new Executive Order—Executive Order 2020-96—which rescinded Executive Order 2020-17 and Executive Order 2020-92 (which replaced Executive Order 2020-77) and imposed significantly

lessened restrictions as compared to its predecessors. EO 2020-96. Subsequently, on June 1, 2020, the Governor issued Executive Order 2020-110, which further lessens restrictions. EO 2020-110. Thus, the challenged executive orders no longer have any legal force. And notably, Executive Order 2020-96 did not, and Executive Order 2020-110 does not, impose *any* of the restrictions of Executive Order 2020-17 and Executive Order 2020-77 that Plaintiffs claim are invalid. Accordingly, the provider Plaintiffs were able to resume non-essential medical and dental procedures beginning May 29, 2020, at 11:59 pm. EO 2020-96 § 19. Similarly, as of that same timeframe, Mr. Gulick could schedule (if he had not already) and undergo his knee replacement surgery. *Id.* at §§ 8(a)(6), 19.

And, although there is an exception to the mootness rule for situations that are “capable of repetition, yet evading review,” *e.g.*, *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 603 (1982), under the current circumstances there are no facts suggesting that the conduct is capable of repetition—*i.e.*, that the restrictions of Executive Orders 2020-17 and Executive Order 2020-77 will be re-enacted. For one, case law on this issue supports a finding of mootness: In *Kentucky Right to Life*, the Sixth Circuit rejected the plaintiffs’ argument that, because the state legislature remained free to reenact the prior statutory scheme, their claims were properly before the court even after the law had changed. *Kentucky Right to Life*, 108 F.3d at 643. On the other hand, in *City of Mesquite v. Aladdin’s Castle*, 455 U.S. 283, 289–90 (1983) the Supreme Court refused to dismiss the claims as moot because the governmental entity, in no uncertain terms,

indicated that if the claims were dismissed as moot, it would definitely enact the unconstitutional ordinance again.

Here, like in *Kentucky Right to Life*, and unlike in *Aladdin's Castle*, although there is a *possibility* that the Governor could issue a future executive order that places some restrictions on nonmedical procedures, it is far from a sure thing. A gubernatorial executive order is an official act—and one not entered into lightly. *See Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (treating government action with “more solicitude” than action by a private party). And the possibility of such a re-issuance depends on circumstances that are not yet known—the path of COVID-19. In addition, based on the Governor’s new executive order, Executive Order 2020-110, she is clearly moving in the direction of *lifting* restrictions, not returning to more restrictive measures. EO 2020-110.

But even if some restrictions tighten in the future, the contours of a future executive order could be very different from those challenged here. *See Kentucky Right to Life*, 108 F.3d at 644 (citing *Kremens*, 431 U.S. at 129). This is particularly true with respect to Plaintiffs’ vagueness challenge. *See id.* (holding that overbreadth analysis is inappropriate if the challenged statute has been amended or repealed) (quoting *Bigelow v. Virginia*, 421 U.S. 809, 817–19 (1975)).

Ultimately, given the enactment of Executive Order 2020-96 and Executive Order 2020-110, Plaintiffs are no longer constrained by the restrictions of Executive Order 2020-17 and Executive Order 2020-77 that they claim are invalid. As such, Plaintiffs’ claims are moot.

II. This Court should decline to exercise supplemental jurisdiction over Plaintiffs' state-law authority issue.

Plaintiffs first challenge the EPGA on its face, claiming it is open-ended and permits unbridled lawmaking by the Governor, with no temporal, durational, substantive, or legislative checks in violation of the nondelegation doctrine and the separation-of-powers clause of the Michigan Constitution. (Dkt. 1, Compl. ¶ 106, PageID.26.) This is a state-law claim over which the Court should decline to exercise supplemental jurisdiction.

Supplemental jurisdiction is a matter of discretion, and “need not be exercised in every case in which it is found to exist.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). The purpose of joining claims in federal court is “judicial economy, convenience and fairness to litigants.” *Id.* Absent those criteria, “a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them.” *Id.* (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)). “Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties.” *Gibbs*, 383 U.S. at 726.

Under 28 U.S.C. § 1367(c), the court can decline to exercise supplemental jurisdiction over a claim in several circumstances: “(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.”

Illustratively, in *Doe v. Sundquist*, 106 F.3d 702, 704 (6th Cir. 1997), the plaintiffs

sought a preliminary injunction to block the enforcement of a new state statute addressing the disclosure of adoption records. The complaint alleged both state and federal constitutional violations. The court declined to exercise supplemental jurisdiction since the issue was one of “peculiar relevance to the primary police functions of the state.” *Id.* at 707. The court determined that the state had an interest in “having the first opportunity to construe its own constitution and laws” and thus the court declined to exercise supplemental jurisdiction over the state law claim and dismissed the claims that relied on federal law. *Id.*

Here, too, Michigan should have the first opportunity to construe its *own* laws and determine whether they violate the State’s delegation and separation-of-powers doctrines. In fact, two state-court judges have recently opined on the EPGA and EMA in the preliminary injunction context, (*Mich. United for Liberty v. Whitmer*, Michigan Court of Claims Docket No. 20-000061-MZ; *Martinko v. Whitmer*, Michigan Court of Claims Docket No. 20-000062-MM); and a third just addressed on the merits all the issues Plaintiffs raise in Counts I and II. (*Mich. House and Senate v. Whitmer*, Michigan Court of Claims Docket No. 20-000079-MZ, attached as Ex. 1). And the defendants in the *House and Senate* case, and the plaintiffs in the *Martinko* case each recently filed separate bypass applications to the Michigan Supreme Court. (*Mich. House and Senate v. Whitmer*, Mich. Docket No. 161377; *Martinko v. Whitmer*, Mich. Docket No. 161333.) Thus, this very issue is already squarely before Michigan’s highest court, and this Court has an interest

in “avoiding the unnecessary resolution of state law issues.” *Hankins v. The Gap, Inc.*, 84 F.3d 797, 803 (6th Cir. 1996).

There is yet another compelling reason to decline supplemental jurisdiction: the circumstances here are exceptional under § 1467(c)(4) because the state-law questions are novel and the COVID-19 pandemic is unprecedented, necessitating swift state action. For all these reasons, this Court should decline to exercise supplemental jurisdiction over the state-law claims.

III. This Court should not grant the requested declaratory or injunctive relief.

This Court should exercise its discretion to deny the requested declaratory relief, and it should deny Plaintiffs’ request for permanent injunctive relief because the factors weigh in the Attorney General’s favor.

A. This Court should not grant declaratory relief on the state-law issues.

Plaintiffs request declaratory relief on the issue of the validity of the EPGA or the EMA. (Dkt. 1, Compl., ¶¶ 83–99, PageID.22–25) as well as on their delegation and separation-of-powers arguments (*Id.* at ¶¶ 100–112, PageID.25–28.) This Court should decline to exercise its discretion to issue declaratory relief on these issue, as the well-established *Grand Trunk* factors counsel against such relief.

It is well-settled that the decision to exercise jurisdiction over a declaratory judgment action rests in the sound discretion of the court. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286–288 (1995); *Scottsdale Ins. Co v. Flowers*, 513 F.3d 546, 544

(6th Cir. 2008). The Declaratory Judgment Act provides that “[i]n a case of actual controversy within its jurisdiction . . . , any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration.” 28 U.S.C. § 2201; *Public Service Comm’n of Utah v. Wycoff*, 344 U.S. 237 (1952).

The Sixth Circuit considers the following factors in determining whether it is appropriate for a district court to issue a declaratory ruling: (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for a race for *res judicata*,” (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and, (5) whether there is an alternative remedy which is better or more effective. *Grand Trunk W. R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984) (citing 6A Moore’s Federal Practice ¶ 57.08[2] at 57–37 (1983)); *see also Muhammad v. Paruk*, 553 F. Supp. 2d 893 (E.D. Mich. 2008) (dismissing an action after weighing these factors).

Here, factors three, four, and five counsel against a grant of declaratory relief on these issues. When they filed this action, Plaintiffs understood that these issues had already been raised in state-court cases. It was a race to see if this Court would opine on this issue before the state courts. And, again, given that the state-law issue have already been decided by the Michigan Court of Claims and are now

squarely before Michigan’s Supreme Court via a bypass application in the *House & Senate* case, Mich. Docket No. 161377, a federal court declaration would increase friction between state and federal courts. Also, the state courts are the appropriate courts to decide the issue of the validity of state laws. Letting the issue play itself out in Michigan courts is a more effective remedy than federal-court intervention.

Declaratory relief is therefore inappropriate.

B. Plaintiffs are not entitled to permanent injunctive relief because they do not meet the well-established factors for such extraordinary relief.

In considering whether to grant permanent injunctive relief, a court must consider four factors: (1) actual success on the merits, (2) whether failure to grant the injunction will result in irreparable injury, (3) whether issuance of the injunction would cause substantial harm to the opposing parties, and (4) whether the injunction will not disserve the public interest. *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012). A permanent injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

1. Plaintiffs cannot succeed on the merits.

As explained more fully below in Argument IV, Plaintiffs cannot succeed on the merits of any of their claims against the Attorney General.

2. The lack of a permanent injunction will not result in irreparable injury to Plaintiffs.

In considering whether to issue an injunction, courts must consider whether the plaintiff will suffer irreparable injury without the injunction. *Certified Restoration Dry Cleaning Network v. Tenke Corp.*, 511 F.3d 535, 550 (6th Cir. 2007). “To demonstrate irreparable harm, the plaintiffs must show that . . . they will suffer actual and imminent harm rather than harm that is speculative or unsubstantiated.” *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006). That is, a plaintiff seeking preliminary injunctive relief must do more than show that irreparable harm is merely possible; they must “demonstrate that it is *likely* in the absence of an injunction.” *NDSL, Inc. v. Patnoudé*, 914 F. Supp. 2d 885, 899 (W.D. Mich. 2012) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original). And harm is not irreparable if it can be fully compensated by monetary damages. *Overstreet v. Lexington–Fayette Urban County Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002).

As an initial matter, because the challenged Executive Orders are no longer in force, Plaintiffs will suffer *no* harm absent a permanent injunction—let alone irreparable harm. That is, the provider Plaintiffs may now begin conducting medical procedures previously deemed non-essential. And Mr. Gulick can schedule (if he has not done so already) and undergo his knee replacement surgery.

Regardless, the injuries that Plaintiffs claim to have suffered are not irreparable. The provider Plaintiffs have not demonstrated that economic harm is likely—only that it is possible. Nor have they shown that their alleged harm cannot

be fully compensated by monetary damages. For example, they have not demonstrated that their business will be threatened by insolvency, as opposed to merely taking a temporary financial hit, which losses would be calculable. And, as was true with the plaintiffs in *Michigan Bell Telephone Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001), where the court recognized that the telephone company could recoup its losses by raising rates, provider Plaintiffs can recoup their financial losses now that the restrictions imposed by Executive Order 2020-17 and Executive Order 2020-77 are eased. There is no reason to believe that patients who were previously postponed will not now reschedule their procedures.

The provider Plaintiffs also claim loss of goodwill as an irreparable harm. *Id.* While loss of customer goodwill can constitute irreparable harm, *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) (internal citation omitted), here it is unlikely that Michigan citizens—most of whom are well aware of the various executive orders—will have any ill will toward businesses that were required to comply with executive orders and that did everything possible to keep Michiganders safe during the COVID-19 crisis. And there is no reason to believe that future customers will be deterred from using their services, since they were not singled out in the prohibition against non-essential medical procedures. All similar businesses faced the same restrictions under the challenged executive orders. Even those individuals who were unhappy with Executive Order 2020-17 and Executive Order 2020-77 are likely to blame the Governor, not the businesses who were compelled by law to comply with her orders, subject to criminal penalties for noncompliance.

As to Mr. Gulick, he claims he could not have his scheduled knee replacement, could not receive follow up care for his previous knee replacement, is in “excruciating pain,” is unable to “get prescription pain medication until he can be seen on June 11, and has had to reduce his work hours by 80%.” (Dkt. 10, Br. Supp. PI, PageID.245.) The challenged orders did not prohibit his licensed medical providers from taking action to “address [his] medical emergency or to preserv[e] [his] health and safety.” (Dkt. 1, Compl., Ex. 4, EO 2020-17 § 1, PageID.69.) Nor did they prevent him from scheduling his surgery for a future date. And his reduced hours can be compensated by money damages.

Finally, as outlined in Argument IV below, Plaintiffs cannot demonstrate that their federal constitutional rights have been violated. This factor therefore weighs against a permanent injunction.

3. The balance of harms weighs in the Attorney General’s favor, and an injunction is contrary to the public interest.

The remaining factors, “harm to the opposing party and weighing the public interest, merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Here, it is difficult to discuss the balance of harms and the public interest when the challenged Executive Orders no longer have any legal effect (which, again, underscores that Plaintiffs’ claims are moot.) But during the time they were in effect, Executive Order 2020-17 and Executive Order 2020-77 saved lives in Michigan by helping to “flatten the curve” of Michigan cases and deaths, and

conserved valuable medical resources to allow our healthcare system to remain ready to treat an influx of cases. That was clearly in the public interest during this deadly pandemic. And the Attorney General enforced those Executive Orders in her role as Chief Law Enforcement Officer.

In conclusion, Plaintiffs have failed to meet the well-established permanent injunction factors and are therefore not entitled to injunctive relief.

IV. This Court should dismiss all claims against the Attorney General because Plaintiffs have failed to state a claim on which relief can be granted.

Generally, when considering a motion to dismiss under Rule 12(b)(6), the Court must construe the complaint in the light most favorable to plaintiff, accept the plaintiff's factual allegations as true, and draw all reasonable factual inferences in plaintiff's favor. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008). But “courts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’” *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “[A] plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555; *see Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009); *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010). “To survive a motion to dismiss, [plaintiff] must allege ‘enough facts to state a claim to relief that is plausible on its face.’” *Traverse Bay Area Intermediate Sch. Dist. v. Michigan Dep’t of Educ.*, 615 F.3d 622, 627 (6th Cir. 2010).

Here, for the various reasons detailed below, Plaintiffs have failed to state a claim against the Attorney General that is plausible on its face.

A. Plaintiffs' allegations are sparse as to the Attorney General.

To begin, Plaintiffs' sparse allegations directly against the Attorney General are embodied in just seven paragraphs of a 151-paragraph Complaint:

- ¶ 61: That on March 25, the Attorney General's office admitted of EO 2020-21, "I think it's a difficult executive order to really wrap your arms around," and that "[t]he Attorney General's office explained that its process of clarifying the meaning of the order occurred on an ad hoc, case-by-case basis: 'Every instance we get a call asking about whether or not businesses essential is being first reviewed by our office and then shared with the governor's office so that we can begin to get some clarity around the executive order. '";
- ¶ 62: That the portion of the Attorney General's official website that provides guidance to businesses and law enforcement regarding the definition of "critical infrastructure workers" has linked to the updated CISA guidance, instead of to the March 19 CISA Guidance, which Executive Orders 2020-42, 2020-59, 2020-70, and 2020-77 explicitly reject;
- ¶ 63: That the Attorney General's office reiterated that violating the order could result in criminal penalties and forced closure of a business by law enforcement;
- ¶ 80: That, after the Legislature refused to extend the Governor's declaration of emergency past April 30, the Attorney General issued a letter to law enforcement officials asserting that the Governor's executive orders—including her Stay Home, Stay Safe orders—continued to be valid under the Emergency Powers of the Governor Act and directing that law enforcement officials continue to enforce the Governor's orders, but without defending the extension of the emergency under the Emergency Management Act;
- ¶ 120: Again, that the Attorney General's Office said the standards adopted in Executive Order 2020-77 are "difficult . . . to really wrap your arms around" and that the office attempts to clarify the meaning of the order with the Governor's office on an ad hoc basis, but had not outlined criteria under which those ad hoc determinations are evaluated.

- ¶ 124: Again, that the Attorney General's official website links to the updated CISA guidance, instead of to the March 19 CISA Guidance.

These sparse allegations against the Attorney General do not state a claim that is plausible on its face as to the Attorney General, and all claims against the Attorney General should therefore be dismissed. *See Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 680–81.

B. Attorney General Nessel is entitled to qualified immunity as to the request for money damages.

Plaintiffs' Complaint requests money damages. (Dkt. 1, Compl., Prayer for Relief (d), PageID.36.) The Attorney General has qualified immunity as to the money-damages claims.

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing that the official violated a statutory or constitutional right, and that the right was "clearly established" at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 567 U.S. 731, 735 (2011). Lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The U.S. Supreme Court has explained that "[a] [g]overnment official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [were] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" *al-Kidd*, 567 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Although courts do not require a case directly on point, existing precedent must have placed

the statutory or constitutional question “beyond debate.” *Id.* And qualified immunity “gives government officials breathing room to make ‘reasonable but mistaken judgments about open legal questions.’” *al-Kidd*, 567 U.S. at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The claims against the Attorney General for money damages fall far short of that threshold.

Here, as explained below in Argument IV.C, D, E, and F, Plaintiffs cannot prove a constitutional violation against the Attorney General. But even if they could, she would be entitled to qualified immunity because application of the challenged Executive Orders raise *new* legal questions, such that *no case* would have clearly established that the Attorney General was violating the Due Process Clause or the dormant Commerce Clause by enforcing the orders. To the contrary, what the Attorney General would have understood, based on the U.S. Supreme Court’s words in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905), was that in a pandemic, “[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.” *Id.* If that is somehow incorrect based on the COVID-19 pandemic here in Michigan, the Attorney General is entitled to breathing room to be mistaken in her judgment.

And as to Plaintiffs’ state-law claims (Counts I and II), a Michigan state court has already held that the Governor had the authority to issue orders under the EPGA. (*Mich. House and Senate v. Whitmer*, Michigan Court of Claims Docket No.

20-000079-MZ, attached as Ex.1.) This is current Michigan law, and, as the State's top lawyer and chief law enforcement officer, the Attorney General intends to abide by it unless it is overturned. Even if a court later rules differently, at a minimum, the issues were open legal questions and thus were not clearly established such that the Attorney General would have known she was violating state law by enforcing Executive Orders 2020-17 and 2010-77.

Therefore, the Attorney General is entitled to qualified immunity on Plaintiffs' money-damages claims.

C. The challenged executive orders were reasonable under the EPGA (Count II).

Plaintiffs allege that the Governor has applied any authority granted to her under the EPGA arbitrarily, unreasonably and in violation of Michigan's Separation of Powers Clause and has failed to comport with the terms of that Act. (Dkt. 1, Compl., ¶ 107, PageID.26.) But that is inaccurate as to the challenged orders.

Executive Order 2020-17 temporarily restricted non-essential medical procedures, with the goal of mitigating the spread of COVID-19, protecting public health, providing essential protections, and ensuring the availability of healthcare resources—including staffing, medical equipment, and personal protective equipment. Executive Order 2020-77 temporarily suspended certain activities that were not necessary to sustain or protect life, and prohibited a person or entity from operating a business or conducting operations “that require[ed] workers to leave their homes or places of residence except to the extent that those workers [we]re

necessary to sustain or protect life, [or] to conduct minimum basic operations.” EO 2020-77 § 4.

To be a valid exercise of the authority granted under the EPGA, Executive Order 2020-17 and Executive Order 2020-77 must have been “reasonable orders” that the Governor “consider[ed] necessary to protect life and property or to bring the emergency situation within the affected area under control.” Mich. Comp. Laws § 10.31(2). In promulgating each of these executive orders, the Governor specifically stated that she considered the restrictions imposed by those orders to be “reasonable and necessary” to mitigate the spread of COVID-19 and protect the public health across the State of Michigan. *See, e.g.*, EO 2020-17; EO 2020-92. She was correct in her assessment.

No one would dispute that these orders placed restrictions on liberties that would, in a “normal” context, be unreasonable. But these are not normal times. And while the Constitution does not disappear in the face of a public health crisis, neither is the Bill of Rights a “suicide pact.” *See Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Instead, it is well-settled that, in times of public health crises, a state may restrict the rights of individuals in order to secure the safety of the community:

Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 27 (1905).

To that end, “[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country

essential to the safety, health, peace, good order, and morals of the community.” *Id.* at 26. Such conditions are unreasonable only if they have “no real or substantial relation to those objects [of securing public health and safety], or [are], beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Id.* at 31.

COVID-19 has created a public health crisis of unprecedented gravity in our lifetime. Responding to, having the resources to respond to, and stemming the spread of, COVID-19 are paramount to all our well-being. And it is widely accepted that, in the absence of any vaccine or treatment, the most effective—if not only—way to combat this highly infectious virus and flatten the curve so our healthcare system and its resources are not overwhelmed, is through social distancing.

In promulgating Executive Order 2020-17 and Executive Order 2020-77, which placed restrictions on certain activities to conserve medical resources and limit social interactions, the Governor had done just that. Michigan was able to flatten its curve, dropping from third in the nation in terms of the number of COVID-19 cases, to eighth in the nation on June 2, 2020.¹⁴ The absence of the restrictions imposed in both of the challenged executive orders would have opened gateways for the virus to reach every family and social network in every part of the State, leading to a significant spike in the number of cases and an overburdening of our healthcare system. And the absence of the restrictions imposed in Executive

¹⁴ CNN, *Tracking Covid-19 cases in the US*, available at: <https://www.cnn.com/interactive/2020/health/coronavirus-us-maps-and-cases/> (last accessed June 2, 2020 at 11:00 AM).

Order 2020-17 specifically would have led to shortages of medical supplies and equipment necessary to fight this virus—resources that were already in short supply.

Accordingly, Executive Order 2020-17 and Executive Order 2020-77 bore a real and substantial relationship to securing the public health and safety. Given the challenging circumstances presented by COVID-19, the Governor validly exercised the powers delegated in the EPGA to issue reasonable executive orders aimed at mitigating its spread and ensuring the health and safety of the People of Michigan. Therefore, the Executive Orders were reasonable, valid, and enforceable under the EPGA.

D. The challenged Executive Orders were not vague (Count III).

Plaintiffs allege that Executive Order 2020-17 and Executive Order 2020-77 did not give any person of ordinary intelligence a reasonable opportunity to know what is prohibited and to be able to act accordingly. (Dkt. 1, Compl., ¶¶ 116, 118, PageID.28–29.) This argument is unavailing.

As an initial matter, the United States Supreme Court has suggested that federal courts should not opine on whether a state statute is vague until the highest state court has had an opportunity to give the statute a narrowing or clarifying construction. *See Steffel v. Thompson*, 415 U.S. 452, 469 (1974). The Michigan Supreme Court has not yet had that opportunity with respect to the challenged executive orders. In any event, Executive Order 2020-17 and Executive Order 2020-17 were not vague.

A law is void for vagueness if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion. *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 358–59 (6th Cir. 1998) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Significantly, “the degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.” *United Food & Commercial Workers Union*, 163 F.3d at 498. The United States Supreme Court has also explained that “the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry.” *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). To succeed, Plaintiffs must demonstrate that the law is impermissibly vague in all of its applications. They have not made that showing.

With respect to Executive Order 2020-17, that order gave a medical provider fair notice of what was prohibited and thus was not vague in the context of the COVID-19 pandemic. The Order specifically defined a “non-essential procedure” as one that was “not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider.” EO 2020-17. The Governor gave discretion to medical providers to determine a what was non-essential and what constituted a medical emergency for each individual patient because providers were best suited to determine what was medically necessary. Medicine is a regulated profession, and doctors have extensive training

in determining a what constitutes medical emergency and what steps are necessary to preserve a patient’s health. The medical Hippocratic Oath is similarly undefined, yet medical professionals understand what “help the sick” and “abstain from all intentional wrong-doing and harm” mean in any situation.

Further, the Executive Order 2020-17 enumerated procedures that *must have been postponed*, including joint replacement, bariatric surgery, and cosmetic surgery (except for emergency or trauma-related surgery where postponing would significantly impact the health or safety of the patient). It also indicated procedures that *should have been excluded* from postponement, such as surgeries related to advanced cardiovascular disease that would prolong life, oncological testing and treatment, pregnancy-related visits, labor and delivery, organ transplants, and procedures related to dialysis. Finally, the order detailed the procedures that *must have been excluded* from postponement, including emergency or trauma-related procedures, where delaying would significantly impact the health and welfare of the patient. In this way, the Order gave medical personnel examples on a continuum from those that must have been postponed to those that must not have been postponed, leaving the professional to determine where each patient was uniquely situated. Thus, the term “non-essential” procedure was limited by illustrative examples so there was not unfettered discretion, yet still allowed a degree of latitude for doctors in determining what this meant for each patient.

The Governor recognized that medical providers were intimately aware of their patients’ health and what was needed to thrive, and rightly gave them the

necessary discretion rather than mandating a one-size-fits-all approach and an inflexible definition of non-essential procedures that would rob those providers of that discretion. As such, Executive Order 2020-17 was not unconstitutionally vague, and Plaintiffs have failed to state a void-for-vagueness claim.

With respect to Executive Order 2020-77, Plaintiffs argue that order is vague because it is unclear who qualifies as “critical infrastructure workers.” (Dkt. 1, Compl., ¶ 118–24, PageID.29–30.) The thrust of Plaintiffs’ claim is premised on their belief that there was no rational reason for the Governor’s decision as to what industries qualify as critical infrastructure. (*Id.* at ¶ 119, PageID.30.) But, even if that belief were true (which the Attorney General does not concede), that does not make the Executive Order vague. To the contrary, as Plaintiffs point out, the Executive Order referenced a list promulgated by the Cybersecurity and Infrastructure Security Agency (CISA) on March 19, 2020, *see* EO 2020-77, which contained a detailed description of what workers and industries constitute critical infrastructure.¹⁵ Such a list provided significant guidance for critical infrastructure designations to those subject to the Executive Order.

Despite this detailed list, Plaintiffs complain that the Governor’s use of the CISA guidance was insufficient because the guidance “superseded,” and the Governor provided no reason for continued use of “superseded” guidance. (Dkt. 1, Compl., ¶ 119, PageID.29.) Again, the Governor’s failure to provide a reason for her

¹⁵ Available at: <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>.

decision to rely on the same guidance (though superseded) does not render the Executive Order vague. And, in any event, continually relying on one guidance actually provides *more* clarity than would repeatedly changing the standards as the guidance is revised. Indeed, to revise the Executive Order's standards as the guidance is updated would require those subject to the Executive Order to keep abreast not only of changes within the text of the applicable Executive Orders, but also of changes within the CISA guidance.

While Plaintiffs argue that the Attorney General added confusion because her website linked to the updated CISA guidance, (Dkt. 1, Compl., PageID.30), they fail to recognize that the Executive Order itself linked to the March 19, 2020 guidance. *See* EO 2020-77 § 8. Moreover, there are no allegations that the Attorney General has been improperly enforcing based on incorrect guidance or that Plaintiffs have been harmed as a result. Second, with respect to what constitutes a critical infrastructure operation, the differences between the March 19 CISA guidance and the updated guidance are fairly minimal. (See comparison of March 19 and updated guidance.¹⁶) Indeed, although the updated guidance gives more specific examples, under either version of the guidance, Plaintiffs would know whether they constitute critical infrastructure.

Plaintiffs further argue that the Attorney General “admitted [Executive Order 2020-77] was vague because she said the standards adopted in Executive

¹⁶ Available at <https://www.foxrothschild.com/content/uploads/2020/04/CISA-Comparison-Guidance-on-the-Essential-Critical-Infrastructure-Workforce-2.0-to-3.0.pdf>.

Order 2020-77 are ‘difficult . . . to really wrap your arms around’ ” and she had attempted to clarify the meaning of the order with the Governor’s office on a case-by-case basis. (Dkt. 1, Compl., ¶ 120, PageID.29.) But the quoted statement was taken out of context and cannot be interpreted as an admission that EO 2020-77 was vague. Indeed, it is difficult to wrap your arms around the entire pandemic, particularly at the speed at which events are unfolding. And coordination as to consistency of enforcement, and determinations made on a case-by-case basis, are not tantamount to “ad hoc” enforcement.

Finally, with respect to both challenged executive orders, they should be viewed in the context of what their preambles state as their purpose: “To mitigate the spread of COVID-19, protect the public health, provide essential protections to vulnerable Michiganders, and ensure the availability of health care resources.” EO 2020-17; EO 2020-77. This purpose provides an objective framework for determining the definition of the term “non-essential procedures” and “critical infrastructure workers,” much like the preamble and school context the court considered in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In *Grayned*, the plaintiff had alleged that an anti-noise ordinance was unconstitutionally vague as it prohibited noise that “disturb[ed] or tend[ed] to disturb” school sessions. *Id.* at 108. Even though enforcing the statute required some degree of police judgment, the Court determined that it was not unconstitutionally vague, especially when considering the ordinance’s preamble and the school context in which the statute

was written. *Id.* at 110–11. Likewise, here, the purpose of the executive order gives both those subject to and those enforcing the order guidance and parameters.

In sum, Plaintiffs have failed to state a void-for-vagueness claim.

E. The Attorney General’s enforcement of the challenged Executive Orders did not violate procedural or substantive due process.

Plaintiffs’ claims also fail under both procedural and substantive due process.

1. The challenged Executive Orders did not violate procedural due process (Count IV).

Plaintiffs allege that Executive Order 2020-17 provides no procedure or process through which to challenge the determination that certain medical treatments—such as bariatric surgery or joint replacement—are non-essential. (Dkt. 1, Compl., ¶ 132, PageID.32.) They argue that Executive Order 2020-77 provides no process through which to challenge a business’s designation as non-critical infrastructure, does not outline the criteria that would serve as a reasonable guide to such a determination, and provides no pre-deprivation or post-deprivation process. (*Id.* at ¶ 131, PageID.31.) Plaintiffs’ arguments fall short.

In attempting to combat a public health emergency, “[a]ll constitutional rights may be reasonably restricted.” *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020) (citing *Jacobson*, 197 U.S. at 11); *see also Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 393 (1902) (upholding state quarantine of passengers on boat even when all were healthy). Indeed, “a community has the right to protect itself against an epidemic of disease which

threatens the safety of its members.” *Jacobson*, 197 U.S. at 27. And the health and safety of the public is a “paramount governmental interest which justifies summary administrative action.” *Hodel v. Virginia Surface Min. & Reclamation Ass’n, Inc.*, 452 U.S. 264, 300 (1981).

Relevant here, procedural due process is “not a technical conception with a fixed content unrelated to time, place and circumstance.” *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, it is a flexible standard in which the court analyzes government and private interests. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Government interests include the administrative burden the additional procedural requirements would impose on the state. *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). Other considerations include the length of time involved and the finality of the deprivation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). In other words, due process is “calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In this case, the pandemic sets the stage for any process due to the citizens of the state of Michigan. COVID-19 hit Michigan quickly and furiously and did not allow for extended deliberation on how to best preserve individual liberties. In addressing this emergency, the Governor was expeditious and crafted a series of Executive Orders aimed at advancing the State’s interest in saving lives.

Specifically, the purpose of all of the Executive Orders is “[t]o mitigate the spread of COVID-19, protect the public health, provide essential protections to

vulnerable Michiganders, and ensure the availability of health care resources.”

E.g., EO 2020-97. And the effect of the Stay Home, Stay Safe orders is to mitigate the spread of the deadly virus and to save lives. The challenged Executive Orders and the restriction on Plaintiffs were temporary. And they were in force only until they were no longer necessary. There was no permanent taking and the Executive Orders did not result in an erroneous deprivation of liberty.

The Executive Orders were also narrowly tailored. They detailed who constituted critical infrastructure workers who could leave their homes for narrow purposes in order to keep the economy running. And they gave businesses—indeed, *these* Plaintiffs, flexibility and discretion to determine on a patient-by-patient basis which patients’ needs were “essential.” With each subsequent Executive Order that she enacts, the Governor evaluates the science, the number of cases, and the availability of medical supplies and medical professionals, in order to determine how much to relax the restrictions to continue saving lives while allowing for more businesses to open. Under these circumstances, procedural due process requires no more.

Plaintiffs’ private interests pale in comparison. Mr. Gulick experienced a temporary delay in surgery that was not essential to his survival. If it had been necessary, his doctor could have completed the surgery in accordance with the medical oath he took to do all that is necessary to save a life. Indeed, Executive Orders 2020-17 and 2020-77 did not prevent surgery if it was medically necessary. In fact, Executive Order 2020-17 provided an exception “for emergency or trauma-

related surgery where postponement would significantly impact the health, safety, and welfare of the patient.” EO 2020-17. Further, all Plaintiffs’ financial loss from the restriction does not compare to the thousands of people who could have lost their lives but for the Governor’s swift action. The Executive Orders were necessary and a proper attempt to contain the virus.

On balance, the Governor’s stated purpose in implementing the Executive Orders and the very real possibility of the loss of more lives far outweighs the Plaintiffs’ procedural-due-process concerns. The inconvenience to Plaintiffs in postponing a non-essential surgery and loss of income are temporary losses. Had the Governor not acted swiftly in enacting the Executive Orders and keeping everyone in their homes, the results could be far reaching to society and include an immeasurable number of fatalities. As such, Plaintiffs have not stated a procedural due process claim.

2. The Attorney General’s enforcement of Executive Orders 2020-17 and 2020-77 did not violate substantive due process (Count V).

Plaintiffs allege that Executive Orders 2020-17 and 2020-77 violated the right to intrastate travel and the right to practice one’s chosen profession. (Dkt. 1, Compl., ¶ 136, PageID.32.) They assert that strict scrutiny applies. (*Id.* at ¶ 138, PageID.32–33.) In their application of strict scrutiny, Plaintiffs argue that: (1) once the curve has been flattened, the protection of public health in the face of a global pandemic is not compelling state interest, and (2) the government has made no

attempt to narrowly tailor Executive Order 2020-17 or Executive Order 2020-92 to serve that interest. (*Id.* at ¶ 139, PageID.33.) Plaintiffs are mistaken.

The hallmark of substantive due process is to protect an individual against “arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114 (1889)) (emphasis added). The threshold question is “whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). When a statute is enacted to protect the public safety, review is only available if it “has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Jacobson*, 197 U.S. at 31.

In engaging in a substantive due process analysis, the court determines whether there is a fundamental liberty at stake, and if so, the government can infringe on that liberty if there is a “compelling state interest” that is “narrowly tailored.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The U.S. Supreme Court, however, has been “reluctant to expand the concept of substantive due process.” *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

While the Supreme Court has recognized interstate travel as a fundamental right, *Saenz v. Roe*, 526 U.S. 489, 498 (1999), it has not yet determined whether the Constitution protects a limited right of intrastate travel, *Johnson v. Cincinnati*, 310 F.3d 484, 496–97 (6th Cir. 2002). The Sixth Circuit is one of a few circuits that has acknowledged a right to intrastate travel as fundamental. *Id.* at 498.

But even when there are personal liberties violated, a government's quarantine can be constitutionally reasonable in a public health context. *See Jacobson*, 197 U.S. at 11. Indeed, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. The government can quarantine citizens until "the spread of the disease among the community at large has disappeared." *Id.* at 29.

Here, as in *Jacobson*, there are compelling government interests at stake: controlling the pandemic and saving lives.

Plaintiffs argue that there was no compelling government interest since the curve of the pandemic had flattened. But that argument ignores science and medical knowledge. It has been widely publicized that, even if the curve flattens temporarily, the public is not out of danger since the virus has not been eradicated. COVID-19 is extremely contagious, and even though social distancing helped flatten the curve, the virus will be ever-present unless and until the medical profession finds a cure or a vaccine. Thus, the government's interest is both compelling and continuous.

The Executive Orders were narrowly tailored to carry out that compelling interest in at least three ways. First, they were narrowly tailored to prevent the spread of COVID-19. Executive Order 2020-77 separated the various industries based on the essential nature of the workers and allowed at least some critical infrastructure workers to continue working in-person. While the Governor adopted the federal CISA guidelines regarding the definition of critical infrastructure

workers, her failure to adopt subsequent iterations of the guidelines is of no merit. There is no requirement to do so, and, in fact, it is less confusing for the public to have one iteration of the definition of critical infrastructure workers than to have that definition change over time. As time went on and the curve began to flatten, the Governor issued subsequent Executive Orders that loosened restrictions and carefully determined the categories of workers that were less likely to come into close contact with others and the Orders relaxed restrictions for an increasing number of industries. These determinations were not arbitrary, but rather, calculated to slowly allow sections of the economy to open without sacrificing gains made through the original Stay Home, Stay Safe order.

Second, Executive Order 2020-17 was narrowly tailored to preserve precious medical resources that have been in short supply since the COVID crisis began.

Third, the Executive Orders provided the least restrictive way to control the spread of the virus while attempting to keep the economy afloat. The most restrictive method would have been to maintain a complete economic shutdown. Instead, the challenged Executive Orders provide for some level of autonomy under some circumstances, depending on whether the individuals were critical infrastructure workers and essential to the economy. And notably, with each subsequent Executive Order, the Governor released some restrictions, allowing for more autonomy for community members. Under these difficult circumstances, the Governor's orders were necessary, tailored narrowly, and responded to "a terrible

context [where] the consequences of mistaken indulgence can be irretrievably tragic.” *Siegel v. Shinnick*, 219 F. Supp. 789, 791 (E.D.N.Y. 1963).

In sum, Plaintiffs have failed to state a substantive due process claim.

F. The Attorney General’s enforcement of the challenged Executive Orders did not violate the dormant Commerce Clause (Count VI).

Lastly, Plaintiffs argue that Executive Order 2020-17 and Executive Order 2020-77 violated the dormant Commerce Clause. (Dkt. 1, Compl., PageID.34–35.)

Not so.

Under the Commerce Clause of the United States Constitution, Congress is granted the power “[t]o regulate Commerce with foreign Nations, and among the several States.” U.S. Const. art. I, § 8, cl. 3. While the Clause is framed as an affirmative grant of power to Congress, it has also “long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.” *S-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). This “dormant” form of the Commerce Clause “limits the power of states ‘to erect barriers against interstate trade.’” *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 644 (2010) (citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980)).

In evaluating a dormant Commerce Clause challenge to a state law, courts engage in a two-step inquiry. *Id.* First, a court must determine whether “a state statute directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-state interests.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573,

579 (1986). If so, the statute is “generally struck down . . . without further inquiry.” *Id.* If not, that is, if the “statute has only indirect effects on interstate commerce and regulates evenhandedly,” *id.*, a court must apply the balancing test enumerated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Int’l Dairy Foods Ass’n*, 622 F.3d at 644. Under this balancing test, a court must uphold “a state regulation unless the burden it imposes upon interstate commerce is ‘clearly excessive in relation to the putative local benefits.’” *Id.* (citing *Pike*, 397 U.S. at 142). The party challenging the statute bears the burden of proving that the burdens placed on interstate commerce outweigh the benefits that accrue to intrastate commerce. *E. Kentucky Res. v. Fiscal Court of Magoffin Cty., Ky.*, 127 F.3d 532, 545 (6th Cir. 1997).

Here, the first prong of the dormant Commerce Clause analysis is not at issue: Plaintiffs make no claim that the challenged executive orders directly regulated or discriminated against interstate commerce or had the effect of favoring in-state economic interests over out-of-state interests. Rather, the thrust of Plaintiffs’ argument under the dormant Commerce Clause is directed at the second prong; specifically, that the burdens imposed by the challenged Executive Orders outweighed their public-health benefit. (Dkt. 1, Compl., ¶¶ 149–150, PageID.35.) But Plaintiffs fail to make any such showing, and therefore have failed to state a dormant Commerce Clause claim.

To be sure, the economic burden that Plaintiffs faced under the challenged Executive Orders was significant. But, in relation to the putative local benefits of

those orders—which were far greater than Plaintiffs would have this Court believe, and which were not illusory as Plaintiffs claim—that burden was not clearly excessive. In fact, the balance tips sharply in favor of the benefits that accrued from the challenged Executive Orders.

As demonstrated in Sections I.B.1.c. and I.B.3. above, the challenged Executive Orders were highly effective in achieving their stated public-health goals. Both orders slowed the spread of COVID-19 across the State of Michigan, resulting in a flattening of the curve. Additionally, Executive Order 2020-17 preserved healthcare resources, including highly-sought-after personal protective equipment, to allow Michigan’s healthcare system to stand ready to treat an influx of cases.

Moreover, while Plaintiffs argue that less burdensome means were available to available to achieve the same ends, “[i]t is no part of the function of a court” to decide which measures are “likely to be the most effective for the protection of the public against disease.” *Jacobson*, 197 U.S. at, 30. Indeed, the Supreme Court has long recognized that the enactment of measures designed to protect the public health, including measures aimed at the prevention of the spread of disease such as those at issue here, rests at the heart of a State’s police power. *Id.* at 24–25. And, particularly relevant here, over a century ago, the Supreme Court recognized that, “until Congress has exercised its power on the subject, . . . state quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution of the United States, although their operation affects interstate or foreign commerce. . . .”

Compagnie Francaise de Navigation a Vapeur, 186 U.S. at 387 (1902).¹⁷ Thus, under established Supreme Court law, the Commerce Clause is not implicated by state laws aimed at controlling the spread of disease.

In sum, because Plaintiffs have failed to demonstrate that the burdens of the challenged executive orders were clearly excessive in relation to their public-health benefit, Plaintiffs have failed to state a dormant Commerce Clause claim.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant Attorney General Dana respectfully requests that this Honorable Court dismiss all of Plaintiffs' against her, either because they are moot, because this Court should not exercise supplemental jurisdiction over Plaintiffs' state-law claims, because the Court should not issue the requested declaratory and injunctive relief, or because in Plaintiffs' sparse factual allegations against her, they fail to state a claim upon which relief may be granted as to any of the claims.

Respectfully submitted,

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¹⁷ While this case was decided prior to current dormant commerce clause jurisprudence, it remains good law and has been cited with favor in recent cases related to the COVID-19 crisis from other jurisdictions. *See In re Abbott*, 954 F.3d 772, 783–84 (5th Cir. 2020); *Wisc. Legislature v. Palm*, __ N.W.2d __, No. 2020AP765-OA, 2020 WL 2465677, at *43 (Wisc. May 13, 2020).

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Dated: June 2, 2020

Certificate of Service

I hereby certify that on June 2, 2020, I electronically filed this Defendant Attorney General Dana Nessel's Motion to Dismiss with the Clerk of the Court using the ECF system which will send notification of such filing.

A courtesy copy of the aforementioned document was placed in the mail directed to:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a
GRAND HEALTH PARTNERS, WELLSTON
MEDICAL CENTER, PLLC, PRIMARY HEALTH
SERVICES, PC, AND JEFFERY GULICK,

No. 1:20-cv-414

Plaintiffs,

HON. PAUL L. MALONEY

v

MAG. PHILLIP J. GREEN

GRETCHEN WHITMER, in her official capacity as
Governor of the State of Michigan, DANA NESSEL,
in her official capacity as Attorney General of the
State of Michigan, and ROBERT GORDON, in his
official capacity as Director of the Michigan
Department of Health and Human Services,

**ATTORNEY GENERAL
DANA NESSEL'S
SUPPLEMENTAL
BRIEFING ON
CERTIFICATION**

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**ATTORNEY GENERAL DANA NESSEL'S
SUPPLEMENTAL BRIEFING ON CERTIFICATION**

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	ii
Concise Statement of Issue Presented.....	iv
Controlling or Most Appropriate Authority.....	v
Introduction	1
Argument	2
I. Certification is unnecessary because the claims are moot.....	2
II. Because these issues are making their way through Michigan’s appellate courts and will ultimately reach the Michigan Supreme Court on an expedited basis, this Court should hold this case in abeyance.	3
III. Alternatively, this Court should decline to exercise supplemental jurisdiction over the state-law claims.	7
Conclusion and Relief Requested.....	9
Certificate of Service.....	10

INDEX OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Associate Builders & Contractors of Mich. v. Whitmer</i> , Mich. Court of Claims Docket No. 20-000092-MZ	6
<i>Carnegie-Mellon University v. Cohill</i> , 484 U.S. 343 (1988)	8
<i>Carver v. Nassau County Interim Finance Authority</i> , 730 F.3d 150 (2d Cir. 2013).....	8
<i>City of New Rochelle v. Town of Mamaroneck</i> , 111 F. Supp. 2d 353 (S.D.N.Y. 2000).....	8
<i>Doe v. Sundquist</i> , 106 F.3d 702 (6th Cir. 1997)	8
<i>Donohue v. Mangano</i> , 886 F. Supp. 2d 126 (E.D.N.Y. 2012).....	9
<i>Harrison v. NAACP</i> , 360 U.S. 167 (1959)	5
<i>Martinko v. Whitmer</i> , Mich. Docket No. 161333	3, 5
<i>Mich. United for Liberty v. Whitmer</i> , Mich. Court of Claims Docket No. 20-00061-MZ	6
<i>Michigan House of Representative and Michigan Senate v. Whitmer</i> , Court of Claims No. 20-000079-MZ.....	3, 4, 5
<i>Railroad Commission of Texas v. Pullman Co.</i> , 312 U.S. 496 (1941)	1, 5
<i>Taylor v. First of Am. Bank-Wayne</i> , 973 F.2d 1284 (6th Cir. 1992)	7
<i>United Mine Workers of America v. Gibbs</i> , 383 U.S. 715 (1966)	7

Statutes

28 U.S.C. § 1367(c)..... 7, 8, 9
Mich. Comp. Laws § 10.31, *et seq.*..... 1, 3
Mich. Comp. Laws § 30.401, *et seq.*..... 1, 3

Other Authorities

Executive Order 2020-110 2
Executive Order 2020-17 2
Executive Order 2020-77 2
Executive Order 2020-92 2
Executive Order 2020-96 2

Rules

W.D. Mich. L.Civ.R. 83.1 6

CONCISE STATEMENT OF ISSUE PRESENTED

1. Should this Court certify the following questions to the Michigan Supreme Court?
 - a. Whether, under the Emergency Powers of the Governor Act, Mich. Comp. Laws § 10.31, *et seq.*, or the Emergency Management Act, Mich. Comp. Laws § 30.401, *et seq.*, Governor Whitmer has the authority to issue or renew any executive orders after April 30, 2020. [(Dkt. 23, Notice of Hr’g, PageID.1092.)]
 - b. Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution. [*Id.*]

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Doe v. Sundquist, 106 F.3d 702 (6th Cir. 1997)

Harrison v. NAACP, 360 U.S. 167 (1959)

Michigan House of Representative and Michigan Senate v. Whitmer, Mi. S. Ct. No.
161377, 6/4/2020 Order

Taylor v. First of Am. Bank-Wayne, 973 F.2d 1284 (6th Cir. 1992)

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966)

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INTRODUCTION

This Court has invited the parties to submit additional briefing regarding whether this Court should certify the following two issues to the Michigan Supreme Court:

1. Whether, under the Emergency Powers of the Governor Act, Mich. Comp. Laws § 10.31, *et seq.* [(EPGA)], or the Emergency Management Act, Mich. Comp. Laws § 30.401, *et seq.* [(EMA)], Governor Whitmer has the authority to issue or renew any executive orders after April 30, 2020. [(Dkt. 23, Notice of Hr’g, PageID.1092.)]
2. Whether the [EPGA] and/or the [EMA] violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution. [*Id.*]

Defendant Michigan Attorney General Dana Nessel’s answer to the question of whether this Court should certify these issues is “no.” While the Attorney General agrees with this Court that “the ‘last word’ on the meaning of state statutes requiring judicial interpretation belongs not to federal district courts, but to the state supreme court[.]” (Dkt. 23, Notice of Hr’g, PageID.1091 (quoting *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499–00 (1941))), certification is neither necessary nor the most expedient process to undertake in this case.

The Attorney General’s position is that: (1) the claims in this case are moot and should therefore be dismissed, (*see* Dkt. 27, Attorney General’s Mot. to Dismiss, PageID.1395–97); (2) if this Court does not dismiss the claims as moot and intends to exercise supplemental jurisdiction over the state-law claims, it should hold this case in abeyance until the issues—which, notably, have already been raised and

decided in a lower state court—run their course (on a continued expedited basis) through the state appellate system, (*see* update below and Argument II in Attorney General’s Mot. to Dismiss, Dkt. 27, PageID.1399); or (3) this Court could simply decline to exercise supplemental jurisdiction over the state-law claims, (*see* Dkt. 27, Attorney General’s Mot. to Dismiss, PageID.1398–1400). None of these options requires certification from this Court.

ARGUMENT

I. Certification is unnecessary because the claims are moot.

As the Attorney General argued in her motion to dismiss (Dkt. 27, Attorney General’s Mot. to Dismiss, PageID.1396), on May 21, 2020, the Governor issued a new Executive Order—Executive Order 2020-96—which rescinded Executive Order 2020-17 and Executive Order 2020-92 (which replaced Executive Order 2020-77) and imposed significantly lessened restrictions as compared to its predecessors. *See* E.O. 2020-96.¹ Then, on June 1, 2020, the Governor issued Executive Order 2020-110, which further lessens restrictions. *See* E.O. 2020-110. Thus, the challenged executive orders no longer have any legal force, and Plaintiffs’ claims are moot. (*See* Dkt. 27, Attorney General’s Mot. to Dismiss, PageID.1395–97.) It would be a waste of judicial resources to certify state-law issues on moot claims.

¹ All of the Governor’s Executive Orders are available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

II. Because these issues are making their way through Michigan’s appellate courts and will ultimately reach the Michigan Supreme Court on an expedited basis, this Court should hold this case in abeyance.

The state-law issues that Plaintiffs raise in their Complaint have already been raised and decided in a lower state court. (*See Martinko v. Whitmer*, Court of Claims No. 20-000062-MM, April 29, 2020 Opinion and Order Regarding Plaintiffs-Appellants’ April 23, 2020 Motion for A Preliminary Injunction; *Michigan House of Representative and Michigan Senate v. Whitmer*, Court of Claims No. 20-000079-MZ, May 21, 2020 final opinion.) The *House & Senate* case in particular issue is making its way through the appellate courts, and raises issues concerning the Governor’s authority under the EPGA, whether the EPGA is an illegal delegation or violates the separation-of-powers doctrine, and the Governor’s authority under the EMA. (Ex. 1, *House & Senate*, Mich. Docket No. 151377, Bypass App., pp. 20–29, 34–36.)² And given the importance of the issues involved, these cases have consistently been given expedited consideration.

While, in *Martinko*, the Michigan Supreme Court recently denied the plaintiffs’ bypass application because it was “not persuaded that the questions should be reviewed by the Court[,]” (6/4/20 *Martinko* Order;³ 6/4/20), the Court when it denied the bypass application in *House & Senate* (a 4-3 decision) did not use

² The Attorney General notes that the *House & Senate* bypass application does raise an issue regarding the *House & Senate*’s standing to bring their claims in the first place. (Ex. 1, *House & Senate* Bypass App., pp. 14–17.) If that argument is successful, the Michigan Supreme Court would not reach the substantive issues.

³ Available at: <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/RecentCourtOrders/19-20-Orders/161333%202020-06-04%20or.pdf>

that language, instead stating that it was not persuaded that it should review the issues “*before consideration by the Court of Appeals.*” (6/4/20 *House & Senate Order*⁴ (emphasis added).)

Too, the Court’s Order denying bypass in *House & Senate* underscores the Court’s interest in reviewing the case—*after* review by the Court of Appeals. One of the concurrences explained: “I agree with my fellow Justices that this case presents extremely significant legal issues that affect the lives of everyone living in Michigan today. And that is exactly why I join the majority of this Court in denying the parties’ bypass applications—*because* I believe that a case this important deserves full and thorough appellate consideration.” (*Id.*, Bernstein, J., concurring). Another concurrence explained: “[O]ne might be left with the impression that this Court has declined altogether to decide this case. It has not—*it has only declined to decide the case before the Court of Appeals does.* I believe this is both compelled by our court rules and advisable as a matter of prudence. Because I believe the Court neither can nor should review this case *before the Court of Appeals does*, I concur with the Court’s order denying these bypass applications.” *Id.* (Clement, J., concurring (emphasis added)).

Thus, the Court’s Order in *House & Senate* signals that it wants the benefit of the full briefing and analysis that occurs as a case makes its way through normal appellate channels. Presumably, if a majority of the Michigan Supreme Court was

⁴ Available at: <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/RecentCourtOrders/19-20-Orders/161333%202020-06-04%20or.pdf>

unwilling to entertain the *House & Senate* bypass application (which it treated differently than the *Martinko* bypass application), it is just as unlikely to agree to certify the same questions from this Court—especially if it believes, as the Attorney General and Governor have argued, that the federal claims raised in this case are moot.

In the meantime, holding this case in abeyance would serve to “postpone the exercise of [this Court’s] jurisdiction until the state court has had ‘a reasonable opportunity to pass upon’ the relevant questions of law,” *Harrison v. NAACP*, 360 U.S. 167, 176–77 (1959), in much the same way that the *Pullman* abstention operated to postpone the exercise of the federal court’s jurisdiction in *Harrison*. *Id*; *See also Pullman Co.*, 312 U.S. at 499–500 (1941). Because the very issues that Plaintiffs raise in their Complaint and that this Court now flags as potential issues for certification are already making their way through Michigan’s appellate courts, abeyance—rather than engaging in the certification process—is in the interest of judicial economy. Additionally, the state cases challenging the EPGA and the EMA has been expedited in every court. (*E.g.* 6/4/20 *House & Senate* Order (granting immediate consideration); *House & Senate*, Mich. Court of Claims Docket No. 20-000079-MZ;⁵ 6/4/20 *Martinko* Order (granting immediate consideration); *Martinko*, Mich. Court of Claims Docket No. 20-000062-MM;⁶ *Associate Builders &*

⁵ Docket available at: <https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=823894>

⁶ Docket available at: <https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=823831>

Contractors of Mich. v. Whitmer, Mich. Court of Claims Docket No. 20-000092-MZ;⁷
Mich. United for Liberty v. Whitmer, Mich. Court of Claims Docket No. 20-00061-
MZ;⁸ *Mich. United for Liberty* Motion to Expedite Appeal, Mich. App. Docket No.
353643.⁹) Consequently, there is no reason to believe there would be an
unreasonable delay in these issues coming before Michigan's highest court.

Finally, Local Rule 83.1 requires a number of steps prior to certification,
including: (1) a written certification; (2) written findings that: (a) the issue certified
is an unsettled issue of state law; (b) the issue certified will likely affect the outcome
of the federal suit; and (c) certification of the issue will not cause undue delay or
prejudice; (3) citation to authority authorizing the state court involved to resolve
certified questions; and (4) a statement of facts to be transmitted to the Michigan
Supreme Court by the parties as an appendix to the briefs. W.D. Mich.
L.Civ.R. 83.1. Those steps could be avoided by holding this case in abeyance
pending the conclusion of state-court proceedings in (at the very least) the *House &*
Senate case. And since "the order of certification shall stay federal proceedings for a
fixed time," *id.*, holding the case in abeyance achieves the same result.

⁷ Docket available at: <https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=823961>

⁸ Docket available at: <https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=823825>

⁹ Docket available at: https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=353643&CourtType_CaseNumber=2

III. Alternatively, this Court should decline to exercise supplemental jurisdiction over the state-law claims.

As an alternative to holding this case in abeyance, this Court could simply decline to exercise supplemental jurisdiction over the state-law claims, as both Attorney General and the Governor argued in their motion to dismiss. (Dkt. 27, Attorney General’s Mot. to Dismiss, PageID.1398–1400; Dkt. 24-2, Governor’s Mot. to Dismiss, PageID.1119–24.)

Under 28 U.S.C. § 1367(c), the court can, in its discretion, decline to exercise supplemental jurisdiction over a claim in several circumstances: “(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.” *See also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

Here, all four factors are present, meaning this Court should decline to exercise supplemental jurisdiction: *First*, as discussed in Argument I above, all of the federal claims are moot and should therefore be dismissed, implicating the third factor under § 1367(c). *See Gibbs*, 383 U.S. at 726 (“[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.”); *Taylor v. First of Am. Bank–Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992) (“[W]hen ‘all federal claims are eliminated before

trial, the balance of factors . . . will point toward declining to exercise jurisdiction.’ ” (quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

Second, the state-law claims are novel, and concern the State’s interest in the administration of its government, implicating the first factor under § 1367(c). *See Doe v. Sundquist*, 106 F.3d 702, 704, 707 (6th Cir. 1997) (dismissing the federal claim and declining to exercise supplemental jurisdiction over the state law claim since the issue was one of “peculiar relevance to the primary police functions of the state”); *Carver v. Nassau County Interim Finance Authority*, 730 F.3d 150, 154–55 (2d Cir. 2013) (“[W]here a pendent state claim turns on novel or unresolved questions of state law, especially where those questions concern the state’s interest in the administration of its government, principles of federalism and comity may dictate that these questions be left for decision by the state courts.” (quotations omitted)).

Third, the state-law issues in this case predominate over the federal claims, implicating the second factor under § 1368(c). That is, the predominant issues in this case concern the validity and scope of the Governor’s statutory authority to act during an emergency or disaster. *See City of New Rochelle v. Town of Mamaroneck*, 111 F. Supp. 2d 353, 369–71 (S.D.N.Y. 2000) (declining to exercise supplemental jurisdiction where the predominate issues of the case were state-law issues of first impression, concerning the authority of the state to govern, delegate to other governmental entities, and enact laws, the resolution of which would “have wide-reaching impact on issues fundamental to governance” of the state).

And *fourth*, given the current COVID-19 crisis, as well as the fact that these issues are already before the state courts and working their way through the state-court system, the circumstances presented are exceptional, implicating the fourth factor under § 1367(c). *Donohue v. Mangano*, 886 F. Supp. 2d 126, 149 (E.D.N.Y. 2012) (“[T]he existence of the parallel, ongoing state court proceeding also provides a compelling reason for declining supplemental jurisdiction under 28 U.S.C. § 1367(c)(4).” (quotations omitted)).

Therefore, this Court should decline to exercise supplemental jurisdiction over Plaintiffs’ state-law claims.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant Attorney General Dana respectfully requests that this Honorable Court decline to certify issues to the Michigan Supreme Court.

Respectfully submitted,
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Dated: June 5, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020, I electronically filed this Attorney General Dana Nessel's Supplemental Briefing on Certification with the Clerk of the Court using the ECF system which will send notification of such filing.

A courtesy copy of the aforementioned document was placed in the mail directed to:

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UNITED STATES DISTRICT COURT
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**DEFENDANTS' WHITMER, NESSEL AND GORDON'S
JOINT NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING THEIR
MOTIONS TO DISMISS**

Defendants Gretchen Whitmer, Robert Gordon, and Dana Nessel, by counsel, file this joint notice to draw the Court's attention to the recent decision of the United States District Court for the Eastern District of Michigan in *Martinko, et. al. v. Gretchen Whitmer*, Case No. 20-cv-10931, Opinion and Order Granting Defendant's Motion to Dismiss (E.D. Mich. June 5, 2020)(Exhibit A). By this filing, Defendants also raise Eleventh Amendment Immunity regarding Plaintiffs' state law claims in Counts I and II and any claim in this case for retrospective declaratory or injunctive relief.

Providing supplemental authority to a court is an important practice. Indeed, in the federal appellate courts there is a specific rule that sets forth the procedure for doing so. Rule 28(j) of the Federal Rules of Appellate Procedure states as follows:

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. . . .

This rule makes sense. If there is subsequent authority that may assist the court with rendering its decision, it is appropriate to bring the authority to the court's attention and to briefly explain why the party believes this authority is relevant.

Here, the decision of the Eastern District in *Martinko* is relevant because the Court dismissed claims very similar to the claims in this case on the basis of mootness and Eleventh Amendment immunity. In *Martinko*, the plaintiffs challenged two executive orders issued by Governor Whitmer in March and April 2020 in response to the coronavirus pandemic that has affected, and continues to affect, the state, the country, and the entire world. Specifically, the plaintiffs complained that EO 2020-21 and EO 2020-42, which imposed certain travel and business restrictions with widespread application throughout the State of Michigan, deprived them of business income and interfered with their right to travel to their businesses and between residences.

Like this case, the executive orders challenged by the *Martinko* plaintiffs were rescinded and the restrictions challenged by the plaintiffs were lifted. Also like this case, the *Martinko* plaintiffs asserted that because there was a chance the restrictions may be imposed again in the future, their case was not moot. Nevertheless, in *Martinko*, the Court dismissed the plaintiffs' complaint in its entirety.

In short, the Court determined that plaintiffs were not entitled to damages or retrospective injunctive or declaratory relief because the Governor enjoys Eleventh Amendment immunity in her official capacity. In addition, the Court determined

that the plaintiffs were not entitled to prospective injunctive or declaratory relief because the executive orders that underlie their complaint have been rescinded. Plaintiffs' claims in this case are similarly moot and foreclosed by the Eleventh Amendment. Furthermore, and for the reasons set forth in Defendants' Joint Motion for Reconsideration Regarding Certification, the state law claims in Counts I and II are barred by the Defendants' Eleventh Amendment immunity. See, e.g., *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984); *Ernst v. Rising*, 427 F.3d 351, 368–69 (6th Cir. 2005). As a result, this case should also be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 11, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

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UNITED STATES DISTRICT COURT
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Exhibit A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVE MARTINKO, et al.,

Plaintiffs,

Civil Action No. 20-CV-10931

vs.

HON. BERNARD A. FRIEDMAN

GRETCHEN WHITMER,

Defendant.

OPINION AND ORDER GRANTING DEFENDANT’S MOTION TO DISMISS

This matter is presently before the Court on defendant’s motion to dismiss [docket entry 13]. Plaintiffs have filed a response in opposition. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide this motion without a hearing. As the Court is granting defendant’s motion, there is no need for defendant to file a reply.

Plaintiffs are Steve Martinko; Martinko’s landscaping company, Contender’s Tree and Lawn Specialists, Inc.; and Michael and Wendy Lackomar.¹ They are suing Gretchen Whitmer, the current governor of the State of Michigan, regarding two temporary, emergency Executive Orders (“EO”) she issued in March and April 2020 in response to the coronavirus pandemic that has affected, and continues to affect, the state, the country, and the entire world. Specifically, plaintiffs complain that EO 2020-21 and EO 2020-42, which imposed certain travel and business restrictions with widespread application throughout the State of Michigan, deprived them of business income and interfered with their right, as to Martinko, to travel

¹ A fifth plaintiff, Jerry Frost, has voluntarily dismissed the complaint. He alleged that the executive orders at issue in this case violated his rights because they prevented him from traveling to visit his girlfriend.

between his residence and his business, and, as to the Lackomars, to travel between their primary residence and their cottage.

In Count I, plaintiffs claim that EO 2020-21 and EO 2020-42 constituted a regulatory “taking” of their property without compensation in violation of their Fifth Amendment rights. In Counts II and III, they couch the same allegations as substantive due process claims, in violation of their Fourteenth Amendment rights. Plaintiffs seek the following relief:

- a. Issuing a Temporary Restraining Order enjoining Defendant from enforcing Executive Orders 2020-21 and 2020-42 as a violation of Plaintiffs’ fundamental rights under the First, Fifth and Fourteenth Amendments;
- b. A declaratory judgment that issuance and enforcement of Executive Orders 2020-21 and 2020-42 [i]s an unconstitutional violation of Plaintiffs['] substantive due process rights under the First and Fourteenth Amendment[s];
- c. Compensatory damages adequate to justly compensate Plaintiffs for the regulatory taking of their Physical Location and Tangible Property;
- d. Compensatory damages adequate to satisfy Plaintiffs in the amount owed for Defendants’ [sic] violations of the Due Process Clause of the Fourteenth Amendment;
- e. Punitive damages;
- f. A declaratory judgment that issuance and enforcement of Executive Orders 2020-21 and 2020-42 [i]s an unconstitutional taking without just compensation, under the Fifth and Fourteenth Amendment[s];
- g. A declaratory judgment that issuance and enforcement of Executive Orders 2020-21 and 2020-42 [i]s an unconstitutional violation of Plaintiffs['] substantive due process rights under the First and Fourteenth Amendment[s];

- h. A permanent injunction to prohibit Defendant[] from enforcing the Executive Orders 2020-21 and 2020-42;
- i. An award of costs and expenses, including reasonable attorneys' fees under 42U.S.C. § 1988; and
- j. Such other and further relief as this Court deems appropriate.

Compl. at 20-21.

Defendant correctly argues that plaintiffs' complaint must be dismissed because this suit is barred by the Eleventh Amendment. A suit against Michigan's governor in her official capacity is a suit against the state itself, *see Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (citing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)), and the Eleventh Amendment bars suits by citizens against a state in federal court. As the Supreme Court has explained,

we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. *See, e.g., Cory v. White*, 457 U.S. 85, 90, 102 S.Ct. 2325, 2329, 72 L.Ed.2d 694 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought"). . . . The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48, 115 S.Ct. 394, 404, 130 L.Ed.2d 245 (1994); it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct and Sewer Authority*, 506 U.S., at 146, 113 S.Ct., at 689 (internal quotation marks omitted).

Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 58 (1996). *See also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (reiterating that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state" and

that “[t]his jurisdictional bar applies regardless of the nature of the relief sought”).² An exception to Eleventh Amendment immunity is recognized when a plaintiff seeks “prospective injunctive relief to prevent a continuing violation of federal law.” *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. 123 (1908)). See also *Pennhurst*, 465 U.S. at 103. However, this exception does not apply to “claims for retrospective relief,” including claims for injunctive relief concerning statutes that have become moot by amendment. *Green*, 474 U.S. at 68-69.

In the present case, defendant notes that the executive orders plaintiffs challenge have been rescinded and that the restrictions that are the basis of this lawsuit no longer exist. Plaintiffs themselves concede that EO 2020-21, issued on March 24, 2020, was “revoked and replaced” by EO 2020-42 on April 9. See Compl. ¶¶ 17-18. Plaintiffs further concede that EO 2020-59 “rescinded 2020-42 and removed the ban on landscapers working and lifted the ban on traveling to second homes within Michigan,” Pls.’ Resp. Br. at 2, and that “there is no longer a direct restriction on Plaintiffs using or accessing their property.” *Id.* at 8. The Court takes judicial notice of the fact that the governor has recently lifted the stay-at-home order and that most businesses may now operate normally. See EO 2020-110, dated June 1, 2020. Plaintiffs’

² The fact that plaintiffs claim that defendant has taken their property without compensation does not change the Eleventh Amendment analysis. Plaintiffs cite *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019), for the proposition that they may bring a § 1983 action as soon as government action “takes” their property. But the defendant in that case was a Pennsylvania township that issued an ordinance plaintiff claimed took her property without compensation, and the Court, in summarizing its holding, stated that “[a] property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government.” *Id.* at 2179 (emphasis added). Plaintiffs in the present case cite no authority suggesting that a *state* is not entitled to Eleventh Amendment immunity as to a Fifth Amendment takings claim asserted in federal court.

assertion that “there is a good chance that these restrictions will come back,” Pls.’ Resp. Br. at 8, is pure speculation and does not suffice to avoid the conclusion that their request for prospective injunctive and declaratory relief is moot.

In short, plaintiffs are not entitled to damages or restrospective injunctive or declaratory relief because defendant enjoys Eleventh Amendment immunity. And they are not entitled to prospective injunctive or declaratory relief because the executive orders that underlie their complaint have been rescinded. Accordingly,

IT IS ORDERED that defendant’s motion to dismiss is granted.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

Dated: June 5, 2020
Detroit, Michigan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC,
d/b/a GRAND HEALTH PARTNERS,
WELLSTON MEDICAL CENTER, PLLC,
PRIMARY HEALTH SERVICES, PC, AND
JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official
capacity as Governor of the State of
Michigan, DANA NESSEL, in her official
capacity as Attorney General of the State
of Michigan, and ROBERT GORDON, in his
official capacity as Director of the Michigan
Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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DEFENDANTS WHITMER, NESSEL AND GORDON'S
JOINT MOTION FOR RECONSIDERATION
REGARDING CERTIFICATION

CONCISE STATEMENT OF ISSUES PRESENTED

1. This Court lacks jurisdiction over Plaintiffs' state law claims under the Eleventh Amendment. As a result, this Court lacks jurisdiction to certify the state law issues to the Michigan Supreme Court in the first instance. This Court should not certify the issues in Counts I and II to the Michigan Supreme Court and should instead dismiss Counts I and II without prejudice.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

WD Local Rule 7.4

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 121 (1984).

ARGUMENT

- I. This Court lacks jurisdiction over Plaintiffs' state law claims under the Eleventh Amendment. As a result, this Court lacks jurisdiction to certify the state law issues to the Michigan Supreme Court in the first instance. This Court should not certify the issues in Counts I and II to the Michigan Supreme Court and should instead dismiss Counts I and II without prejudice.**

WD Local Rule 7.4 regards motions for reconsideration, and states:

Generally, and without restricting the discretion of the court, motions for reconsideration which merely present the same issues ruled upon by the court shall not be granted. The movant shall not only demonstrate a palpable defect by which the court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof.

In this motion, Defendants raise Eleventh Amendment immunity regarding the certification issue and in response to Plaintiffs' state law claims in Counts I and II. Defendants do not merely present the same issues already ruled upon by the Court.

Eleventh Amendment immunity is a dispositive issue requiring a different disposition of the state law claims. Under the Eleventh Amendment, the Court lacks jurisdiction over Counts I and II, and must dismiss those claims rather than certifying the issue to the Michigan Supreme Court. Certification of issues over which this Court lacks jurisdiction is a palpable defect, and the parties and the Court have been misled.

- A. The Eleventh Amendment bars the adjudication of Counts I and II against the State in federal court.**

As the Supreme Court has explained, "[t]he ultimate guarantee of the Eleventh Amendment is that non-consenting States may not be sued by private

individuals in federal court.” *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 363 (2001). Counts I and II present state law claims regarding the scope and state constitutionality of the Michigan Emergency Powers of the Governor Act (EPGA) and the Michigan Emergency Management Act (EMA). In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984), the Supreme Court held that the Eleventh Amendment forbids federal courts from enjoining state institutions and state officials on the basis of state law and that the doctrine of pendent jurisdiction does not override the Eleventh Amendment. The Sixth Circuit has also emphasized that “the States’ constitutional [Eleventh Amendment] immunity from suit prohibits all state-law claims filed against a State in federal court, whether those claims are monetary or injunctive in nature.” *Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005).

Moreover, where, as here, a claim is asserted against a state official in her official capacity, the claim is functionally equivalent to a claim asserted against the state itself. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (explaining that “an official capacity suit is, in all respects other than name, to be treated as a suit against the [governmental] entity” for which the official serves as an agent); *Cady v. Arenac County*, 574 F.3d 334, 342 (6th Cir. 2009) (noting that “a lawsuit against an officer in his official capacity and against the governmental entity [for which he serves] ... are functionally the same and should therefore be subjected to the same analysis”). The sole exception to this rule—i.e., an official-capacity claim for prospective injunctive relief under *Ex parte Young*—does not apply to claims

alleging non-compliance with state law. *See Ernst*, 427 F.3d at 368–69; *Freeman v. Michigan Department of State*, 808 F.2d 1174, 1179 (6th Cir. 1987). Consequently, the Court lacks jurisdiction over Counts I and II under the Eleventh Amendment, and the state laws are subject to dismissal without prejudice. This Court should not certify the issues in Counts I and II where the Court lacks jurisdiction over those claims. To do so would be a palpable error.

B. Defendants have not waived Eleventh Amendment immunity.

As the Supreme Court has recognized, “[a] State remains free to waive its Eleventh Amendment immunity from suit in a federal court.” *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 618, (2002). A state may waive its immunity through its litigation conduct; but the touchstone of waiver doctrine is intent—the state’s litigation conduct must clearly indicate the state’s intent to waive its immunity. *Id.* at 620. A clear intent to waive immunity may be inferred when a state’s litigation conduct displays an inconsistent and unfair invocation of immunity “to achieve litigation advantages”—such as removing a case to federal court only to later seek dismissal from that court under the Eleventh Amendment. *Id.* .

Waiver is a case-specific inquiry, focused on the intent clearly indicated by the course of a state’s litigation conduct as a whole. For example, the Sixth Circuit has held that where a state loses its case on the merits after extensive discovery, a state may not then claim sovereign immunity. *Ku v. Tennessee*, 322 F.3d 431, 435 (6th Cir. 2003); see also *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 756–58,

760–63 (9th Cir. 1999) (holding state waived sovereign immunity when it did not raise it until the opening day of trial, after it had filed two motions to dismiss and an answer that did not assert it, consented to have a magistrate try the case, conducted discovery, moved to compel discovery and for sanctions, participated in a pre-trial conference, and filed trial material).

Barachkov v. Davis, 580 Fed. Appx. 288 (6th Cir. 2014) (Exhibit A) is instructive. In that case, the plaintiffs contended that the defendant waived its sovereign immunity by asserting the defense primarily in its summary-judgment reply brief. *Id.* at 300. The defendant first raised the issue of sovereign immunity in its answer to the complaint and again in its amended affirmative defenses. *Id.* While the defendant did not file a Rule 12(b)(1) motion to dismiss on sovereign immunity grounds, neither did it file a motion to dismiss on the merits. *Id.* Less than two months later, the defendant filed its summary-judgment brief where it failed to raise its sovereign immunity. *Id.* Three weeks after the plaintiff filed her response to the motion for summary judgment, the defendant reasserted its sovereign immunity in its reply. *Id.*

In determining that the defendant had not waived Eleventh Amendment Immunity, the Sixth Circuit held that

We have never held that the failure to raise sovereign immunity in an opening summary-judgment brief per se constitutes a waiver. Rather, properly focusing on the whole of [the defendant's] litigation conduct demonstrates that it did not clearly intend to waive its sovereign immunity and consent to federal jurisdiction. *Id.*

Here, Defendants have done nothing that evidences a clear intent to waive immunity. This case is in its infancy. Service of the complaint was effectuated less than 30 days ago. Defendants filed their motions to dismiss only nine days ago, and Plaintiffs have not yet responded. Defendants have yet to even file an answer or raise affirmative defenses to the complaint. And throughout the short life of this case, Defendants have consistently challenged this Court's exercise of jurisdiction over Plaintiffs' state law claims. Eleventh Amendment Immunity only provides further support for that position. The litigation conduct of the Defendants thus has not waived sovereign immunity under the Eleventh Amendment.

CONCLUSION AND RELIEF REQUESTED

This Court lacks jurisdiction over Plaintiffs' state law claims under the Eleventh Amendment. As a result, this Court lacks jurisdiction to certify the state law issues to the Michigan Supreme Court in the first instance. This Court should not certify the issues in Counts I and II to the Michigan Supreme Court and should instead dismiss Counts I and II without prejudice.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC,
d/b/a GRAND HEALTH PARTNERS,
WELLSTON MEDICAL CENTER, PLLC,
PRIMARY HEALTH SERVICES, PC, AND
JEFFERY GULICK,

Plaintiffs,

v

GRETCHEN WHITMER in her official
capacity as Governor of the State of
Michigan, DANA NESSEL, in her official
capacity as Attorney General of the State
of Michigan, and ROBERT GORDON, in his
official capacity as Director of the Michigan
Department of Health and Human Services,

Defendants.

No. 1:20-cv-00414

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Exhibit A

580 Fed.Appx. 288

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1. United States Court of Appeals, Sixth Circuit.

Patricia BARACHKOV, Carol Diehl, and Nancy Englar, Plaintiffs–Appellees/Cross–Appellants,

v.

Linda DAVIS, Chief Judge of the 41B, individually and in her official capacity, Defendant–Appellant/Cross–Appellee.

Nos. 13–1320, 13–1399, 13–1765.

|
Aug. 28, 2014.

Synopsis

Background: Terminated employees of township division of Michigan trial court filed § 1983 action alleging that court, chief judge, and township had violated their First and Fourteenth Amendment rights by ending their employment because of interview statements they made as part of management oversight review conducted by Michigan State Court Administrative Office (SCAO). The United States District Court for the Eastern District of Michigan, Paul D. Brenneman, J., 2012 WL 6015891 and 2013 WL 594015, denied defendants' post-trial motions after jury verdict in employees favor in part. Parties appealed.

Holdings: The Court of Appeals, Julia Smith Gibbons, Circuit Judge, held that:

[1] evidence was sufficient from which reasonable juror could conclude that employees had legitimate expectation of just-cause employment;

[2] reasonable official would not have known that terminating employees without pre-termination hearing was unlawful; and

[3] Michigan trial court did not clearly indicate its consent to federal jurisdiction.

Affirmed in part, vacated in part, and remanded.

West Headnotes (3)

- [1] **Constitutional Law** 🔑 Termination or discharge
Municipal Corporations 🔑 Proceedings
Public Employment 🔑 Requisites and sufficiency of hearing

Evidence was sufficient from which reasonable juror could conclude in action under § 1983 that government employees had legitimate expectation of just-cause employment, and thus they were entitled to pre-termination due process, where prior supervisor testified that he communicated his just-cause policy to workforce in general and current and former employees testified that it was understood that supervisor adopted just-cause standard. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

- [2] **Civil Rights** 🔑 Employment practices

Reasonable official would not have known that terminating government employees without pre-termination hearing was unlawful, and thus official who did so was entitled to qualified immunity in employees' § 1983 procedural due process action; even if employee had informed official that employees could not be terminated without just cause, there was no written policy on that issue, official reasonably undertook to determine employees' employment status, official had not been informed by prior supervisor, despite his opportunity to do so, that employees could not be terminated without just cause, and default status for those employees was at-will employment. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

- [3] **Federal Courts** 🔑 Litigation conduct

Federal Courts  **Courts**

Michigan trial court did not clearly indicate its consent to federal jurisdiction in lawsuit under § 1983, and thus did not waive its Eleventh Amendment sovereign immunity, by not filing motion to dismiss and by not raising its immunity in its initial summary-judgment brief, since court first raised issue of sovereign immunity in its answer to complaint and again in its amended affirmative defenses, its somewhat belated assertion of sovereign immunity did not appear to be strategic decision, and court raised sovereign immunity in its summary judgment briefing and raised it before merits of case had been ruled upon. [U.S.C.A. Const.Amend. 11](#); [42 U.S.C.A. § 1983](#).

[4 Cases that cite this headnote](#)

***289** On Appeal from the United States District Court for the Eastern District of Michigan.

BEFORE: [COLE](#), Chief Judge; [NORRIS](#) and [GIBBONS](#), Circuit Judges.

Opinion

***290** [JULIA SMITH GIBBONS](#), Circuit Judge.

In July 2004, Linda Davis, Chief Judge of Michigan's 41B District Court, fired Patricia Barachkov, Nancy Englar, and Carol Diehl (collectively “the Employees”). The Employees filed suit against Davis in her individual and official capacities, alleging violations of their procedural due process rights under the Fourteenth Amendment. The case was tried to a jury, which returned a verdict in favor of the Employees and awarded compensatory and punitive damages. Davis appeals the denial of her motions for judgment as a matter of law, motion for a new trial, and motion to remit damages. For the following reasons, we hold that Davis is entitled to qualified immunity, vacate the award of damages against her, and remand for consideration of the Employees' entitlement to equitable relief.

I.

This case has been before this court once before. In 2012, we heard an appeal from the district court's grant of Davis's motion for summary judgment, and while the factual record at trial supersedes the summary-judgment record, [Nolfe v. Ohio Ky. Oil Corp.](#), 675 F.3d 538, 545 (6th Cir.2012), our prior opinion lays out some of the basic and undisputed factual background.

[The] 41B District Court is a Michigan trial court assigned jurisdiction over traffic violations, civil and criminal infractions, small claims, and probation oversight. At times relevant to this case, 41B District Court was comprised of two physically separate divisions, one serving the city of Mt. Clemens, and the other serving Clinton Township. Each municipality was responsible for maintaining, financing and operating its respective division of the court.

Appellants were employees of the Clinton Township division of the court until their terminations in July, 2004. Appellants Barachkov and Englar were employed as court clerks, while Appellant Diehl was a court cashier. During Appellants' employment, Linda Davis was Chief Judge of the 41B District Court and was assigned supervisory authority over personnel in both locations by law, and possessed the authority to hire, fire, discipline, or discharge employees. Chief Judge Davis and Judge John Foster sat in the Mt. Clemens location, while Judge William Cannon sat in Clinton Township.

[Barachkov v. 41B Dist. Court](#), 311 Fed.Appx. 863, 865 (6th Cir.2009).

Starting well before Davis's chief judgeship, Cannon was permitted almost unfettered discretion in formulating policy for the Clinton Township court location. This included discretion to formulate a termination policy for court employees working in the Clinton location.¹ Clinton Township first memorialized its personnel policies in the 1990s in the form of the Disciplinary Action Procedure (“DAP”), which provided in part for just-cause employment. Cannon was neither required to adopt the DAP nor did he implement it in its entirety. He “used [his] own judgment and followed through on what [his] policy had always been since [he] was elected.” He testified that he applied the DAP to his employees to the extent it conformed to his preexisting policy, which was to provide notice, progressive discipline, and good cause for termination.

Cannon testified that his employees were aware that he employed a just-cause standard, in part because he told them so. *291 He also testified that he circulated the DAP to his employees. The Employees testified that they received the DAP and understood themselves to be just-cause employees. Other employees executed affidavits attesting that they were at-will employees and there was additional testimony at trial that it was understood that Cannon maintained an at-will policy.

Davis became aware of the Clinton Township location's personnel policies in early 2004 when she participated in a comprehensive feasibility study into the merger of the Clinton Township and Mt. Clemens locations. A primary focus of the feasibility study was to determine 41B's human resources and personnel policies. Davis attended regular meetings about the potential merger with judges and representatives from the court locations, advisors from the townships, and Deborah Green from the State Court Administrator's Office ("SCAO"). At these meetings, the advisory board on which Davis sat requested personnel policies from Cannon and his representatives. Davis testified on both direct and cross examination that when personnel policies were requested of Cannon, his representatives, and the Clinton Township court location, the advisory board received nothing.

Q: And as it related to that HR analysis, that personnel analysis, did you ask representatives from Clinton Township and the Clinton Township location for any union contracts that they had?

A: We asked them for all contracts that they had.

Q: So that would include individual employment contracts?

A: Yeah.

Q: And did you ask them for employee handbooks, policies and procedures?

A: We asked them to give us all the policies and procedures and did the same thing with Mt. Clemens court so we could start meshing the two together.

Q: Was that request made to each of the judges in each of the courts?

A: The judges were in the meetings where we made the requests. So it wasn't directly made to them, but they certainly were privy to it.

Q: And was that information requested from the administrators of each court, the chief judge, Judge Cannon and the court administrators.

A: Yes.

Q: And was that same information requested from the funding units from each of the courts?

A: Yes.

Q: Did you receive from the Clinton Township location a collective bargaining agreement?

A: No.

Q: Did you receive an employment contract?

A: No.

Q: Did you receive a written policies or procedures manual?

A: No.

Q: Did you receive any written policy or procedure regarding personnel issues, personnel management, just-cause employment status?

A: No....

Q: Did you personally have discussions with Judge Cannon about those documents?

A: Yes.

Q: Did you personally have discussions with the HR representative from the township regarding those documents?

A: I did.

Q: Out of those discussions were any additional documentation or materials *292 provided to you regarding the policies and procedures from that court?

A: None.

Q: Did you reach a conclusion as to whether the Clinton Township employees were at-will employees at that time?

A: Yes.

She testified: “We asked him, when we were doing the merger of the courts, what his policies and practices were, and he said he did not have any, that he didn't really have to discipline people very often at the township. So to my knowledge there were none.”

Green, who was also present in the meetings, testified to the same.

Q: Did you look at personnel and staffing issues as it related to the consolidation?

A: Yes.

Q: Now, as it related to those personnel and staffing issues, would you have asked both courts for their personnel and staffing information as it relates to each court?

A: Yes.

Q: Did you ask that in Mt. Clemens?

A: Yes.

Q: Did you ask that in Clinton Township?

A: Yes.

Q: And would you have made that request from Judge Cannon?

A: Yes....

Q: And did you ask for personnel policies and procedures from Clinton Township?

A: Yes.

Q: Did you get it?

A: No.

Q: Did anybody give you an employee handbook of any kind?

A: No. I got one—I remember seeing one page or one or two pages about sick time and vacation time. I never saw anything more than that.

Q: Okay. Did you ever see a ... personnel policy or procedure from anyone at Clinton Township?

A: No.

Q: Anyone describe to you during these meetings any kind of formal practice or informal practice that had been taking place at the Clinton Township court regarding personnel issues.

A: There was no formal practice.

Q: Okay. Did you reach a conclusion as it relates to the Clinton Township employees as to whether they were at-will employees?

A: I believe they were at will.

Based on the information collected during the feasibility study, both women concluded that Cannon's employees served at will.

When the merger inquiry disclosed personnel problems, SCAO commenced a management oversight review of 41B. We explained:

In late May 2004, Deborah Green, a representative of the SCAO, informed Chief Judge Davis that the SCAO would soon be conducting a management oversight review into the operations and performance of the 41B District Court. On June 28, 2004, Chief Judge Davis held a staff meeting in which she advised the district court staff that, as part of the SCAO investigation, each employee of the court would be interviewed. At this meeting, Chief Judge Davis emphasized the serious nature of the investigation and that the need for honesty was paramount. She informed the employees that no one would be disciplined for previous wrongs, and that no one would lose their jobs if they were honest with the interviewer.

*293 Green independently interviewed each court employee; Chief Judge Davis did not participate in the investigation. Following completion of the interviews, Green concluded that Appellants Barachkov, Diehl, and Englar had lied and withheld information, and had coerced others to do the same. Appellants allege that their answers to Green's questions were honest and that Green asked questions about topics on which they had no personal knowledge.

On July 15, 2004, Chief Judge Davis fired the Appellants. Along with a representative of the SCAO, Chief Judge Davis met individually with each Appellant and informed her that she was being terminated due to her responses during the interview. Appellants were not provided with

advance notice of the terminations or a hearing in which they could dispute the reasons for their dismissal. Appellants contend that their terminations were a result of Chief Judge Davis' desire to advance her political and personal agenda by forcing Judge Cannon to retire, and that they were fired for failing to provide false information about Judge Cannon's management of the Clinton Township division of the 41B District Court....

Appellant Barachkov commenced an action pursuant to § 1983 and various state laws in the United States District Court for the Eastern District of Michigan in October, 2004. Shortly after, Appellants Diehl and Englar followed suit and filed identical actions. On March 31, 2006, the district court consolidated the cases into a single action. Appellees thereafter filed motions for summary judgment alleging that Clinton Township and the 41B District Court were entitled to sovereign immunity and that Appellants could not, as a matter of law, establish any constitutional violations. The district court agreed and granted Appellees' motion.

Barachkov, 311 Fed.Appx. at 865–66.

We reversed the district court's grant of summary judgment on the Employees' Fourteenth Amendment due process claim, holding that

there exists a direct conflict in the evidence regarding the exact contours of the termination policy—if any existed—employed by Judge Cannon, and whether such a policy was ever communicated to, and understood by, all of his employees. This is a genuine issue of material fact which requires further development of the record and cannot be properly resolved on summary judgment.

Id. at 872. We also reversed the district court's dismissal of the Employees' claim for prospective injunctive relief against Davis in her official capacity. *Id.* at 873.

On remand, the district court held that Davis was not entitled to qualified immunity because there was a fact question as to whether the Employees could be terminated only for just

cause. The case proceeded to trial. Davis moved for judgment as a matter of law, which the district court denied. Davis then requested a jury instruction on qualified immunity, which the district court denied, stating that Davis would be free to raise the issue post-verdict. The jury found in favor of the Employees and returned a verdict awarding compensatory and punitive damages in the amount of \$2,277,688. Davis filed a renewed motion for judgment as a matter of law, a motion for a new trial, and a motion to amend the judgment regarding damages, all of which the district court denied. Davis timely appealed. The Employees conditionally cross-appealed in the event the jury verdict is disturbed.

*294 II.

Davis was sued in her individual and official capacities. Qualified immunity shields a defendant sued in his or her individual capacity from monetary liability; it does not shield a defendant from official-capacity claims for equitable relief, *Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir.1997), nor does it shield a defendant from individual-capacity claims for equitable relief, *Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir.2001). Because the Employees may be entitled to equitable relief notwithstanding the fact that Davis may be entitled to qualified immunity, we begin by considering whether the Employees' constitutional rights were violated.

A.

Davis seeks reversal of the district court's denial of her motions for judgment as a matter of law and in the alternative for a new trial on the ground that the Employees could not establish a violation of their constitutional rights. We review *de novo* a district court's denial of a motion for judgment as a matter of law, applying the same deferential standard as the district court. *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 614 (6th Cir.2007). “ ‘District courts should grant judgment as a matter of law only if a complete absence of proof exists on a material issue in the action, or if no disputed issue of fact exists on which reasonable minds could differ.’ ” *Karam v. Sagemark Consulting, Inc.*, 383 F.3d 421, 427 (6th Cir.2004) (quoting *LaPerriere v. Int'l Union UAW*, 348 F.3d 127, 132 (6th Cir.2003)). We view the evidence in the light most favorable to the non-moving party. *Radvansky*, 496 F.3d at 614. “Neither the district court nor the reviewing court may reweigh the evidence or assess the credibility of witnesses.” *Id.*

A district court's denial of a motion for a new trial is reviewed for abuse of discretion. *Id.* We will reverse only if we have “a definite and firm conviction that the trial court committed a clear error of judgment.” *Id.* (quoting *Barnes v. Owens–Corning Fiberglas Corp.*, 201 F.3d 815, 820 (6th Cir.2000)).

1.

[1] The focus of Davis's appeal is the district court's conclusion that the Employees adduced sufficient evidence of a property interest protected by the Due Process Clause.² At the outset, to the extent that Davis argues that the Employees' evidence could not establish a property interest a matter of law, this issue was decided by our prior opinion in this case. *Barachkov*, 311 Fed.Appx. at 872. What remains for our consideration in this appeal is a question of evidentiary sufficiency: whether the Employees adduced sufficient evidence from which a reasonable juror could conclude that the Employees had an interest protected by the Due Process Clause.

“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (quoting *Mullane *295 v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). There are two components to a procedural due process claim: whether a protected interest exists and whether, if that interest exists, constitutionally sufficient procedures were used to protect that interest. *See Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 565 (6th Cir.2004). This dispute centers on whether the Employees had a property interest in continued employment.

The Employees claim that Cannon's policies created a contract implied at law for just-cause employment by instilling a legitimate expectation of continued employment. Just-cause employment is a cognizable property interest, *Barachkov*, 311 Fed.Appx. at 871 (citing *Farhat v. Jopke*, 370 F.3d 580, 595 (6th Cir.2004)), and Michigan recognizes a legitimate-expectation theory as one way to establish just-cause employment, *see Singfield*, 389 F.3d at 565 (property interests are defined, *inter alia*, by state law). “Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party.” *Lytle v. Malady*, 458 Mich. 153, 579 N.W.2d 906, 910

(1998). Michigan courts apply a two-step inquiry to evaluate legitimate-expectations claims. *Id.* First, the court determines what the employer promised. *Id.* Second, the court determines “whether the promise is reasonably capable of instilling a legitimate expectation of just-cause employment.” *Rood v. Gen. Dynamics Corp.*, 444 Mich. 107, 507 N.W.2d 591, 607 (1993).

Certain promises do not suffice. “[O]nly policies and procedures reasonably related to employee termination are capable of instilling such expectations.” *Id.* The fact that an employer follows a disciplinary system is not alone enough to establish just-cause employment. *Biggs v. Hilton Hotel Corp.*, 194 Mich.App. 239, 486 N.W.2d 61, 62–63 (1992). And “[a] lack of specificity of policy terms or provisions, or a policy to act in a particular manner as long as the employer so chooses, is grounds to defeat any claim that a recognizable promise in fact has been made.” *Lytle*, 579 N.W.2d at 911. Finally, the policy must be communicated “‘to the work force in general or to specific classifications of the work force, rather than an individual employee.’” *Rood*, 507 N.W.2d at 606 n. 3 (quoting *Bankey v. Storer Broad. Co.*, 432 Mich. 438, 443 N.W.2d 112, 114 n. 3 (1989)). “[A] mere subjective expectation on the part of an employee is insufficient to create a jury question as to whether an employment contract may be terminated only for just cause.” *Grow v. Gen. Prods., Inc.*, 184 Mich.App. 379, 457 N.W.2d 167, 169 (1990).

As relates to this appeal, the question before the jury was whether Cannon communicated his just-cause policy to the workforce in general. *Rood*, 507 N.W.2d at 607. Davis attempts to retry this issue, pointing to evidence from which we could conclude that Cannon did not disseminate his policy to the workforce at large. But the fact remains that there was ample evidence to the contrary.

Cannon testified:

Q: Now this practice that you had adopted, did anyone compel you to adopt that practice?

A: No.

Q: And you said you didn't document that practice in any way. Did you circulate the fact that that was your practice to anybody?

A: Oh the employees knew.

Q: The employees knew?

A: Sure?

Q: How did they know?

A: I told them....

*296 Q: Now let's talk about your practice, You said the employees knew about your practice. How did they know about your practice?

A: I told them.

Q: When did you do that?

A: At meetings and if they asked me individually, I explained it to them. Which didn't happen very often. But certainly at meetings it was discussed. Not at great lengths or every meeting or anything like that, but they understood what the policy was and if they say they didn't—because Deborah Green would say that[—it] would be disingenuous.”

Cannon also testified that he circulated the DAP to employees, consistent with the fact that the DAP mirrored his policies.

The Employees testified that it was understood that Cannon adopted a just-cause standard and that they had received the DAP. Monica Sylvester, a former court employee, also testified that Cannon informed court employees that they followed Clinton Township's personnel policies, including a just-cause standard.

Viewing this evidence in the light most favorable to the Employees, there is sufficient evidence from which a reasonable juror could conclude that the Employees had a legitimate expectation of just-cause employment. Accordingly, because it is undisputed that the Employees received no pre-termination process, they have established that their constitutional rights were violated. See *Loudermill*, 470 U.S. at 542–43, 105 S.Ct. 1487.

B.

[2] A defendant sued in his or her individual capacity enjoys immunity from civil damages unless the defendant's conduct violated a clearly established constitutional right. *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 724 F.3d 687, 695 (6th Cir.2013). Whether a defendant official

is entitled to qualified immunity is a question we review *de novo*. *Id.* at 693.

We have, at times, elaborated a three-part qualified-immunity standard. See *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir.1999) (*en banc*). After determining whether a constitutional violation occurred and whether the constitutional right was clearly established, we consider whether “what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.” *Id.* This third requirement is implicit in the two-part framework and flows from *Saucier v. Katz*, 533 U.S. 194, 205, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). See *Sample v. Bailey*, 409 F.3d 689, 696 n. 3 (6th Cir.2005). In a procedural due process case such as this, the relevant inquiry is whether a reasonable official would have known that terminating the Employees without a pre-termination hearing was unlawful. See *Silberstein v. City of Dayton*, 440 F.3d 306, 316–18 (6th Cir.2006); *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 896–97 (6th Cir.2006).

The Employees dispute this characterization of the law. They assert that the qualified immunity analysis has two parts and that there is no inquiry into the reasonableness of the Davis's conduct in light of the facts confronting her. The Employees maintain that “no reasonable official could misunderstand the need to provide process to a just-cause employee” and that it is irrelevant whether Davis was objectively reasonable in concluding that the Employees served at will.

For this proposition, the Employees rely on *Pucci v. Nineteenth District Court*, 628 F.3d 752 (6th Cir.2010). There, Julie Pucci was terminated from her administrative position at a Michigan court and brought a procedural due process claim against Somers, *297 the court's chief judge. *Id.* at 755. On the issue of qualified immunity, we held: “Obviously, if Pucci is ultimately found to have a property interest in her employment, her right to at least some pre-termination process was clearly established. Since she received no process, Somers is not entitled to qualified immunity.” *Id.* at 767. There was no discussion of whether Somers was objectively unreasonable in concluding that Pucci was an at-will employee.

But that there was no analysis of this element of the qualified-immunity standard in *Pucci*, in the factual context of that case, does not mean that *Pucci* fundamentally altered our qualified-immunity analysis. Indeed, *Pucci* applied the framework set out in *Silberstein*, where we observed that “the inquiry

over whether a constitutional right is ‘clearly established’ must be undertaken in light of the specific context of the case, not as a broad general proposition.” 440 F.3d at 316 (citing *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151). There, the officials’ qualified-immunity defense relied exclusively on the argument that a reasonable official in their positions would not have known that Silberstein was entitled to a pre-termination hearing. *Id.* at 316.

The Board Members do not dispute that a City of Dayton employee in the classified service had a clearly established right to a pre-termination hearing at the time of Silberstein’s termination; rather, they argue that Silberstein’s status as a classified employee is disputable such that a reasonable person would not know that he or she was violating Silberstein’s rights.

Id. Canvassing the facts as they would have appeared to a reasonable official, we held “the [officials’] argument that an objectively reasonable official could misunderstand Silberstein’s employment [status was] unpersuasive,” as “Silberstein’s position was clearly established.” *Id.* at 317.

Silberstein and in turn *Pucci* thus reflect well-established qualified-immunity law. The “ ‘objective legal reasonableness’ standard analyzes claims of immunity on a fact-specific, case-by-case basis to determine whether a reasonable official in the defendant’s position could have believed that his conduct was lawful, judged from the perspective of the reasonable official on the scene.” *Cochran v. Gilliam*, 656 F.3d 300, 306 (6th Cir.2011); *Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir.2000) (same); see also *Rodgers*, 529 Fed.Appx. at 651 (“The district court erred, however, by failing to consider whether a reasonable official in [defendant’s] position would have understood that she was violating the plaintiffs’ constitutional rights in light of the circumstances at the time.”). Again, the relevant inquiry in a procedural due process case is whether a reasonable official would have known that terminating the Employees without a pre-termination hearing was unlawful. See *Silberstein*, 440 F.3d at 316–18; *Miller*, 448 F.3d 887 at 896–97. Thus, we turn to whether Davis was objectively unreasonable, based

on the circumstances confronting her, in concluding that the Employees served at will.

We hold that she was not. As discussed above, beginning in early 2004, a few months before Davis terminated the Employees, she personally participated in a feasibility study into the merger of the 41B District Court locations designed in large part to determine the personnel policies at each location. Davis attended regular meetings about the potential merger. At those meetings, both Cannon and his representatives from the Clinton Township location were asked to provide any personnel policies pertaining to Cannon’s employees. Davis received nothing from Cannon, his representatives, or the Clinton Township *298 location to suggest that the Employees were anything other than at-will employees. Indeed, Davis testified: “We asked [Cannon], when we were doing the merger of the courts, what his policies and practices were, and he said he did not have any, that he didn’t really have to discipline people very often at the township. So to my knowledge there were none.”

Based on the undisputed facts confronting her, Davis made an objectively reasonable determination that the Employees served at will. The default status for court employees was at-will employment. For the Employees to be just-cause employees, Cannon would have had to affirmatively adopt that policy. On request for personnel policies, a matter of considerable import, a reasonable official could expect to receive a written policy and, at the very least, a reasonable official in Davis’s position would have expected Cannon to inform her of his non-written policy when the issue was broached. Davis’s personal participation in the feasibility study, a measure designed in part to determine the status of court employees, was an adequate “precautionary measure [.]” *Miller*, 448 F.3d at 897.

Nor was Davis objectively unreasonable, as the district court suggested, because she did not re-determine the Employees’ status in the period between when the feasibility inquiry was conducted and their terminations. The feasibility study was conducted at some point at the beginning of 2004. Davis terminated the Employees in July 2004. It was not objectively unreasonable to conclude that the status of the Employees did not change between the beginning of 2004 and July of that year, absent some reason to believe it had changed.

The Employees make numerous contrary arguments, none of which is availing. Englar testified that she told Davis at her termination that she was a just-cause employee. But Davis

was not objectively unreasonable in relying on information collected from the policymakers rather than the employee being terminated. The Employees also argue that Davis was aware of a Michigan Supreme Court administrative order requiring courts to mirror as closely as possible the personnel policies of their respective funding units. Because the Clinton Township location's funding unit was a just-cause employer, the Employees contend Davis should have known that the Employees could be fired only for just cause. The district court rejected this argument unequivocally and we agree: “[T]he proposed conclusion does not follow as a matter of fact, or law, because despite this administrative order, it was undisputed at trial that ‘at the end of the day’ Judge Cannon was permitted to develop his own personnel policies.”

The Employees argue that Green established that it was prevailing common knowledge among Cannon's staff that Cannon had a just-cause policy. Whether this was common knowledge among Cannon's staff is beside the point; what matters is whether the policy was known to the extent that a reasonable person in Davis's position would have been aware of its existence. See, e.g., *Silberstein*, 440 F.3d at 306 (“This court has held that a plaintiff satisfied the second prong of qualified immunity analysis by presenting evidence that for twenty-five years it had been generally understood that employees in his position were entitled to a hearing before their positions were terminated, and the defendant presented no evidence that he did not share such an understanding.” (citing *Singfield*, 389 F.3d at 567–68)). Davis presented evidence that she did not share such an understanding and that she reasonably undertook to determine the Employees' employment status. Davis was *299 not objectively unreasonable in crediting the information collected from the investigation, including from Cannon himself, over a contested assertion that Cannon's employment policies were common knowledge to his employees.

The district court erred in denying Davis qualified immunity.

III.

[3] The Employees cross-appeal the district court's dismissal of 41B as a defendant, contending that 41B's litigation conduct waived its Eleventh Amendment sovereign immunity.³ “Whether sovereign immunity exists is a question of constitutional law,” which we review *de novo*. *S & M Brands, Inc. v. Cooper*, 527 F.3d 500, 507 (6th Cir.2008).

Sovereign immunity is a quasi-jurisdictional doctrine, under which “[a] State remains free to waive its Eleventh Amendment immunity from suit in a federal court.” *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 618, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002). A state may waive its immunity through its litigation conduct; but the touchstone of waiver doctrine is intent—the state's litigation conduct must clearly indicate the state's intent to waive its immunity. *Id.* at 620, 122 S.Ct. 1640. A clear intent to waive immunity may be inferred when a state's litigation conduct is inconsistent and unfair. *Id.* Waiver doctrine thus prevents the state from gaining an unfair litigation advantage by prohibiting a state from testing the waters with respect to the merits of its claim only to assert sovereign immunity once it believes its claim will fail. That is, a state waives its sovereign immunity where its dilatory assertion of immunity is a “tactical decision.” *In re Bliemeister*, 296 F.3d 858, 862 (9th Cir.2002); *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 763 (9th Cir.1999) (“The Eleventh Amendment was never intended to allow a state to appear in federal court and actively litigate the case on the merits, and only later belatedly assert its immunity from suit in order to avoid an adverse result.”); see also *Lapides*, 535 U.S. at 620, 122 S.Ct. 1640 (characterizing a purpose of the doctrine constructive-waiver doctrine as prohibiting states from selectively using immunity “to achieve litigation advantages”).

Waiver is a case-specific inquiry, focused on the course of a state's litigation conduct. For example, this court has held that where a state loses its case on the merits after extensive discovery, a state may not then claim sovereign immunity. *Ku v. Tennessee*, 322 F.3d 431, 435 (6th Cir.2003). Likewise, the Ninth Circuit has held that a state waived its sovereign immunity when it filed a limited response, an answer, and a motion for summary judgment; attended an oral hearing and argued the merits; and heard the court announce its preliminary leanings, all without raising its sovereign immunity. See *Bliemeister*, 296 F.3d at 862 (“To allow a state to assert sovereign immunity after listening to a court's substantive comments on the merits of a case would give the state an unfair advantage when litigating suits.”); see also *Hill*, 179 F.3d at 756–58, 760–63 (holding state waived sovereign immunity when it did not raise it until the opening day of trial, after it had filed two motions to dismiss and an answer that did not assert it, consented to have a magistrate try the case, conducted discovery, moved to compel discovery and for sanctions, participated in a pre-trial conference, and filed trial material).

*300 The Employees argue that 41B waived its sovereign immunity by asserting the defense primarily in its summary-judgment reply brief. We have never held that the failure to raise sovereign immunity in an opening summary-judgment brief *per se* constitutes a waiver. Rather, properly focusing on the whole of 41B's litigation conduct demonstrates that it did not clearly intend to waive its sovereign immunity and consent to federal jurisdiction.

41B first raised the issue of sovereign immunity in its answer to the complaint and again in its amended affirmative defenses. While 41B did not file a Rule 12(b)(1) motion to dismiss on sovereign immunity grounds, neither did it file a motion to dismiss on the merits. Less than two months later, 41B filed its summary-judgment brief where it failed to raise its sovereign immunity. Three weeks after Barachkov filed her response, 41B reasserted its sovereign immunity in its reply. Thus, while 41B did not file a motion to dismiss and did not raise its immunity in its initial summary-judgment brief, neither does 41B's somewhat belated assertion of sovereign immunity appear to be a strategic decision. 41B raised sovereign immunity in its summary judgment briefing and, importantly, raised it before the district court had ruled on

the merits of the case. 41B's litigation conduct was neither unfair nor inconsistent, and it cannot be said that its dilatory assertion of sovereign immunity was but a tactical decision. *Cf. Ku*, 322 F.3d at 435. 41B has not clearly indicated its consent to federal jurisdiction and thus has not waived its sovereign immunity.

IV.

Although the district court correctly found that there was sufficient basis for the jury to conclude that the Employees were in fact just-cause employees, the award of damages cannot stand because the district court erred in determining that Davis was not entitled to qualified immunity. Accordingly, we vacate the award of damages. We remand to the district court to determine the Employees' entitlement to equitable relief. And we affirm the district court's judgment holding that 41B was entitled to sovereign immunity.

All Citations

580 Fed.Appx. 288

Footnotes

- 1 Employees of the court were not Clinton Township employees.
- 2 Davis also asserts that she is entitled to judgment as a matter of law because the Employees failed to plead the inadequacy of state remedies. In 2004, we clarified that a plaintiff only needs to plead the inadequacy of state remedies when the deprivation is the result of random or unauthorized state action. *Mitchell v. Fankhauser*, 375 F.3d 477, 483–84 (6th Cir.2004); see also *Rodgers v. 36th Dist. Court*, 529 Fed.Appx. 642, 649–50 (6th Cir.2013). Davis's acts were neither random nor unauthorized. The Employees were therefore not required to plead or prove the inadequacy of post-termination, state-law remedies. See *Mitchell*, 375 F.3d at 484.
- 3 The Employees abandon any argument that Clinton Township was improperly dismissed.

2020 WL 2112374

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Western Division.

Stephen CASSELL and The Beloved Church, an
Illinois not-for-profit corporation, Plaintiffs,

v.

David SNYDERS, Sheriff of Stephenson
County, Jay Robert Pritzker, Governor of
Illinois, Craig Beintema, Administrator of the
Department of Public Health of Stephenson
County, Steve Schaible, Chief of Police of
the Village of Lena, Illinois, Defendants.

20 C 50153

Signed May 3, 2020

Synopsis

Background: Evangelical Christian church and its pastor brought action against Illinois Governor, sheriff, county's public health administrator, and police chief under § 1983 and state law, alleging stay-at-home orders issued during COVID-19 pandemic violated First Amendment's Free Exercise Clause, Illinois's Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and the Illinois Department of Health Act (DHA). Church and pastor moved for temporary restraining order (TRO) and preliminary injunction preventing enforcement of the stay-at-home orders.

Holdings: The District Court, [John Z. Lee](#), J., held that:

plaintiffs' claims for declaratory and injunctive relief with respect to orders that had been superseded were moot;

plaintiffs' residual claims that applied to superseding order were not moot;

plaintiffs faced credible threat of prosecution for violating stay-at-home order, and thus had -in-fact required for Article III standing;

plaintiffs had less than negligible chance of prevailing on claim that the order violated Free Exercise Clause;

stay-at-home order was neutral, generally applicable law, and thus rational basis test applied to claim that order violated Free Exercise Clause;

Eleventh Amendment barred plaintiffs' state law claims;

no equally effective but less restrictive alternatives were available to promote Illinois's compelling interest in controlling spread of COVID-19, as required for order to satisfy RFRA; and

Governor had authority under EMAA to declare more than one emergency related to the ongoing COVID-19 pandemic.

Motion denied.

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MEMORANDUM OPINION AND ORDER

[John Z. Lee](#), United States District Judge

*1 So far, over 60,000 Americans have died from contracting COVID-19. That is more than the number of people who perished during the 9/11 terrorist attacks, Pearl Harbor, and the Battle of Gettysburg combined. Hoping to slow the pathogen's spread, governors and mayors across the country have implemented stay-at-home orders. While those orders have already saved thousands of lives, they come at a considerable cost. In Illinois, as in other states, the orders have interfered with the ability of residents to work, learn, and worship.

This case is about whether those restrictions are consistent with the religious freedoms enshrined in the Federal Constitution and in Illinois law. Every Sunday for the past five years, members of the Beloved Church have gathered with their pastor, Stephen Cassell, to pray, worship, and sing. Since Governor Pritzker's first stay-at-home order went into effect, however, the Beloved Church has been forced to move those services online. And, in the intervening weeks, the Governor has issued additional orders, extending the restrictions.

Convinced that these orders impermissibly infringe on their religious practices, Cassell and the Beloved Church have sued Pritzker, Stephenson County Sheriff David Snyders, Stephenson County Public Health Administrator Craig Beintema, and Village of Lena Police Chief Steve Schaible. In particular, Plaintiffs allege that the stay-at-home orders violate the First Amendment's Free Exercise Clause, Illinois's Religious Freedom Restoration Act ("RFRA"), 775 Ill. Comp. Stat. 35/15, the Emergency Management Agency Act ("EMAA"), 20 Ill. Comp. Stat. 3305/7, and the Illinois Department of Health Act ("DHA"), 20 Ill. Comp. Stat. 2305/2(a).

Plaintiffs hope to return to their church on May 3, 2020, to worship without limitations. To that end, on April 30, 2020, they filed a motion asking the Court to enter a temporary restraining order and a preliminary injunction preventing Defendants from enforcing the stay-at-home orders. Given the time constraints, the Court ordered expedited briefing; Defendants filed their responses to the motion on May 1, 2020, and Plaintiffs submitted their reply on May 2, 2020.

The Court understands Plaintiffs' desire to come together for prayer and fellowship, particularly in these trying times. It is not by accident that the right to exercise one's religious beliefs is one of the core rights guaranteed by our Constitution. And whether it be the Apostles and Jesus gathering together to break bread and share wine on the night before his crucifixion (Luke 22:7-23), or Peter addressing the many at Pentecost and forming the first church (Acts 2:14-47), Christian tradition has long cherished communal fellowship, prayer, and worship.

But even the foundational rights secured by the First Amendment are not without limits; they are subject to restriction if necessary to further compelling government interests—and, certainly, the prevention of mass infections and deaths qualifies. After all, without life, there can be no liberty or pursuit of happiness.

*2 Recently, after this lawsuit was filed, Governor Pritzker issued a new order, recognizing the free exercise of religion as an "essential activity." April 30 Order § 2, ¶ 5(f), ECF No. 26-1. The order now states that worshippers may "engage in the free exercise of religion" so long as they "comply with Social Distancing Requirements" and refrain from "gatherings of more than ten people." *Id.* Furthermore, "[r]eligious organizations and houses of worship are encouraged to use online or drive-in services [which are not limited to ten people] to protect the health and safety of their congregants." *Id.*

The Court is mindful that the religious activities permitted by the April 30 Order are imperfect substitutes for an in-person service where all eighty members of Beloved Church can stand together, side-by-side, to sing, pray, and engage in communal fellowship. Still, given the continuing threat posed by COVID-19, the Order preserves relatively robust avenues for praise, prayer and fellowship and passes constitutional muster. Until testing data signals that it is safe to engage more fully in exercising our spiritual beliefs (whatever they might be), Plaintiffs, as Christians, can take comfort in the promise of Matthew 18:20—"For where two or three come together in my name, there am I with them."

For the reasons below, Plaintiffs' motion for a temporary restraining order and preliminary injunction is denied.

I. Preliminary Factual Findings¹

A. The Pandemic

COVID-19 is "a novel severe acute respiratory illness" that spreads rapidly "through respiratory transmission." April 30 Order at 1, ECF No. 26-1 ("April 30 Order" or "Order"). Making response efforts particularly daunting, asymptomatic individuals may carry and spread the virus, and there is currently no known vaccine or effective treatment. *Id.*; Pritzker Resp. Br. at 12, ECF No. 26. The virus has killed hundreds of thousands, infected millions, and disrupted the lives of nearly everyone on the planet. April 30 Order at 1–2. In Illinois alone, at least 2,350 individuals have perished from the pathogen, with more than 50,000 infected. *Id.* at 2.

B. The Stay-at-Home Orders

To slow the spread of COVID-19, Governor Jay R. Pritzker issued a stay-at-home order on March 20, 2020. ECF No.

1-1. He extended that order two weeks later, before issuing a new directive with modified restrictions at the end of April. *See* April 30 Order. In substance, these orders direct Illinoisans to practice what experts call “social distancing.” That means limiting activity outside the home, staying at least six feet apart from others, and refraining from congregating in groups of more than ten. *Id.* § 1. To facilitate these efforts, businesses deemed non-essential have been required to cease operations, and schools have been forced to close their doors. The Governor has determined that, if the orders were not in effect, “the number of deaths from COVID-19 would be between ten to twenty times higher.” April 30 Order at 2.

At the same time, the stay-at-home orders have resulted in significant hardships for many individuals and their families. With schools closed, families have had to care for their children and oversee their education on a full-time basis. With businesses shuttered, many Illinoisans now find themselves furloughed or fired. And with large gatherings prohibited, religious groups have had to refrain from their usual activities.

*3 In an effort to alleviate some of those concerns, the April 30 Order, which is effective until the end of May, provides that Illinoisans may leave their homes to perform certain “Essential Activities.” April 30 Order § 1, ¶ 5. Though the Order did not initially include religious events in its list of Essential Activities, it was amended shortly after Plaintiffs filed this lawsuit and their associated request for a temporary restraining order. *Compare* ECF No. 1-3, with ECF No. 26-1. As amended, the Order clarifies that worshippers may “engage in the free exercise of religion” so long as they “comply with Social Distancing Requirements” and refrain from “gatherings of more than ten people.” April 30 Order § 2, ¶ 5(f). In doing so, “[r]eligious organizations and houses of worship are encouraged to use online or drive-in services to protect the health and safety of their congregants.” *Id.*

C. The Beloved Church

Pastor Stephen Cassell formed the Beloved Church, an evangelical Christian organization, to promote “the truths of God's unconditional Love, amazing Grace, and majestic Restoration.” Compl. ¶ 24, ECF No. 1. Cassell is passionate about “shar[ing] the love of God with [his] congregants, who form what [he] believe[s] is [a] Church family.” *Id.* ¶ 25.

To that end, Cassell leads Sunday services at the Church's building in Lena, Illinois. *Id.* ¶ 27. On a typical Sunday, about eighty worshippers attend. *Id.* During each service, Cassell reads from scripture, delivers a sermon, and leads

the congregation in prayer and song. *Id.* ¶ 28. After the ceremony, he encourages worshippers to engage in informal conversation with each other, building fellowship and community. *Id.* ¶ 29. Plaintiffs view Sunday prayer services as “the central religious rites of the Church congregation.” *Id.* ¶ 31.

In late March, the Stephenson County Department of Public Health served Cassell with a cease-and-desist notice. *Id.* ¶ 48. It declared that the Beloved Church was required to adhere to the guidelines elaborated in the stay-at-home orders. *Id.* ¶ 49. For example, the notice stated that religious gatherings of over ten people would not be permitted. *Id.* ¶ 49. It went on to warn that violators “may be subject to additional civil and criminal penalties.” *Id.* ¶ 49. Fearing fines and prosecution, the Beloved Church has refrained from holding Sunday services in person, *id.* ¶ 50, and, like many religious organizations, Cassell has instead held services online on various forums, including Facebook Live and YouTube.²

Viewing these remote services as “a violation of the Church's existence as a Christian congregation,” Plaintiffs take aim at Governor Pritzker's most recent Order. Cassell Decl. ¶ 3, ECF No. 34. To support this challenge, Plaintiffs have submitted with their reply brief a declaration by Cassell stating that the Beloved Church's parking lot cannot accommodate drive-in services; that typically 10 to 15 family units attend a service, most of which consist of many members; that the church's facility can seat 15 family units with six feet of distance between each unit; and that Cassell will supply all attendees with masks (or other face coverings) and hand sanitizer. *Id.* ¶¶ 5, 8–10, 16.

II. Legal Standard

*4 “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (internal quotation marks omitted). A party seeking a preliminary injunction must show that (1) its case has “some likelihood of success on the merits,” (2) it has “no adequate remedy at law”, and (3) “without relief it will suffer irreparable harm.” *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 816 (7th Cir. 2018). As part of the preliminary-injunction analysis, a district court may consider a nonmovant's defenses in determining the movant's likelihood of success on the

merits. See *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 308 (7th Cir. 2010).

If the moving party meets these threshold requirements, the district court “weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.” *Ezell v. City of Chi.*, 651 F.3d 684, 694 (7th Cir. 2011). “The standards for granting a temporary restraining order and a preliminary injunction are the same.” *USA-Halal Chamber of Commerce, Inc. v. Best Choice Meats, Inc.*, 402 F. Supp. 3d 427, 433 (N.D. Ill. 2019) (citation omitted).

III. Mootness, Standing, and Ripeness

As a threshold matter, Defendants question whether Article III authorizes this Court to adjudicate Plaintiffs' claims. In doing so, they articulate three distinct theories. First, Governor Pritzker says that Plaintiffs' motion is moot in light of the new provisions in the April 30 Order relating to religious activities. Second, Sheriff Snyders, Public Health Administrator Beintema, and Police Chief Schaible (“County and Village Defendants”) submit that Plaintiffs lack standing to sue. Finally, the same group of Defendants argues that this case is not ripe for review.

A. Mootness

To begin with, Governor Pritzker contends that Plaintiffs' claims have been mooted by the post-complaint issuance of the April 30 Order, which supersedes EO 2020-10 and EO 2020-18, and provides a new framework for religious organizations starting May 1, 2020. To the extent that Plaintiffs seek declaratory and injunctive relief with respect to EO 2020-10 and EO 2020-18, without regard to the new provisions in the April 30 Order, their claims are indeed moot. See *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, No. 18-280, — U.S. —, — S.Ct. —, — L.Ed.2d —, 2020 WL 1978708, at *1 (U.S. Apr. 27, 2020) (holding that a request for declaratory and injunctive relief was mooted by amendment of the statute).

But to the extent that Plaintiffs assert residual claims that apply equally to the April 30 Order, those claims are not moot. Cf. *id.* (remanding residual claims based on the new statute for further proceedings); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)

(same). “[A] case does not become moot as long as the parties have a concrete interest, however small, in the litigation[]....” *Campbell-Ewald Co. v. Gomez*, — U.S. —, 136 S. Ct. 663, 665, 193 L.Ed.2d 571 (2016). And it is clear that Plaintiffs take umbrage at the restrictions on religious gatherings imposed by the April 30 Order, including the ten-attendee limit. See Compl. ¶¶ 27–31. Accordingly, Governor Pritzker's argument that the case is moot fails.

B. Standing

Next, the County and Village Defendants contend that Plaintiffs lack standing. To establish standing, a plaintiff must show (1) an “injury in fact,” (2) a sufficient “causal connection between the injury and the conduct complained of,” and (3) a “likel[i]hood” that the injury will be “redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Defendants focus their fire on the first element.

*5 As a general rule, “[a]n injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (internal quotation marks omitted). But an “allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.” *Id.* (emphasis deleted and internal quotation marks omitted). “[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights” *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); see *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007); *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 640 (7th Cir. 1990) (recognizing that “special flexibility, or ‘breathing room,’ ...attaches to standing doctrine in the First Amendment context”) (citation omitted).

Babbitt v. United Farm Workers National Union is instructive. 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). In that case, the Supreme Court held that the plaintiffs could bring a pre-enforcement action because they alleged “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exist[ed] a credible threat of prosecution thereunder.” *Id.*, 442 U.S. at 298, 99 S.Ct. 2301. The statute at issue made it illegal to encourage consumers to boycott an “agricultural product by the use of dishonest, untruthful and deceptive publicity.” *Id.* at 295, 99 S.Ct. 2301. And the plaintiffs pleaded

they had “actively engaged in consumer publicity campaigns in the past” and “inten[ded] to continue to engage in boycott activities” in the future. *Id.* Even though the plaintiffs did not “plan to propagate untruths,” they maintained that “‘erroneous statement is inevitable in free debate,’ ” and this was sufficient to establish standing. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

As in *Babbitt*, Plaintiffs have alleged an Article III injury. According to Plaintiffs, Beintema issued and Snyders' deputy sheriff served a cease-and-desist notice on March 31, 2020, advising Plaintiffs that the Department of Public Health could issue a closure order if they did not adhere to Governor Pritzker's Executive Order 2020-10. Compl. ¶ 47. Although the notice references Executive Order 2020-10, the allegations create a reasonable inference that the notice also would apply to the April 30 Order, which prohibits “gatherings of more than ten people.” April 30 Order § 2, ¶ 5(f).

Moreover, the notice stated that “police officers, sheriffs and all other officers in Illinois are authorized to enforce such orders. In addition to such an order of closure...you may be subject to additional civil and criminal penalties.” *Id.*, Ex. C, Cease and Desist Notice, ECF No. 1-3. Along the same lines, the April 30 Order expressly warns that “[t]his Executive Order may be enforced by State and local law enforcement pursuant to, *inter alia*, Section 7, Section 15, Section 18, and Section 19 of the Illinois Emergency Management Agency Act, 20 ILCS 3305.” April 30 Order § 2, ¶ 17.

For their part, Plaintiffs state that, for the past five years, they have held church services with eighty people in attendance, and they intend to hold a service on Sunday, May 3, 2020. *Id.* ¶¶ 11, 27. Plaintiffs further assert that, based on the cease-and-desist notice, they fear arrest, prosecution, fines, and jail time if the full congregation attends the service. *Id.* ¶ 50. And, although Snyders states that he does not intend to enforce the April 30 Order against Plaintiffs if they go through with their plans to gather on May 3, 2020, he does not provide any assurance that the Order will not be enforced thereafter. Therefore, based on the record, the Court finds that Plaintiffs face “a credible threat of prosecution,” *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301, and the allegations in the complaint are sufficient to state an injury-in-fact.

C. Ripeness

*6 In the alternative, the County and Village Defendants argue that Plaintiffs' claims do not satisfy the Article III requirement of ripeness. But when a court has determined that a plaintiff has sufficiently alleged an Article III injury, a request to decline adjudication of a claim based on prudential ripeness grounds is in “some tension” with the Supreme Court's “reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflinching.” *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (internal quotation marks omitted); see *Susan B. Anthony List*, 573 U.S. at 167, 134 S.Ct. 2334.

Be that as it may, ripeness is satisfied here. To determine ripeness, courts examine (1) “the fitness of the issues for judicial decision,” and (2) “the hardship to the parties of withholding court consideration.” *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 325 F.3d 879, 882 (7th Cir. 2003). First, Plaintiffs' claims raise purely legal questions that are typically fit for judicial review, and further factual development will provide little clarification as to these issues. See *Susan B. Anthony List*, 573 U.S. at 167, 134 S.Ct. 2334; *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011); *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 325 F.3d 879, 882 (7th Cir. 2003).

Second, denying judicial review imposes a not-insignificant hardship on Plaintiffs by forcing them to choose between refraining from congregating at their church and engaging in assembly while risking civil fines and criminal penalties. Accordingly, the County and Village Defendants' argument that the Plaintiffs claims are unripe are unavailing. With that, the Court turns to the merits of Plaintiffs' motion.

IV. Likelihood of Success on the Merits

Plaintiffs challenge the April 30 Order on two grounds. First, they maintain that it runs afoul of the First Amendment's Free Exercise Clause. Second, they insist that the Order violates three state statutes—the Illinois Religious Freedom Restoration Act, the Emergency Management Agency Act, and the Illinois Department of Health Act.

A. Free Exercise Claim³

1. Government Authority During a Public Health Crisis

The Constitution does not compel courts to turn a blind eye to the realities of the COVID-19 crisis. For more than a century, the Supreme Court has recognized that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27, 25 S.Ct. 358, 49 L.Ed. 643 (1905); see *Prince v. Massachusetts*, 321 U.S. 158, 166–67, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (“The right to practice religion freely does not include liberty to expose the community...to communicable disease.”). During an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply. *Id.*; see *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Under those narrow circumstances, courts only overturn rules that lack a “real or substantial relation to [public health]” or that amount to “plain, palpable invasion[s] of rights.” *Jacobson*, 197 U.S. at 31, 25 S.Ct. 358. Over the last few months, courts have repeatedly applied *Jacobson*'s teachings to uphold stay-at-home orders meant to check the spread of COVID-19. See, e.g., *Abbott*, 954 F.3d at 783–85; *Gish v. Newsom*, No. EDCV20755JGBKX, 2020 WL 1979970, at *5 (C.D. Cal. Apr. 23, 2020).

*7 This is not to say that the government may trample on constitutional rights during a pandemic. As other judges have emphasized, *Jacobson* preserves the authority of the judiciary to strike down laws that use public health emergencies as a pretext for infringing individual liberties. See, e.g., *Abbott*, 954 F.3d at 800 (Dennis, J., dissenting) (citing *Jacobson*, 197 U.S. at 28–29, 25 S.Ct. 358)). Furthermore, *Jacobson*'s reach ends when the epidemic ceases; after that point, government restrictions on constitutional rights must meet traditionally recognized tests. And so, courts must remain vigilant, mindful that government claims of emergency have served in the past as excuses to curtail constitutional freedoms. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), abrogated by *Trump v. Hawaii*, — U.S. —, 138 S. Ct. 2392, 2423, 201 L.Ed.2d 775 (2018).

Today, COVID-19 threatens the lives of all Americans. The disease spreads easily, causes severe and sometimes fatal symptoms, and resists most medical interventions. April 30 Order at 1–2. When Governor Pritzker issued the amended stay-at-home rules, thousands of Illinoisans had perished due to the disease. *Id.* Based on the plethora of evidence here, the Court finds that COVID-19 qualifies as the kind of public health crisis that the Supreme Court contemplated in

Jacobson and that the coronavirus continues to threaten the residents of Illinois.

While Plaintiffs acknowledge the seriousness of the pathogen, they insist that the stay-at-home orders have successfully flattened the curve of active COVID-19 cases, eliminating the need for continued precautions. But, to borrow an analogy from Justice Ginsburg, that “is like throwing away your umbrella in a rainstorm because you are not getting wet.” *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 590, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting). Without the stay-at-home restrictions, the Governor estimates that ten to twenty times as many Illinoisans would have died and that the state's hospitals would be overrun. April 30 Order at 2. Plaintiffs have failed to marshal any credible evidence that suggests otherwise.

As a fallback position, Plaintiffs portray the April 30 Order as “arbitrary” and “unreasonable.” *Jacobson*, 197 U.S. at 28, 25 S.Ct. 358. Specifically, they claim that the Order subjects religious organizations to more onerous restrictions than their secular counterparts. But, as we shall shortly see, the Order adopts neutral principles that satisfy *Jacobson*'s reasonableness standard.

In sum, because the current crisis implicates *Jacobson*, and because the Order undoubtedly advances the government's interest in protecting Illinoisans from the pandemic, the Court finds that Plaintiffs have a less than negligible chance of prevailing on their constitutional claim.

2. Traditional First Amendment Analysis

Even if *Jacobson* were not to apply here, the Order nevertheless would likely withstand scrutiny under the First Amendment's Free Exercise Clause. That provision prevents the government from “plac[ing] a substantial burden on the observation of a central religious belief or practice” unless it demonstrates a “compelling government interest that justifies the burden.” *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 631 (7th Cir. 2007). As the Supreme Court has elaborated, however, “neutral, generally applicable laws may be applied to religious practice even when not supported by a compelling government interest.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751, 2761, 189 L.Ed.2d 675 (2014) (citing *Emp't Div. v. Smith*, 494 U.S. 872, 879–80, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). In other words, a “neutral law of general applicability is constitutional if it is supported by a rational basis.” *Ill. Bible Colleges Ass'n. v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017).

*8 For the rational basis test to apply, the challenged law must be both neutral and generally applicable. The neutrality element asks whether “the object of the law is to infringe upon or restrict practices because of their religious motivation.” *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 743 (7th Cir. 2015) (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)). The general applicability element “forbids the government from impos[ing] burdens only on conduct motivated by religious belief in a selective manner.” *Listecki*, 780 F.3d at 743. As these definitions suggest, the neutrality and general applicability requirements usually rise or fall together.

In evaluating these two elements, courts draw on principles developed in the context of the Fourteenth Amendment's Equal Protection Clause. *See, e.g., Lukumi*, 508 U.S. at 540, 113 S.Ct. 2217 (instructing lower courts to “find guidance in our equal protection cases”). At its core, equal protection analysis hinges on whether “the decisionmaker ...selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon a particular group.” *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). In keeping with that framework, courts apply the rational basis test to Free Exercise Clause claims, unless the challenged rule “fail[s] to prohibit nonreligious conduct that endangers the [government's] interests in a similar or greater degree” than religious conduct. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217.

Lukumi is instructive. There, the Supreme Court reviewed municipal ordinances that prescribed penalties for “any individual or group that kills, slaughters or sacrifices animals for any type of ritual.” *Lukumi*, 508 U.S. at 527, 113 S.Ct. 2217. In holding that “the object or purpose of [the challenged] law is the suppression of religion or religious conduct,” the Court looked to three main factors. *Id.* at 533, 113 S.Ct. 2217. First, it determined that the drafters of the ordinances displayed a “pattern” of animosity towards “Santeria worshippers,” who practiced animal sacrifice. *Id.* at 542, 113 S.Ct. 2217. Second, it recognized that “the ordinances [we]re drafted with care to forbid few killings but those occasioned by religious sacrifice.” *Id.* at 543, 113 S.Ct. 2217. Third, it concluded that the “ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.” *Id.* at 536, 113 S.Ct. 2217.

This case is different. For one, nothing in the record suggests that Governor Pritzker has a history of animus towards religion or religious people, and Plaintiffs do not argue otherwise. For another, the Order proscribes secular and religious conduct alike. *See, e.g.,* April 30 Order § 2, ¶ 3 (forbidding “any gathering of more than ten people”). Indeed, its limitations extend to most places where people gather, from museums to theaters to bowling alleys. *Id.* And finally, Plaintiffs have not established that the Order “suppress[es] much more religious conduct than is necessary” to slow the spread of COVID-19. *Lukumi*, 508 U.S. at 536, 113 S.Ct. 2217. To the contrary, the April 30 Order expressly preserves various avenues for religious expression, including gatherings of up to ten people and drive-in services. April 30 Order § 2, ¶ 5(f). For these reasons, the Court concludes that the Order does not “impose special disabilities on the basis of...religious status.” *Smith*, 494 U.S. at 877, 110 S.Ct. 1595.

Neither of Plaintiffs' counterarguments is persuasive. First, they claim that the Order “targets... church services because it makes them the only Essential Activity effectively subject to the 10-person maximum requirement.” But that argument rests on a misreading of the Order. In fact, the Order broadly prohibits “any gathering of more than ten people [other than members of the same household]... unless exempted by this Executive Order.” April 30 Order § 2, ¶ 3. And nothing in the Section that enumerates “Essential Activities” appears to exempt secular activities from that generally-applicable constraint. *Id.* § 2, ¶ 5.

*9 It is true that the provision recognizing religious activities as essential reiterates the ten-person restriction. *Id.* ¶ 5(f). But, read as a whole, the Order appears to apply that limit to the other Essential Activities as well. For example, Section 2, ¶ 5 of the Order permits “individuals” to leave their homes in order to visit their doctors, pick up groceries, and travel to work at “Essential Businesses” (which must abide by their own additional restrictions). *Id.* ¶ 5(a)–(d). It also lists “hiking,” “running,” and “[f]ishing” as essential activities. *Id.* ¶ 5(c). In practice, those are pursuits that individuals normally perform alone or in small groups. By contrast, people of faith tend to gather for worship in much greater numbers, as Plaintiffs themselves acknowledge. Compl. ¶ 27. Understood in that context, it makes sense for Order to explicitly remind worshippers that they must abide by the prohibition on large groups.

Second, Plaintiffs complain that “grocery stores,” “food and beverage manufacturing plants,” and other “Essential

Businesses” need not comply with the ten-person limitation.⁴ April 30 Order § 2, ¶ 12(a), (b). If Walmart and Menards are allowed to host more than ten visitors, Plaintiffs’ theory goes, then so should the Beloved Church. But the question is not whether any secular organization faces fewer restrictions than any religious organization. Rather, the question is whether secular conduct “that endangers the [government]’s interests in a similar or greater degree” receives favorable treatment. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. Only then does different treatment signal that the government’s “object” is to target religious practices. *Id.* at 533, 113 S.Ct. 2217.

Contrary to Plaintiffs’ suggestion, retailers and food manufacturers are not comparable to religious organizations. The avowed purpose of the Order is to slow the spread of COVID-19. As other courts have recognized, holding in-person religious services creates a higher risk of contagion than operating grocery stores or staffing manufacturing plants. *See, e.g., Gish*, 2020 WL 1979970, at *6. The key distinction turns on the nature of each activity. When people buy groceries, for example, they typically “enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete.” *Id.* The purpose of shopping is not to gather with others or engage them in conversation and fellowship, but to purchase necessary items and then leave as soon as possible.⁵

By comparison, religious services involve sustained interactions between many people. During Sunday services, for example, Cassell encourages members of his congregation to “converse” and “build fellowship and morale.” Compl. ¶ 29. Indeed, Plaintiffs view “informal conversations and fellowship” as “essential parts of a functioning Christian congregation.” *Id.* Given that religious gatherings seek to promote conversation and fellowship, they “endanger” the government’s interest in fighting COVID-19 to a “greater degree” than the secular businesses Plaintiffs identify. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217.

This distinction finds support in the record. There are many examples where religious services have accelerated the pathogen’s spread. For instance, of eighty congregants who attended a Life Church service in Illinois on March 15, ten contracted the disease, and at least one died. *See* Anna Kim, “Glenview church hit by COVID-19 is now streaming service online, as pastor remembers usher who died of disease,” *Chicago Tribune* (Mar. 31, 2020). Along the same lines, South Korea tracked more than 5,000 individual cases to a single church. *See* Youjin Shin, Bonnie Berkowitz, Min Joo-

Kim, “How a South Korean church helped fuel the spread of the coronavirus,” *Washington Post* (Mar. 25, 2020). And, near Seattle, at least forty-five individuals who attended a church choir gathering were diagnosed with COVID-19. *See* Richard Read, “A choir decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead,” *Los Angeles Times* (Mar. 29, 2020). In comparison, Plaintiffs have failed to identify a grocery store or liquor store that has acted as a vector for the virus.

*10 A more apt analogy is between places of worship and schools. Like their religious counterparts, educational institutions play an essential part in supporting and promoting individuals’ wellbeing. At the same time, education and worship are both “activities where people sit together in an enclosed space to share a communal experience,” exacerbating the risk of contracting the coronavirus. *Gish*, 2020 WL 1979970, at *6. And here, the Order imposes the same restrictions on schools as it does on churches, synagogues, mosques, and other places of worship.

What is more, the interior of Beloved Church (like many churches of its kind) resembles that of a small movie theater. And, like moviegoers, during a service, congregants generally focus on the pastor or another speaker, who is typically in the front of the room. *See* Cassell Decl. ¶ 15 (photos of church interior). But, here again, movie theaters and concert halls (unlike churches) are completely barred from hosting any gatherings. April 30 Order § 2, ¶ 3. This reinforces the conclusion that the Order is not meant to single out religious people or communities of faith for adverse treatment.

This is not the first time that a governor’s stay-at-home order has been challenged by a religious group, and the majority of courts in those cases have determined that the orders reflect neutral, generally-applicable principles. *See, e.g., Gish*, 2020 WL 1979970, at *5–6 (“Because the Orders treat in-person religious gatherings the same as they treat secular in-person communal activities, they are generally applicable.”); *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB/SCY, 2020 WL 1905586, at *35 (D.N.M. Apr. 17, 2020) (“[The government] may distinguish between certain classes of activity, grouping religious gatherings in with a host of secular conduct, to achieve ... a balance between maintaining community health needs and protecting public health.”).

For their part, Plaintiffs make much of *First Baptist v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020). In *First Baptist*, the stay-at-home orders in question

prohibited “mass gatherings” at a number of establishments, including auditoriums, theaters, and stadiums, as well as “churches and other religious facilities.” *Id.* at *2. The orders also exempted places like airports, “retail establishments where large numbers of people are present but are generally not within arm’s length of one another for more than 10 minutes,” and food establishments provided that patrons practice social distancing. *Id.*

Even though the orders covered a wide array of secular places as well as religious places, the court determined that the orders amounted to “a wholesale prohibition against assembling for religious services anywhere in the state by more than ten congregants.” *Id.* at *4. “[B]oth orders,” the court emphasized, “expressly state” that “their prohibitions against mass gatherings apply to churches or other religious facilities.” *Id.* at *7. For that reason, *First Baptist* held that “these executive orders expressly target religious gatherings on a broad scale and are, therefore, not facially neutral.” *Id.*

The approach in *First Baptist* is difficult to square with *Lukumi*. Taken alone, the fact that a government restriction refers to religious activity (while at the same time listing others) cannot be sufficient to show that its “object or purpose” is to target religious practices for harsher treatment. *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217; see *Maryville Baptist Church, Inc. et al. v. Andy Beshear*, No. 20-5427. — F.3d —, 2020 WL 2111316, at *3 (6th Cir. May 2, 2020) (slip opinion) (mentioning religious gatherings “by name” does not establish “that the Governor singled out faith groups”). Instead, *Lukumi* embraced a functional assessment of how the challenged law operates in practice. In engaging in that analysis, courts must consider how a particular stay-at-home order treats secular and religious activities that are substantially comparable to one another. *First Baptist* overlooked that step.⁶

*11 Nor does *Maryville Baptist*, a recently released Sixth Circuit opinion, support Plaintiffs’ position. That case involved a pair of stay-at-home orders that proscribed both “drive-in and in-person worship services,” while permitting their secular equivalents. *Maryville Baptist*, 2020 WL 2111316, at 1. Because Kentucky’s governor “offered no good reason” to treat drive-in religious services and drive-in businesses differently, the court halted enforcement of the prohibition on drive-in services. *Id.* at *4. At the same time, because of gaps in the factual record, the Court of Appeals allowed the ban on in-person services to continue pending further proceedings in the district court. *Id.*

Applied here, the Sixth Circuit’s reasoning counsels in favor of upholding Governor Pritzker’s Order. Unlike in *Maryville Baptist*, the April 30 Order confirms that religious organizations in Illinois may hold drive-in services. See Supp. Not. at 1–2, ECF No. 32. To the extent that the Sixth Circuit expressed concerns about restrictions on in-person services, those doubts stemmed from the fact that the Kentucky Governor’s orders prohibit in-person religious gatherings, regardless of how many worshippers attend. *Maryville Baptist*, slip. op. at 9. “[I]f the problem is numbers, and risks that grow with greater numbers,” the court reasoned, “there is a straightforward remedy: limit the number of people who can attend a service at one time.” *Id.* That is exactly what Governor Pritzker’s latest order does.

Ultimately, then, the Court concludes that the April Order qualifies as a neutral, generally applicable law. It therefore withstands First Amendment scrutiny so long as “it is supported by a rational basis.” *Anderson*, 870 F.3d at 639. Given the importance of slowing the spread of COVID-19 in Illinois, the Order satisfies that level of scrutiny, and Plaintiffs do not seriously argue otherwise. As a result, the Court finds that Plaintiffs’ Free Exercise claim is unlikely to succeed on the merits.

B. State Law Claims

1. Sovereign Immunity

The Eleventh Amendment protects Defendants from Plaintiffs’ RIFRA, EMAA, and DHA claims. That provision dictates that “[t]he 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 or Subjects of any Foreign State.” U.S. Const. amend. XI. Although not explicit in the text, the Eleventh Amendment also “guarantees that an unconsenting State is immune from suits brought in federal courts by her own citizens.” *Council 31 of Am. Fed’n of State, Cty. & Mun. Employees, AFL-CIO v. Quinn*, 680 F.3d 875, 881–82 (7th Cir. 2012) (citations and quotation marks omitted). “[I]f properly raised, the amendment bars actions in federal court against ... state officials acting in their official capacities.” *Id.* (citation omitted).

Because Defendants are state officials, who have been sued in their official capacities and have raised sovereign immunity, the Eleventh Amendment shields them from Plaintiffs’ state law claims. To be sure, “individual state officials may be sued

personally” for federal constitutional violations committed “in their official capacities.” *Goodman v. Carter*, No. 2000 C 948, 2001 WL 755137, at *9 (N.D. Ill. July, 2, 2001) (citing *Ex Parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). But that principle does not extend to “claim[s] that officials violated state law in carrying out their official responsibilities.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

For example, in *Carter*, a court in this circuit considered a suit that raised claims under the First Amendment's Free Exercise Clause, as well as Illinois's RFRA statute. 2001 WL 755137, at *1. “[Plaintiff]’s ILRFRA claim,” the *Carter* court observed, “asks this court to instruct state officials on how to conform their conduct to state law.” *Id.* at *10. Explaining that “such a state-law claim may not be entertained under this court’s supplemental jurisdiction simply because a proper § 1983 claim is also presented,” the court applied the doctrine of sovereign immunity and dismissed the RFRA claim. *Id.* (citing *Pennhurst*, 465 U.S. at 121, 104 S.Ct. 900). For the same reason, the Eleventh Amendment almost certainly forecloses Plaintiffs’ state law claims here.

2. Merits of the State Law Claims

*12 Sovereign immunity aside, the Court finds that Plaintiffs’ RFRA, EMAA, and PHDA claims are unlikely to succeed on the merits. The Court addresses each statutory claim in turn.

a. RFRA

For starters, Plaintiffs maintain that the Order violates Illinois’s RFRA statute. Under that statute, the “government may not substantially burden a person’s exercise of religion ...unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling government interest.” 775 Ill. Comp. Stat 35/15.

At this stage, the Court assumes (without deciding) that the Order’s prohibition on in-person religious gatherings of more than ten people qualifies as a “substantial burden” under the RFRA. *Id.* § 35/15. That means that Defendants must show that the ten-person limitation is the least restrictive way to promote a compelling interest.

Turning first to the government’s interest in fighting COVID-19, Plaintiffs reiterate their claim that “the coronavirus epidemic ‘curve’ has been substantially ‘flattened’ statewide.” Compl. ¶ 69. Because previous stay-at-home orders have partially succeeded in limiting the pathogen’s spread, Plaintiffs posit that the government no longer has a compelling interest in preventing large gatherings. Yet the virus continues to proliferate, Illinoisans continue to die, and restrictions remain vital to ensuring that hospitals are not overwhelmed. April 30 Order at 1–2. In these exceptional circumstances, controlling the spread of COVID-19 counts as a compelling interest. See *United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (recognizing that the government’s interest in “the safety...of [its] citizens” is “compelling”).

The remaining question is whether the ten-person limit is the “least restrictive means” of pursuing that goal. 775 Ill. Comp. Stat 35/15. This element turns on “whether [the government] could have achieved, to the same degree, its compelling interest” without interfering with religious activity. *Affordable Recovery Hous. v. City of Blue Island*, No. 12 C 4241, 2016 WL 5171765, at *8 (N.D. Ill. Sept. 21, 2016). But Plaintiffs have failed to spotlight, and the Court has not found, any less restrictive rules that would achieve the same result as the prohibition on large gatherings.

While permitting the Beloved Church to hold in-person services with its full congregation might be less disruptive, it would not advance the government’s interest in curtailing COVID-19 “to the same degree” as the ten-person limit. *Id.* The Court recognizes that Cassell has promised to equip worshippers with masks, place hand sanitizer at entryways, and arrange seating so that families can remain six feet apart and follow the social distancing requirements set forth in the Order. Cassell Decl. ¶¶ 7–11. But it is not entirely clear, given the seating configuration at Beloved Church, whether social distancing would be possible.

According to Cassell, ten to fifteen families attend a typical service, and many are “large families, some with up to 12 members.”⁷ *Id.* ¶ 12. Yet the photographs of the church’s interior provided by Cassell depict a total of twenty rows, many with fewer than seven seats. *Id.* ¶ 15. To remain six feet apart, it appears that each family unit must sit at least one row apart from another. It is difficult to see how the church could accommodate ten to fifteen large families in this manner.⁸ But, even assuming that it is possible, an eighty-

person service poses a greater risk to public safety than a gathering of ten or fewer or a drive-in service.

*13 Indeed, Defendants highlight the example of a church choir practice where the members actually used hand sanitizer and practiced social distancing. *See* Richard Read, “A choir decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead,” *Los Angeles Times* (Mar. 29, 2020). Despite those efforts, forty-five choir members ended up contracting COVID-19 and two died. *Id.* As that example illustrates, large gatherings magnify the risk of contagion even when participants practice preventative measures.

It is also important to recognize the religious exercises that the April 30 Order does allow. In addition to drive-in services and smaller worship services, the Order permits Cassell and other staff members to visit and minister to parishoners in their homes. It allows small group meetings, bible study meetings, and prayer gatherings at the church or in private homes, subject to the ten-person limit. It empowers Cassell and members of his congregation to celebrate communion in small groups. And it authorizes individual congregants to go to the church to obtain spiritual help and guidance from their pastor and/or other church staff members. *See* Compl. ¶ 33 (noting that “prayer and spiritual counseling visits and meetings are central functions of [Cassell's] leadership”).

Considering the seriousness of the continuing COVID-19 pandemic, the threat of additional infections in the context of large gatherings, and the avenues for religious worship, prayer, celebration, and fellowship that the April 30 Order does allow, the Court finds that no equally effective but less restrictive alternatives are available under these circumstances, and Plaintiffs' RFRA claim is thus unlikely to succeed on the merits.

b. Emergency Management Agency Act

Plaintiffs also contend that Governor Pritzker exceeded his authority under the EMAA. That Act equips the Governor with an array of emergency powers, including the authority “[t]o control... the movement of persons within the area, and the occupancy of premises therein.” 20 Ill. Comp. Stat. 3305/7(8). To make use of those powers, the Governor must first issue a proclamation “declar[ing] that a disaster exists.” *Id.* § 3305/7. After that, he may invoke the Act's emergency powers “for a period not to exceed 30 days.” *Id.*

The question here is whether the Act permits Governor Pritzker to declare more than one emergency related to the spread of COVID-19.⁹ In Plaintiffs' view, the ongoing pandemic only justifies a single 30-day disaster proclamation. In response, Defendants maintain that, so long as the Governor makes new findings of fact to determine that a state of emergency still exists, the Act empowers him to declare successive disasters, even if they stem from the same underlying crisis.

Based on the text and structure of the Act, Defendants have the better argument. By its terms, the Act defines a disaster as “an occurrence or threat of widespread or severe damage, injury or loss of life...resulting from ... [an] epidemic.” 20 Ill. Comp. Stat. 3305/4. The data show that COVID-19 has infected more and more residents and continues to do so; therefore, a “threat of widespread or severe damage, injury or loss of life” continues to exist. *Id.*; *see* April 30 Order at 1–2 (discussing the continued threat imposed by Covid-19).

*14 This statutory construction makes sense. Some types of disasters, such as a storm or earthquake, run their course in a few days or weeks. Other disasters may cause havoc for months or even years. For example, the Act designates “air contamination, blight, extended periods of inclement weather, [and] drought” as disasters. 20 Ill. Comp. Stat. 3305/4. Those events pose a threat that may persist for long periods of time and certainly beyond a single 30-day period. It is difficult to see why the legislature would recognize these long-running problems as disasters, yet divest the Governor of the tools he needs to address them.

This is not to say that the Governor's authority to exercise his emergency powers is without restraint. To support each successive emergency declaration, the Governor must identify an “occurrence or threat of widespread or severe damage, injury or loss of life.” 20 Ill. Comp. Stat. 3305/4. Once an emergency has abated, the facts on the ground will no longer justify such findings, and the Governor's emergency powers will cease. And, should this or any future Governor abuse his or her authority by issuing emergency declarations after a disaster subsides, affected parties will be able to challenge the sufficiency of those declarations in court. But in this case, Plaintiffs do not question the Governor's factual findings, only his authority to issue successive emergency proclamations based on the same, ongoing disaster. For these reasons, the Court concludes that this claim lacks even a negligible chance of success.

c. Department of Health Act

Lastly, Plaintiffs invoke Illinois's Department of Health Act, 20 Ill. Comp. Stat. 2305/2(a). Under that Act, the “State Department of Public Health...has supreme authority in matters of quarantine and isolation.” *Id.* § 2305/2(a). Before exercising its authority to “quarantine,” “isolate,” and make places “off limits the public,” however, the Department must comply with certain procedural requirements. *Id.* § 2305/2(c). As Plaintiffs see it, the Act vests the Department with the exclusive authority to quarantine and isolate Illinoisans, making Governor Pritzker's orders *ultra vires*.

The problem for Plaintiffs is that the challenged Order does not impose restrictions that fall within the meaning of the Act. By definition, a “quarantine” refers to “a state of enforced isolation.” *Quarantine*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/quarantine>; *see also*, e.g., *In re Washington*, 304 Wis.2d 98, 735 N.W.2d 111, 121–22 (2007) (explaining that to “quarantine” is “to isolate”); *Com. v. Rushing*, 627 Pa. 59, 99 A.3d 416, 423 (2014) (indicating that to “place in quarantine” equates to requiring an individual to be “set apart” from other members of society (emphasis added)); *Ex Parte Culver*, 187 Cal. 437, 202 P. 661, 664 (1921) (“ ‘Quarantine’ as a verb means to keep persons, when suspected of having contracted or been exposed to an [infectious] disease, out of a community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community.” (emphasis added) (citation omitted)).

As discussed above, the Order empowers Cassell to, among other things, worship and pray with small groups of his parishioners, visit them in their homes (while observing social distancing), and lead drive-in sermons. *See Daniel v. Putnam Cty.*, 113 Ga. 570, 38 S.E. 980, 981 (1901) (noting that even stringent means of preventing disease dissemination are not “quarantine” unless they preclude engagement between the individual and members of their community). So, while the Order curtails the ability of individuals to gather in large groups, it falls far short of a “quarantine” as that term appears in the Act. The Court therefore concludes that this claim has almost no likelihood of success on the merits.

V. Equitable Considerations

*15 The remaining factors confirm that Plaintiffs are not entitled to a preliminary injunction. Under the Seventh Circuit's “sliding scale approach,” the less likely a claimant is to win, the more that the “balance of harms [must] weigh in his favor.” *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 966 (7th Cir. 2018). Given that Plaintiffs' claims have little likelihood of prevailing on the merits, they cannot obtain a preliminary injunction without showing that the scales tip heavily in their direction.

But, if anything, the balance of hardships tilts markedly the other way. Preventing enforcement of the latest stay-at-home order would pose serious risks to public health. The record reflects that COVID-19 is a virulent and deadly disease that has killed thousands of Americans and may be poised to devastate the lives of thousands more. April 30 Order at 1–2. And again, the sad reality is that places where people congregate, like churches, often act as vectors for the disease. *See Pritzker Resp.* at 12–13 (collecting examples). Enjoining the Order would not only risk the lives of the Beloved Church's members, it also would increase the risk of infections among their families, friends, co-workers, neighbors, and surrounding communities.

While Plaintiffs' interest in holding large, communal in-person worship services is undoubtedly important, it does not outweigh the government's interest in protecting the residents of Illinois from a pandemic. Certainly, the restrictions imposed by the Order curtail the ability of the congregants of Beloved Church to worship in whatever way they would like. But this is not a case where the government has “ban[ned]” worshippers from practicing their religion altogether, as Plaintiffs insist. PI Mot. at 8, ECF No. 7. And again, the Order empowers Cassell and the other members of his church to worship, sing, break bread, and pray together in drive-in services, online meetings, and in-person in groups of ten or fewer. April 30 Order § 2, ¶ 5(f). Such allowances go a long way towards mitigating the harms Plaintiffs identify.

Taking into account COVID-19's virulence and lethality, together with the State's efforts to protect avenues for religious activity, the Court finds that equitable considerations, including the promotion of the public interest, weigh heavily against the entry of the temporary restraining order and preliminary injunction that Plaintiffs seek. Coupled with the relative weakness of Plaintiffs' legal arguments, this is fatal to their motion.

VI. Conclusion

These are unsettling times. Illinois and the rest of world are engaged in a massive effort to stave off the COVID-19 pandemic and the human suffering and death that it brings. At the same time, the stay-at-home orders issued by government officials as part of these efforts have resulted in their own form of loss and suffering—financial, emotional, psychological, and spiritual. The broader societal and political debate about how to balance these interests is beyond the purview of this Court. For present purposes, it suffices to state that Governor

Pritzker's April 30 Order satisfies minimal constitutional requirements as they pertain to religious organizations, like the Beloved Church. Accordingly, Plaintiffs' motion for a temporary restraining order and a preliminary injunction is denied.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 2112374

Footnotes

- 1 “[T]he district judge, in considering a motion for preliminary injunction...must make factual determinations on the basis of a fair interpretation of the evidence before the court.” *Darryl H. v. Coler*, 801 F.2d 893, 898 (7th Cir. 1986). The facts summarized here derive from Plaintiffs' complaint, the parties' briefs supporting and opposing the motion, and the accompanying exhibits; none are materially disputed.
- 2 For example, in recent weeks, Cassell has presented a series of sermons titled “Corona-Lie,” where he has expressed skepticism regarding the extent of the COVID-19 crisis, as well as the government's motives in responding to it. See, e.g., Beloved Church Media, *Sunday March 15, 2020: Corona-Lie (Pastor Steve Cassell)* at 38:35, YOUTUBE, <https://www.youtube.com/watch?v=QJix0dCxhGQ&t=1699s> (“Why don't we shut the country down for the 2500 people that have died from [Corona Beer]? Because it doesn't fit the narrative. I don't know if you realize this, but you are being absolutely manipulated and controlled by a system that wants you to believe what it tells you.”). See *Goplin v. WeConnect, Inc.*, 893 F.3d 488, 491 (7th Cir. 2018) (approving the district court taking judicial notice of a party's website in deciding a motion where the counterparty cited the website in its response brief).
- 3 Plaintiffs' motion focuses on their claim under the Free Exercise Clause. In the reply brief, however, they also argue that the Order violates the First Amendment's Free Speech and Freedom of Assembly provisions. But, because Plaintiffs failed to include these arguments in their opening brief and offer them only in reply, the arguments are waived as a matter of fairness. See *Wonsey v. City of Chi.*, 940 F.3d 394, 399 (7th Cir. 2019).
- 4 At times, Plaintiffs also argue that the government does not enforce social distancing requirements as applied to Essential Businesses. See Pls.' Reply at 8. In support, Cassell states that he has observed social distancing violations while shopping at Menards and Walmart. Cassell Decl. ¶ 16. But limited, anecdotal instances of noncompliance contribute little to the inference that the “object or purpose” of the challenged order is to interfere with religious practices. *Lukumi*, 508 U.S. at 527, 113 S.Ct. 2217.
- 5 Indeed, among other things, the Order requires retail stores that are designated as Essential Businesses to set up aisles to be one-way “to maximize spacing between customers and identify the one-way aisles with conspicuous signage and/or floor markings.” April 30 Order § 2.
- 6 *On Fire Christian Center, Inc. v. Fischer*, another district court case Plaintiffs cite, does not support their position either. No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020). In *Fischer*, the City of Louisville proscribed “drive-in church services, while not prohibiting a multitude of other non-religious drive-ins and drive-throughs.” *Id.* at *6. That is not the case here.
- 7 In fact, as Plaintiffs put it, “[t]he Church has numerous families that have taken seriously the biblical admonition to ‘be fruitful and multiply.’” Pl. Reply at 3.
- 8 Cassell also states that “[i]t is not feasible to conduct drive-in services on TheBeloved Church's property” because they “do not have a parking lot that can accommodate such services.” *Id.* ¶ 5. But the church appears to have a large parking lot that can accommodate a number of cars to conduct such services. See <https://www.google.com/maps/place/216+W+Mason+St,+Lena,+IL+61048/@42.3784957,-89.827654,3a,75y,99.24h,66.75t/data=!3m6!1e1!3m4!1s-EqLIBLYW6X0O96wk9B0nA!2e0!7i13312!8i6656!4m5!3m4!1s0x8808103eadade1e7:0x6807f35e1247a6cb!8m2!3d42.378454!4d-89.8273456>; see also *Ke Chiang Dai v. Holder*, 455 Fed. Appx. 25, 26 n.1 (2012) (taking judicial notice of Google Maps).

- 9 Plaintiffs also cast Governor Pritzker's previous orders as improper continuations of the initial emergency declaration. Given that the Governor has issued a new disaster declaration, that argument is moot.

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Supreme Court of Washington.

Shyanne COLVIN, Shanell Duncan,
Terry Kill, Leondis Berry, and
Theodore Roosevelt Rhone, Petitioners,

v.

Jay INSLEE, Governor of the State of Washington,
and [Stephen Sinclair](#), Secretary of the Washington
State Department of Corrections, Respondents.

NO. 98317-8

|
Filed July 23, 2020

Synopsis

Background: Five inmates serving criminal sentences at different state Department of Corrections facilities filed petition for writ of mandamus seeking to compel Governor and Secretary of Department to release three categories of offenders to reduce prison populations due to danger COVID-19 posed to prison inmates, and, alternatively, sought leave to amend to file personal restraint petition.

Holdings: The Supreme Court, [Stephens](#), C.J., held that:

Supreme Court lacked authority, under separation of powers doctrine, to command executive branch to exercise its powers to release thousands of inmates, and thus inmates were not entitled to writ, and

inmates failed to demonstrate that Governor and Secretary were deliberately indifferent to serious harm from COVID-19 outbreak, and thus there was no basis for granting personal restraint petition.

Writ denied.

González, J., filed dissenting opinion, in which [Yu](#), [Montoya-Lewis](#), and Gordon McCloud, JJ., joined.

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Opinion

STEPHENS, C.J

*1 ¶1 This matter came before us on a petition for a writ of mandamus from five inmates serving criminal sentences at different Washington Department of Corrections (Department) facilities. We retained jurisdiction because of the extraordinary nature of the relief petitioners seek—and because of the extraordinary danger COVID-19 (coronavirus disease) poses to inmates in Washington’s prisons. But mandamus is not the answer for every emergency, and it cannot deliver the relief petitioners seek here.

¶2 Mandamus is a term familiar to attorneys and the judiciary, but not most members of the public. In plain English, petitioners ask the court to force Governor Jay Inslee and Department of Corrections Secretary Stephen Sinclair to reduce the prison population by ordering the immediate release of three categories of offenders. But the writ they seek asks us to encroach on the executive branch and exceed the court’s authority; it would require the judiciary to supervise the executive based on policies the legislature never approved, in direct violation of long recognized separation of powers principles. Without a showing an official in the executive branch has failed to perform a *mandatory nondiscretionary* duty, courts have no authority under law to issue a writ of mandamus—no matter how dire the emergency. The petitioners alternatively seek leave to amend their petition by filing a personal restraint petition. But on the record before us, they have not shown that the respondents have acted with deliberate indifference to the extreme risk that COVID-19 creates for the incarcerated. Amending their mandamus petition would therefore be futile. For these reasons, we dismiss the mandamus action and deny the motion to amend.

FACTS

¶3 The record here differs from a typical case in the Washington Supreme Court. We do not have the benefit of any hearings, factual findings, credibility determinations, or discovery. Rather, the parties agreed on a record that mainly includes descriptions of the prison conditions, expert opinions on the risks that COVID-19 presents in the prison environment, and the petitioners’ declarations as to their individual situations. For purposes of our decision, we accept the petitioners’ factual descriptions as true. The

petitioners claim close confinement creates a substantial risk of harm because of the current public health emergency caused by COVID-19. These concerns are legitimate and well founded. The current widely reported medical evidence suggests that the COVID-19 risks of serious complications or death are highest for offenders over age 50 and those with certain preexisting medical conditions, but it can also be serious for younger people and those in good health. And serious outbreaks have occurred at other prisons and jails nationwide.¹

*2 ¶4 Concerns about COVID-19 are all the more serious because our understanding of this public health threat is evolving and incomplete. The virus's virulence and severity are unclear because there has been insufficient time to develop accurate, reliable, and widespread testing both for the virus and the presence of its antibodies. Without doubt, the prison system faces a daunting challenge from a serious public health threat.

¶5 Medical experts recommend limiting the spread of the virus by social distancing, frequent hand washing, and wearing masks or face coverings. Experts currently think the virus is unlikely to spread from person to person at a distance of more than six feet, and thus the primary mitigating measure has been social distancing. Based on this advice, beginning in March 2020, the governor has issued several proclamations through his emergency powers, all designed to limit the spread of the virus as much as reasonably possible.

¶6 Prisons are not designed to easily accommodate social distancing. To combat the virus in this setting, the respondents have developed and implemented a multistep plan. The Department issued social distancing guidelines to offenders in early March 2020, started screening visitors on March 6, and stopped visits on March 13, all in an effort to prevent the virus from spreading into facilities. But social distancing is difficult, if not impossible, in some prison settings due to logistics and population. The Department houses the named petitioners in various facilities throughout the state.

¶7 Each petitioner argues that we should grant their immediate release because they fall into one of three categories of risk: (1) those with preexisting medical conditions complicated by COVID-19, (2) those over age 50, and (3) those who already have release dates pending within the next 18 months. Three petitioners fall within the first group. Shyanne Colvin was 7 months pregnant when the petition was filed, and she reported possible complications because she suffered a grand mal

seizure and required preventive seizure medication. Leondis Berry is 46 years old and has serious heart conditions; he has had four heart surgeries and needs to use a pacemaker. He reports that he has housing available with his wife upon release. Theodore Rhone is 62 years old and has [diabetes](#) and [high blood pressure](#). Rhone's declaration does not show what his housing situation would be if released.

¶8 In the second category, Terry Kill is 52 years old and reports that he has housing available with his wife. Shanell Duncan falls within the third category. He is 40 years old and has an anticipated release date of December 27, 2020. He reports that he has stable housing available with a partner in Spokane.

¶9 Neither the briefing nor the agreed record gives full information on the petitioners' criminal history nor any history of prison discipline. Colvin pleaded guilty to delivery of a controlled substance (methamphetamine) and a corresponding special allegation that she or an accomplice committed the offense in a county jail; she was thus subject to a mandatory 18-month sentence enhancement under [RCW 9.94A.533\(5\)\(a\)](#). See [State v. Colvin](#), No. 36618-9-III, slip op. at 1, 2019 WL 6040445 (Wash. Ct. App. Nov. 14, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/366189_unp.pdf. Records provided by amicus briefing show that Berry was convicted of multiple counts of first and second degree robbery. Rhone is serving a life sentence as a persistent offender and has a conviction for first degree robbery with a firearm. Victim impact statements included with amicus briefing describe Kill as having three felony convictions in Snohomish County, including a burglary of a vacation home. And records attached to the amicus briefing show that Duncan has convictions for third degree assault, unlawful possession of a firearm, robbery, and fourth degree assault involving domestic violence.

*3 ¶10 The petitioners claim crowded prison conditions do not allow for effective social distancing, creating an unreasonable risk of contracting COVID-19. At the time of filing, no member of the prison population in Washington had tested positive for the virus. A few days later, though, one prisoner at Monroe Correctional Complex (MCC) tested positive. In an apparent reaction to the news and fears of an outbreak, a significant disturbance ensued at MCC. The petitioners sought emergency relief, and we set an accelerated briefing schedule to consider their request. We also ordered the respondents to immediately exercise their authority to take all necessary steps to protect the health and safety

of the prison population from COVID-19, and directed the respondents to file a report on their plans for safeguarding prisoners from the disease. This order neither granted a writ of mandamus nor required any specific remedy. Instead, we intended the order to preserve and protect the petitioners' rights and claims to every extent possible pending oral argument.

¶11 As directed, the respondents filed reports detailing their safety plan and the steps taken. Besides the steps discussed above, the Department has tried to follow United States Center for Disease Control and Prevention guidelines by administering screening protocols, creating special procedures for transporting offenders, implementing physical distancing protocols, providing free soap and handwashing facilities, and issuing instructions for facility cleaning and sanitizing. These protocols included an order that all facilities ensure that all staff and offenders wear face coverings. The Office of Corrections Ombuds toured MCC and concluded that it was unable to effectively impose social distancing with its population, noting that both staff and incarcerated individuals asked that some offenders be released to increase the space available. Photographs from the tour show that although offenders and staff have surgical face masks, the common areas can become crowded. At oral argument, the respondents explained that greater space was available but the pictured offenders had chosen to congregate in the common areas and hallways. On April 15, 2020, the governor issued a proclamation suspending various statutory hurdles to the early release of prisoners, commuting sentences for and ordering the release of certain nonviolent offenders. Proclamation by Governor Jay Inslee, No. 20-50 (Wash. Apr. 15, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-50-%20-%20COVID-19%20Reducing%20Prison%20Population.pdf> [https://perma.cc/C5J8-7KQ2]. The Department has since reported that most of those commuted offenders have been released.²

¶12 At oral argument, the respondents suggested that the prison population had been reduced from almost 18,000 to just over 16,000. They also informed the court that they planned to release Colvin into a home-release parenting program within one or two weeks.³ They also reported that more than a dozen offenders at MCC had tested positive for the virus. One week after oral argument, the Department website clarified that 15 MCC inmates had tested positive and that one inmate on a separate work release program had also tested positive. Although no offenders at any other facilities had tested positive at that time, dozens of

inmates and corrections officers have since been diagnosed with COVID-19 at the Coyote Ridge Corrections Center (CRCC). See *COVID-19 Data*, WASH. DEP'T OF CORR. (July 9, 2020) <https://www.doc.wa.gov/corrections/covid-19/data.htm>. The number of positive test results continues to increase: after oral argument, the Department reported that 58 offenders tested positive at MCC, 231 tested positive at CRCC, 2 tested positive at the Washington State Penitentiary, and 1 tested positive at the Washington Corrections Center. *Id.* The tragic deaths of Berisford Anthony Morse (a 65-year-old corrections officer at MCC), Victor Bueno (a 63-year-old inmate at CRCC), and William Bryant (a 72-year-old inmate at CRCC) underscore the serious danger COVID-19 poses in correctional facilities. Press Release, Wash. Dep't of Corr., First Washington Corrections Line of Duty Death from COVID-19 (May 18, 2020), <https://www.doc.wa.gov/news/2020/05182020p.htm> [https://perma.cc/EZ7T-WTV 4]; Press Release, Wash. Dep't of Corr., First Incarcerated Individual in Washington Dies of COVID-19 (June 18, 2020), <https://doc.wa.gov/news/2020/06182020p.htm> [https://perma.cc/UCJ5-55BU]; Press Release, Wash. Dep't of Corr., Second Incarcerated Individual in Washington Dies of COVID-19 (June 22, 2020), <https://www.doc.wa.gov/news/2020/06242020p.htm> [https://perma.cc/4BVC-9UK8].⁴

ANALYSIS

*4 ¶13 The question before us is not whether the risk of COVID-19 in Washington's prisons requires an immediate response to protect the lives of inmates and staff—clearly it does. Instead, this case asks whether this court can issue a writ of mandamus to direct that response by the governor and the secretary, or whether the petitioners have shown that their continued incarceration is unlawful. We answer no to both questions.

I. THE COURT LACKS AUTHORITY TO DIRECT OR OVERSEE THE GOVERNOR'S COVID-19 MITIGATION STRATEGY THROUGH MANDAMUS

¶14 A writ of mandamus is a rare and extraordinary remedy because it allows courts to command another branch of government to take a specific action, something the separation of powers typically forbids. *Walker v. Munro*, 124 Wash.2d 402, 407, 879 P.2d 920 (1994) (“When directing a writ to ... a coordinate, equal branch of government, the judiciary should be especially careful not to infringe on the historical

and constitutional rights of that branch.”). “One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments—the legislative, the executive, and the judicial—and that each is separate from the other.” *Carrick v. Locke*, 125 Wash.2d 129, 134, 882 P.2d 173 (1994). Though “[o]ur constitution does not contain a formal separation of powers clause[,] ... ‘the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.’ ” *Brown v. Owen*, 165 Wash.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick*, 125 Wash.2d at 135, 882 P.2d 173, and citing WASH. CONST. art. II, § 1, art. III, § 2, art. IV, § 1).

¶15 The framers of the federal constitution designed this three-part system to prevent any one branch of government from gaining too much power. See THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”); *Clinton v. City of New York*, 524 U.S. 417, 482, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (Breyer, J., dissenting) (“[T]he principal function of the separation of powers ... is to ... provid[e] a ‘safeguard against the encroachment or aggrandizement of one branch at the expense of the other.’ ” (quoting *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976))). This does not require that the branches of government be “hermetically sealed off from one another. The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances.” *Carrick*, 125 Wash.2d at 135, 882 P.2d 173.⁵ The separation of powers doctrine “serves mainly to ensure that the fundamental functions of each branch remain inviolate.” *Id.*

*5 ¶16 The fundamental functions of each branch are familiar to most Washingtonians. The legislative branch writes laws, WASH. CONST. art. II, § 1, the executive branch faithfully executes those laws, WASH. CONST. art. III, § 5, and “[i]t is emphatically the province and duty of the judicial department to say what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803); see also WASH. CONST. art. IV, § 1 (vesting the judicial power of the state in this court, superior courts, justices of the peace, and inferior courts created by the legislature).

¶17 The writ of mandamus reflects this limited judicial role of saying what the law is. When the law requires a government official to take a particular action, we have the power to issue a writ of mandamus to say so. See *Freeman v. Gregoire*, 171 Wash.2d 316, 323, 256 P.3d 264 (2011) (“Mandamus is an extraordinary remedy appropriate only where a state official is under a mandatory ministerial duty to perform an act required by law as part of that official’s duties.”). In this way, mandamus is equally a command of the law and a command of this court. As we explained in one of our earliest mandamus cases:

[T]he writ which must necessarily issue under a petition of this kind ... is no more effective than the statute. Each equally commands the officer to perform his duty. One is the announcement of the law by the law making power, the other is the announcement of the law by the court.

State ex rel. Hawes v. Brewer, 39 Wash. 65, 68-69, 80 P. 1001 (1905). A writ of mandamus can only command what the law itself commands. If the law does not require a government official to take a specific action, neither can a writ of mandamus. See *State ex rel. Taylor v. Lawler*, 2 Wash.2d 488, 490, 98 P.2d 658 (1940) (“The jurisdiction given to this court by the state constitution in Art. IV, § 4, to issue writs of mandamus to state officers, does not authorize [us] to assume general control or direction of official acts.”).

¶18 Because a writ of mandamus can require only what the law requires, mandamus cannot control the discretion that the law entrusts to an official. See *SEIU Healthcare 775NW v. Gregoire*, 168 Wash.2d 593, 599, 229 P.3d 774 (2010) (“[M]andamus may not be used to compel the performance of act or duties which involve discretion on the part of a public official.” (quoting *Walker*, 124 Wash.2d at 410, 879 P.2d 920)). Mandamus, therefore, is an appropriate remedy only “ ‘[w]here the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.’ ” *Id.* (emphasis omitted) (quoting *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926)). The manner of carrying out duties “which are, by the constitution and laws, submitted to the executive, can never be made in this court.” *Marbury*, 5 U.S. at 170; see *Spokeo, Inc. v. Robins*, —

U.S. —, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (“[T]he power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches.”).

¶19 “We will not usurp the authority of the coordinate branches of government” by dictating how they must exercise their discretion. *Walker*, 124 Wash.2d at 410, 879 P.2d 920. Doing so would embody “the encroachment or aggrandizement of one branch at the expense of the other,” which the separation of powers is designed to “safeguard against.” *Buckley*, 424 U.S. at 122, 96 S.Ct. 612. “[T]he fundamental functions of each branch [are] inviolate”—the judicial branch cannot “ ‘threaten[] the independence or integrity or invade[] ’ ” the powers of the executive through a writ of mandamus or any other mechanism. *Carrick*, 125 Wash.2d at 135, 882 P.2d 173 (quoting *Zylstra v. Piva*, 85 Wash.2d 743, 750, 539 P.2d 823 (1975)); see *Marbury*, 5 U.S. at 170 (“The province of the court is ... not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”). The very legitimacy of the writ of mandamus in our constitutional system depends on its narrow nature—our job is to say what the law is, not to dictate how another branch should do its job. See *Brown*, 165 Wash.2d at 719, 206 P.3d 310 (“[T]he judiciary [must] not be drawn into tasks more appropriate to another branch.”).

*6 ¶20 As this long history of precedent illustrates, there are thus “strict limits on the circumstances under which we will issue the writ [of mandamus] to public officers.” *SEIU Healthcare 775NW*, 168 Wash.2d at 599, 229 P.3d 774. Besides showing a government official has a clear duty to act, RCW 7.16.160, those seeking the writ must show they have no “plain, speedy and adequate remedy in the ordinary course of law” and that they are “beneficially interested,” RCW 7.16.170. Petitioners bear “the ‘demanding’ burden of proving all three elements justifying mandamus.” *Eugster v. City of Spokane*, 118 Wash. App. 383, 403, 76 P.3d 741 (2003) (quoting *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989)).

¶21 These petitioners have failed to meet their burden. They ask us to command Governor Inslee and Secretary Sinclair to release about 13,000 inmates housed in Washington’s correctional facilities, based on particular categories, but they do not identify any clear duty the governor and secretary have failed to carry out.⁶ Instead, the petitioners argue that “a variety of constitutional and statutory sources” impose on the governor and secretary a duty to “take all reasonable steps to protect people in prison from COVID-19.” See Pet’rs’ Br. in

Supp. of Pet. for a Writ of Mandamus at 30. According to the petitioners, “release is the only actual ‘reasonable’ ” step respondents could take to protect inmates from COVID-19. *Id.* at 53. But because no law commands the governor and secretary to release inmates here, neither can a writ of mandamus. Commanding the governor or the secretary to take specific actions not required by law would exceed this court’s constitutional authority.

¶22 The executive branch has historically led Washington’s response to emergencies. “The proclamation of an emergency and the Governor’s issuance of executive orders” to address that emergency “are by statute committed to the sole discretion of the Governor.” *Cougar Bus. Owners Ass’n v. State*, 97 Wash.2d 466, 476, 647 P.2d 481 (1982), *overruled in part by Chong Yim v. City of Seattle*, 194 Wash.2d 682, 451 P.3d 694 (2019). The law empowers the governor to “proclaim a state of emergency” in response to a disaster which threatens “life, health, property, or the public peace.” RCW 43.06.010(12). An emergency proclamation unlocks “the powers granted the governor during a state of emergency.” *Id.* Those emergency powers are broad and include the authority to prohibit “[a]ny number of persons ... from assembling,” RCW 43.06.220(1)(b), “to waive or suspend” “any statute, order, rule, or regulation [that] would in any way prevent, hinder, or delay necessary action in coping with the emergency,” RCW 43.06.220(2)(g), to “order the state militia ... to assist local officials to restore order,” RCW 43.06.270, and more. “These statutory powers evidence a clear intent by the Legislature to delegate requisite police power to the Governor in times of emergency.” *Cougar Bus. Owners Ass’n*, 97 Wash.2d at 474, 647 P.2d 481.

*7 ¶23 The governor’s response to an emergency “is clearly one of those discretionary acts that are ‘in their nature political, or which are, by the constitution and laws, submitted to the executive,’ and inappropriate for mandamus.” *SEIU Healthcare 775NW*, 168 Wash.2d at 600, 229 P.3d 774 (quoting *Marbury*, 5 U.S. at 170); see RCW 43.06.010(12) (“The governor *may* ... proclaim a state of emergency.” (emphasis added)), .220(1)(b) (“The governor ... *may* ... issue an order prohibiting [a]ny number of persons, *as designated by the governor*, from assembling.” (emphasis added)), .220(2) (“The governor ... *may* ... issue an order or orders concerning waiver or suspension of statutory obligations.” (emphasis added)), .270 (“The governor *may in his or her discretion* order the state militia ... to assist local officials to restore order.” (emphasis added)).⁷

¶24 Governor Inslee has exercised his discretion under these emergency powers dozens of times since proclaiming a state of emergency. Most relevant here, the governor has taken steps to accelerate the release of 950 nonviolent inmates who were set to be released this summer. *See* Proclamation, *supra*; Wash. Gov. Jay Inslee, Emergency Commutation in Response to COVID-19 (Apr. 15, 2020), https://www.governor.wa.gov/sites/default/files/COVID-19%20-%20Commutation%20Order%204.15.20%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery [<https://perma.cc/PY9P-3YK9>]. By May 15, the Department reported 422 inmates had received commutation orders and another 528 had been placed in the community through the rapid reentry program established under the governor's proclamations. Memorandum from Stephen Sinclair, Sec'y of the Wash. Dep't of Corr., to All Incarcerated Individuals (May 15, 2020), <https://www.doc.wa.gov/news/2020/docs/2020-0515-incarcerated-individual-memo-prison-population-reduction-efforts.pdf> [<https://perma.cc/2FYQ-NQHS>].

¶25 The petitioners argue that this action does not go far enough and that the governor must release thousands more inmates to protect them from COVID-19. But like the governor's emergency powers, the governor's power to release inmates by commuting sentences or pardoning offenders is exclusive and discretionary. *See* WASH. CONST. art. III, § 9 ("The pardoning power shall be vested in the governor under such regulations and restrictions as may be prescribed by law."); RCW 10.01.120 ("[T]he governor ... may ... commute a sentence or grant a pardon, upon such conditions, and with such restrictions, and under such limitations as he or she may think proper The governor may also, on good cause shown, grant respites or reprieves from time to time as he or she may think proper." (emphasis added)). Because the constitution and laws of our state entrust the governor with the discretion to pardon those offenders and commute those sentences that he thinks proper, this court has no power to dictate how the governor may exercise that discretion—even in an emergency. *See* *Brown*, 165 Wash.2d at 725, 206 P.3d 310 ("Directing the performance of a discretionary duty would 'usurp the authority of the coordinate branches of government.'" (quoting *Walker*, 124 Wash.2d at 410, 879 P.2d 920)).

*8 ¶26 The administration of correctional institutions is also an undeniably executive function. *See* *Robinson v. Peterson*, 87 Wash.2d 665, 669, 555 P.2d 1348 (1976) ("Questions concerning the rights of inmates of prisons and the duties of

their custodians have not been frequently before this court. This should not be surprising, since the administration of the state institutions and county jails is an executive function and not a judicial one."). To avoid offending the separation of powers, we have long fought to ensure Washington's courts are not "drawn into tasks more appropriate to another branch," including prison administration. *Brown*, 165 Wash.2d at 719, 206 P.3d 310; *see also* *In re Pers. Restraint of Dyer*, 143 Wash.2d 384, 393, 20 P.3d 907 (2001) ("It is not in the best interest of the courts to involve themselves in the 'day-to-day management of prisons.'" (quoting *Sandin v. Conner*, 515 U.S. 472, 482, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995))).

¶27 The petitioners ask us to command the executive branch to exercise its emergency powers, its commutation and pardon powers, and its powers to administer Washington's correctional facilities to immediately release thousands of inmates. But "[w]e will not"—and, consistent with the separation of powers, cannot—"usurp the authority of the coordinate branches of government" by dictating how the executive branch must exercise these discretionary powers. *Walker*, 124 Wash.2d at 410, 879 P.2d 920. The constitution empowers us "to say what the law is," but it does not empower us to dictate "how the executive, or executive officers, perform duties in which they have a discretion." *Marbury*, 5 U.S. at 177, 170.

¶28 Interfering with the governor's choices in responding to this emergency would contravene the historical roles of the executive and judicial branches. Absent a clear mandate for more specific action on the governor's part, we have no authority to oversee the governor's many discretionary actions to address the COVID-19 outbreak. While we do not minimize the serious risks COVID-19 poses to Washington's incarcerated population, we will not use this emergency as an occasion to wield powers that exceed our constitutional authority. For these reasons, we deny and dismiss the petition for a writ of mandamus.

II. THE PETITIONERS HAVE NOT SHOWN
"DELIBERATE INDIFFERENCE" TO SUPPORT
RELIEF UNDER A PERSONAL RESTRAINT
PETITION, SO THEIR MOTION TO AMEND IS
FUTILE

¶29 Following the court's April 10, 2020 order on the petitioners' emergency motion, the petitioners brought a motion to amend their petition to add a personal restraint petition claim. Even setting aside the procedural hurdles to

consideration of such a claim,⁸ allowing the amendment would be futile because the petitioners cannot show that they suffer from unlawful restraint. The personal restraint petition is the procedure by which original actions are brought in the appellate courts of Washington to obtain collateral or postconviction relief from criminal judgments and sentences, and other forms of government restraint, such as civil commitment and prison discipline. Governed by the procedures set forth in Title 16 RAP, a personal restraint petition is the vehicle for seeking relief that was formerly available by petition for writ of habeas corpus or other postconviction motion. [RAP 16.3](#). This court and the Court of Appeals have concurrent original jurisdiction over such petitions. [RAP 16.3\(c\)](#).

¶30 As the name of the action implies, a personal restraint petition is designed to obtain relief from an “unlawful restraint.” The petitioners here are clearly under restraint, as they are confined and serving terms of imprisonment. *In re Pers. Restraint of Stuhr*, 186 Wash.2d 49, 52, 375 P.3d 1031 (2016). But to succeed, the petitioners must show that their confinement is “unlawful.” Only unlawful prison conditions constitute a basis for granting a personal restraint petition. [RAP 16.4\(c\)\(6\)](#).⁹ The petitioners mainly argue that the substantial risk caused by COVID-19 makes their imprisonment cruel or unusual.

*9 ¶31 The petitioners rely on [article I, section 14 of the Washington Constitution](#) and the Eighth Amendment to the United States Constitution, but do not argue for an independent state constitutional analysis on their prison conditions claims. As a result, we apply the Eighth Amendment standards requiring a showing of a substantial risk of serious harm and deliberate indifference to that risk. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). As the facts described above show, the petitioners face a substantial risk of serious harm. Petitioners’ counsel persuasively noted at oral argument that, in prison and jail facilities, inmates live in close confinement with one another with no real choice as to social distancing or other measures to control spread of the virus. The risk of a COVID-19 outbreak is undeniably high in these facilities and under these conditions.

¶32 But it is not sufficient for the petitioners to show a substantial risk of serious harm. Under well-established precedent, obtaining judicial relief also requires showing that the respondents have acted with “deliberate indifference” to that risk. *Farmer*, 511 U.S. at 832, 114 S.Ct. 1970. Under this

constitutional standard, the record must evidence subjective recklessness or deliberate indifference; that is, the official must know of and disregard the risk. *Id.* at 837, 114 S. Ct. 1970. Repeated negligent acts demonstrating systemic deficiencies in the method of providing protections may amount to deliberate indifference. See *Kelley v. McGinnis*, 899 F.2d 612, 616-17 (7th Cir. 1990).

¶33 Here, the record does not show the respondents have acted with deliberate indifference. And there is no indication that extending this court’s initial preservation order would help identify any such indifference. The governor has issued proactive orders to reduce prison populations and to protect offenders incarcerated in prison. The Department has implemented a multifaceted strategy designed to protect offenders housed at various facilities, increasing those protections as more information becomes available about the virus and its risks. Part of that strategy includes a release of some nonviolent offenders. The petitioners imply that any plan that does not lead to their own personal release is insufficient, but this is simply a difference of opinion in how to best fight the threat of COVID-19 in prisons.

¶34 While reasonable minds may disagree as to the appropriate steps that should be taken to protect the prison population while preserving public safety, no evidence here shows that the respondents have acted with deliberate indifference. The result might be different on different facts, and we do not suggest the inadequacy of safety measures can never amount to deliberate indifference. On this record, however, the petitioners cannot show unlawful restraint to support a personal restraint petition and thus granting their motion to amend would be futile. See *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 142, 937 P.2d 154 (1997) (court may deny leave to amend complaint where a “[new] claim would have been futile”). As a result, we deny the motion to amend and dismiss the petition.¹⁰

CONCLUSION

¶35 Consistent with our limited authority to compel only mandatory, nondiscretionary action by another branch of government, we deny the petitioners’ claims for extraordinary judicial relief. We are not indifferent to the serious dangers faced by petitioners and other inmates at heightened risk of contracting COVID-19 in Washington’s correctional facilities, but how the governor and secretary address these dangers and also protect the public necessarily involves the

exercise of discretionary authority that we cannot direct. Even if we could do so, nothing before us suggests how we would succeed where those charged with running Washington's correctional system have failed. Today's decision resolves these claims on the facts before us and does not excuse the governor and secretary from their continuing obligations toward these petitioners and other inmates. At the same time, we will not excuse ourselves from our obligation to respect the discretion vested in another branch of government and uphold the constitutional separation of powers.

WE CONCUR:

Johnson, J.

Madsen, J.

Owens, J.

Worswick, J.P.T.

González, J. (dissenting)

*10 ¶36 When this case was filed, the COVID-19 virus (coronavirus disease) was spreading throughout our state, nation, and world, creating a public health emergency unprecedented in living memory. The resulting fear and anxiety, coupled with the need to take distancing measures, caused massive disruption in our daily lives and institutions. The courts have a role to play in protecting individual rights in times of emergency. It is true that we must not usurp the essential functions of another branch of government. But we too have an essential function: to say what the law is, to say whether the law has been violated, and to order relief when relief is warranted.

¶37 If we are to fulfill our essential judicial function, we must decide whether challenged acts or omissions violate the constitution, even when making that decision is difficult. And we must learn from our history—a history which shows that in times of distress, courts all too often defer to the executive branch and sacrifice precious liberties, especially for our most vulnerable. In *Korematsu v. United States*, for example, amidst fear in a time of war, the judicial branch sanctioned a repulsive, unjustified racial classification that led to enormous suffering authorized by an executive order. 323 U.S. 214, 215, 65 S. Ct. 193, 89 L. Ed. 194 (1944), abrogated by *Trump v. Hawaii*, — U.S. —, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018); see *Korematsu v. United*

States, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting a postconviction writ of coram nobis 40 years later vacating Mr. Korematsu's conviction). This tragic history stands as a caution that in times of crisis, the judiciary must not invoke separation of powers to avoid subjecting government actions to close scrutiny and accountability. Because the majority has abdicated this responsibility with its near-summary dismissal of the petitioners' claims, I dissent.

¶38 The petitioners are five individuals incarcerated in Department of Corrections (DOC) facilities where the State is responsible for their safety during this public health emergency. Because prisons are cramped and crowded environments, petitioners are at an increased risk of contracting COVID-19, and serious outbreaks of this deadly disease have already occurred in multiple prisons, putting inmates, staff, and the community at risk. As of July 16, 2020, there have been at least 651 deaths from coronavirus reported among prisoners across our country, including several in Washington State. *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last visited July 16, 2020); NWPB News, *2nd Inmate Dies, National Guard Deployed To Help with COVID Testing at Eastern Washington Prison*, SPOKANE PUBLIC RADIO (June 26, 2020), <https://www.spokanepublicradio.org/post/2nd-inmate-dies-national-guard-deployed-help-covid-testing-eastern-washington-prison>. Our federal constitution, by prohibiting “cruel and unusual punishment,” requires state officials to take reasonable measures to protect the people in their custody from contracting the virus. U.S. CONST. amend. VIII; see *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Helling v. McKinney*, 509 U.S. 25, 35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993); *Martinez-Brooks v. Easter*, No. 3:20-CV-00569 (MPS), — F.Supp.3d —, — — —, 2020 WL 2405350, at *20-26 (D. Conn. May 12, 2020).

¶39 This responsibility is well established.

“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. ... The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs —e.g., food, clothing, shelter, medical care, and reasonable

safety—it transgresses the substantive limits on state action set by the Eighth Amendment.”

*11 *Helling*, 509 U.S. at 32, 113 S.Ct. 2475 (alterations in original) (quoting *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)); see *Brown v. Plata*, 563 U.S. 493, 510, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011). Our state constitution also prohibits “cruel punishment,” and we have repeatedly found our cruel punishment clause is more protective than the Eighth Amendment. WASH. CONST. art. I, § 14; see *State v. Bassett*, 192 Wash.2d 67, 78-82, 428 P.3d 343 (2018) (collecting cases).

¶40 The petitioners filed this mandamus action arguing the response of state officials to the COVID-19 emergency in prisons was constitutionally inadequate. They argued social distancing is not possible in prisons at the current population levels and asked for a writ of mandamus directing the governor and the DOC secretary to use their powers to significantly reduce the prison population. At oral argument, the petitioners made clear they were not seeking the blanket release of any particular group. They are not seeking a blanket release of all individuals over age 50, of all individuals with serious underlying medical conditions, or of all individuals with early release dates within the next 18 months. Rather, they ask this court to direct DOC to prioritize the release of vulnerable inmates while recognizing DOC’s appropriate authority to consider other factors like public safety in determining how to sufficiently reduce the prison population to allow safe distancing of inmates and staff. Whether this relief is available in mandamus is a difficult question that deserved due scrutiny.

¶41 But by order issued the day of oral argument, a majority of this court summarily dismissed the petition and denied the petitioners’ request to seek similar relief via a personal restraint petition. In the opinion published today, the majority explains its view that a writ of mandamus was not available because no statute specifically requires a reduction of the prison population during the pandemic, and the use of emergency powers to protect the health of inmates requires the governor and DOC secretary to exercise discretion. According to the majority, our hands are tied by “long recognized separation of powers principles.” Majority at —.

¶42 Separation of powers does not mandate the majority’s conclusion. Our constitutional system divides power among three different branches of government to prevent tyranny

and protect liberty. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wash.2d 494, 504, 198 P.3d 1021 (2009). Each branch has its own appropriate sphere of activity and inviolate fundamental functions. *Id.* (citing Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695 (1999); *Carrick v. Locke*, 125 Wash.2d 129, 135, 882 P.2d 173 (1994)). But separation of powers does not call for the branches of government to be entirely “‘sealed off from one another.’” *Id.* (quoting *Carrick*, 125 Wash.2d at 135, 882 P.2d 173). Instead it recognizes that they must remain partially intertwined to effectively check and balance each other. *Id.* While it is an executive branch function to decide whether, when, and how to exercise emergency powers amidst a public health emergency, an emergency “is not a blank check for the [executive] when it comes to the rights of the Nation’s citizens.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). During an emergency, our constitutional system “envisions a role for all three branches when individual liberties are at stake.” *Id.* It remains the judicial function to declare unconstitutional that which transgresses the rights of individuals in our state.

*12 ¶43 Consistent with these principles, Washington law authorizes a writ of mandamus to compel a public official to perform a mandatory nondiscretionary duty or to correct a clear and manifest abuse of discretion. *Brown v. Owen*, 165 Wash.2d 706, 726-27, 206 P.3d 310 (2009) (citing *Walker v. Munro*, 124 Wash.2d 402, 411, 879 P.2d 920 (1994)); *State ex rel. Reilly v. Civil Serv. Comm’n*, 8 Wash.2d 498, 501-04, 112 P.2d 987 (1941); *State ex rel. Beffa v. Superior Court*, 3 Wash.2d 184, 187, 100 P.2d 6 (1940); *State v. Superior Court*, 59 Wash. 670, 673, 110 P. 622 (1910). If the petitioners show unconstitutional acts or omissions by public officials that amount to a clear and manifest abuse of discretion, we may issue a writ of mandamus. See *Brown*, 165 Wash.2d at 726-27, 206 P.3d 310 (citing *Walker*, 124 Wash.2d 402, 879 P.2d 920); *State ex rel. Reilly*, 8 Wash.2d at 501-04, 112 P.2d 987; *State ex rel. Beffa*, 3 Wash.2d at 187, 100 P.2d 6. Under those circumstances, a writ could direct relief that does not interfere with the discretion of the executive branch but mandates that discretion be exercised within constitutional limits. Washington law also authorizes us to grant relief for unconstitutional conditions of confinement via a personal restraint petition. RAP 16.4(c)(6).¹

¶44 I cannot confidently say on the present record whether the petitioners are entitled to the relief they seek. The respondents have filed reports detailing their safety plan and steps taken

to protect inmates from contracting COVID-19. According to these submissions, DOC has adopted protocols in an effort to follow United States Center for Disease Control and Prevention guidelines, has already implemented many of these protocols, and is in the process of implementing others. The governor and the secretary have also exercised their powers to facilitate the early release of some nonviolent offenders, bringing the prison population from approximately 18,000 to just over 16,000. These submissions show commitment to staff, inmates, and the community. But questions of fact remain that preclude a decision on the merits. For that reason, I would not order any relief on this record.²

¶45 But I am confident that this court should not have summarily dismissed the petitioners' suit. This is hardly the first time a case has been filed before all the facts are established. Our court rules contemplate a situation like this where we need to resolve questions of fact before deciding the merits of a petition for a writ of mandamus or a personal restraint petition. *See* RAP 16.2(d), 16.11(a), 16.12. Instead of using these tools and others, the majority—in the name of separation of powers—tosses out the petitioners' claims without meaningfully scrutinizing whether the government is violating their basic liberties. Since the court's order, cases of COVID-19 in DOC facilities have continued

to rise. Recently, positive cases at the Coyote Ridge Corrections Center (CRCC)—which is more than an hour away from community hospitals—doubled in a week, with 101 inmates and staff infected and 1,815 inmates exposed. *See COVID-19 INFORMATION*, Wash. Dep't of Corr., <https://www.doc.wa.gov/news/covid-19.htm#testing> (last visited June 11, 2020); Press Release, Wash. Dep't of Corr., Coyote Ridge Corrections Center Medium Security Complex on restricted movement to contain COVID-19 (June 11, 2020), <https://www.doc.wa.gov/news/2020/06112020p.htm> [<https://perma.cc/64YR-3DCF>].³ We should have retained the matter, ordered the State to provide an updated report, appointed a fact finder, allowed the petitioners to amend their action, and given the petitioners' claims the scrutiny they deserve. I dissent.⁴

Yu, J.

Montoya-Lewis, J.

Gordon McCloud, J.

All Citations

--- P.3d ----, 2020 WL 4211571

Footnotes

- 1 Linda So & Grant Smith, *In Four U.S. State Prisons, Nearly 3,300 Inmates Test Positive for Coronavirus—96% Without Symptoms*, REUTERS (April 25, 2020), <https://www.reuters.com/article/us-health-coronavirus-prisons-testing-in/in-four-u-s-state-prisons-nearly-3300-inmates-test-positive-for-coronavirus-96-without-symptoms-idUSKCN2270RX> [<https://perma.cc/JGM4-CQF9>].
- 2 The petitioners argue that the respondents ultimately decided to release prisoners only because of this court's oversight. Although the release occurred after the lawsuit was filed, this court did not order the release of any offenders. And, contrary to the unjustified political attacks against our dissenting colleagues, no justice would have ordered state officials to immediately release serious violent offenders en masse.
- 3 The Department did release Colvin following oral argument, but Colvin used methamphetamine in violation of the conditions of her release and has since been returned to prison. This unfortunate fact illustrates the difficulties inherent in determining which inmates should be released, even for the Department, which has expertise in this area. The dissent would have this court manage those decisions instead, but fails to explain how—or why—this court's inmate release decisions would be different from, better than, or more just than those reached by the governor and the secretary.
- 4 On June 24, 2020, petitioners brought emergency motions to submit additional evidence regarding the significant rise in COVID-19 cases at CRCC and the conditions of confinement in that facility. They also requested appointment of an expert to conduct supplemental fact finding. The court considered these motions on an expedited basis and denied them by order on July 10, 2020.
- 5 “Legislative control over appropriations, the executive power to veto, and the judicial authority to declare legislative and executive acts unconstitutional, are all examples of direct control by one branch over another.” *In re Salary of Juvenile Dir.*, 87 Wash. 2d 232, 242-43, 552 P.2d 163 (1976) (citing U.S. CONST. art. I, §§ 8, 9; WASH. CONST. art. VIII, § 4; *Train v. New York*, 420 U.S. 35, 95 S. Ct. 839, 43 L. Ed. 2d 1 (1975); U.S. CONST. art. I, § 7; WASH. CONST. art. III, § 12; *United States v. Nixon*, 418 U.S. 683, 703-05, 94 S. Ct. 3090, 41 L. Ed 2d 1039 (1974); *Gruen v. State Tax Comm'n*,

35 Wash.2d 1, 9, 211 P.2d 651 (1949), *overruled prospectively by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash.2d 645, 384 P.2d 833 (1963); *Ex Parte Grossman*, 267 U.S. 87, 119-20, 45 S. Ct. 332, 69 L. Ed. 527 (1925)).

- 6 The dissent suggests the petitioners are not seeking the blanket release of these inmates but, instead, are asking us to “direct DOC [(Department of Corrections)] to prioritize the release of vulnerable inmates while recognizing DOC’s appropriate authority to consider other factors like public safety.” Dissent at ———. But this characterization of petitioners’ request does nothing to advance their cause. “[T]he remedy of mandamus contemplates the necessity of indicating the precise thing to be done” and “ ‘will not lie to compel a general course of official conduct.’ ” *Walker*, 124 Wash.2d at 407-08, 879 P.2d 920 (citing *Clark County Sheriff v. Dep’t of Soc. & Health Servs.*, 95 Wash.2d 445, 450, 626 P.2d 6 (1981), and quoting *State ex rel. Pac. Am. Fisheries v. Darwin*, 81 Wash. 1, 12, 142 P. 441 (1914)). And that is precisely what the dissent would grant: “a writ could direct relief that does not interfere with the discretion of the executive branch but mandates that discretion be exercised within constitutional limits.” Dissent at ——— – ———. “It is hard to conceive of a more general mandate than to order a state officer to adhere to the constitution. We have consistently held that we will not issue such a writ.” *Walker*, 124 Wash.2d at 408, 879 P.2d 920. We do so again today.
- 7 The dissent accuses us of “abdicating [our] responsibility” to “decide whether challenged acts or omissions violate the constitution” by “invok[ing] separation of powers” and “defer[ring] to the executive,” as the United States Supreme Court did in its repudiated decision upholding the incarceration of Japanese Americans during World War II. Dissent at ——— – ——— (citing *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), *abrogated by Trump v. Hawaii*, — U.S. —, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018)). This inaccurate and inflammatory accusation sheds more heat than light. The *Korematsu* decision endorsed the mass incarceration of law-abiding Americans based on their Japanese heritage, on grounds that had little to do with the separation of powers and everything to do with racism. It is unfair to equate that case with our recognition here of the governor’s and secretary’s discretion in implementing emergency measures to mitigate the risk of COVID-19 to those lawfully incarcerated in Washington’s prisons.
- 8 For example, there is no authority for the proposition that a personal restraint petition may be filed by more than one petitioner. We do not reach that question here.
- 9 Lawsuits challenging prison conditions are generally litigated in civil rights or declaratory judgment actions. We are aware of a pending action for declaratory and injunctive relief in *Nagel v. Department of Corrections*, Pierce County Superior Court cause number 20-2-05585-4, making similar prison conditions arguments. A relevant inquiry in considering a personal restraint petition is whether the petitioner has other adequate recourse through such an action, but because we do not grant the motion to amend, we need not decide whether another remedy is available to these petitioners. See [RAP 16.4\(d\)](#) (limiting relief to where other remedies are inadequate).
- 10 The petitioners originally also argued claims arising under [article I, section 12 of the Washington Constitution](#) and the Washington Law Against Discrimination, [RCW 49.60.030](#). But all subsequent argument has focused on federal Eighth Amendment standards. The petitioners have shown no constitutional or statutory basis for relief.
- 1 At this point I see no reason why [CR 23](#) governing class certification would not apply where a sufficiently large number of prisoners claim similar harm. See *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) (noting the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus (citing *Mead v. Parker*, 464 F.2d 1108, 1112-13 (9th Cir. 1972))).
- 2 After the court issued its order denying the petition for a writ of mandamus, several political organizations began spreading false information that the dissenting justices would have ordered state officials to immediately release mass numbers of serious violent offenders. That false information was spread through a social media campaign using images of the justices in a style reminiscent of “wanted” posters. Not surprisingly, the campaign incited harassment and threats toward the dissenting justices, with especially personal and hateful threats directed to the justices of color. Because of these threats, I feel it is important to take the extraordinary step of making clear that the information circulated was false, and no justice would have ordered such relief that day.
- 3 Because the circumstances are rapidly developing, these numbers will undoubtedly be out of date by the time our opinion is filed.
- 4 On June 24, 2020, the petitioners filed (1) a motion to submit new relevant additional evidence in support of their petition for a writ of mandamus, (2) a motion for the appointment of a public health expert, and (3) a motion to expedite consideration of the first two motions. They ask us to consider evidence about the current outbreak at the CRCC, including declarations from three people who are confined there. According to these declarations, because of the outbreak, individuals are confined to their cells for 23.5 hours per day, and those confined in cells that lack toilets and water have had to urinate in bottles, or even soil themselves, while waiting hours for an escort to the bathroom. See Decl. of Abdullahi Noor at ¶¶ 7-8; Decl. of Jason Streiff at ¶¶ 7-8. The petitioners ask us to consider this new evidence about the CRCC outbreak and issue

an order to show cause why an expert should not be appointed to investigate and evaluate the steps DOC is taking to protect the people in its custody. I agree with the majority that expedited consideration of these requests is appropriate. But I would go further. Evidence that there has been a major outbreak at the CRCC is highly relevant to the petitioners' claim that DOC's policies and procedures, which it purports it is using in all of its facilities to mitigate the risk of harm from the virus, do not sufficiently mitigate that risk. We should take this evidence into consideration, see [RAP 9.11\(a\)](#), and enter an order to show cause why an expert should not be appointed, see [ER 706](#).

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STATE OF MICHIGAN
IN THE SUPREME COURT

In re CERTIFIED QUESTIONS FROM THE
UNITED STATES DISTRICT COURT, WESTERN
DISTRICT OF MICHIGAN, SOUTHERN
DIVISION

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a
GRAND HEALTH PARTNERS, WELLSTON
MEDICAL CENTER, PLLC, PRIMARY HEALTH
SERVICES, PC, and JEFFERY GULICK,
Plaintiffs,

v

GOVERNOR OF MICHIGAN,
MICHIGAN ATTORNEY GENERAL, and
MICHIGAN DEPARTMENT OF HEALTH AND
HUMAN SERVICES DIRECTOR,
Defendants.

**The appeal involves a ruling
that a statute or other state
governmental action is
invalid.**

**APPENDIX VOLUME II FOR THE BRIEF OF
DEFENDANT MICHIGAN ATTORNEY GENERAL DANA NESSEL**

ORAL ARGUMENT REQUESTED

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Dated: August 6, 2020

**INDEX TO APPENDIX FOR BRIEF OF
DEFENDANT MICHIGAN ATTORNEY GENERAL DANA NESSEL**

VOLUME I	Page No.
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Attorney General Dana Nessel’s Motion to Dismiss , R 26, 06/02/20	1c–4c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Defendant Attorney General Dana Nessel’s Brief in Support of Motion to Dismiss , R 27, 06/02/20	5c–61c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Attorney General Dana Nessel’s Supplemental Briefing on Certification , R 34, 06/05/20	62c–77c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Defendants’ Whitmer, Nessel, And Gordon’s Joint Notice of Supplemental Authority Regarding their Motions to Dismiss , R 37, 06/11/2020	78c–82c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Exhibit A, Martinko v Whitmer , Case No. 20-cv-10931, Opinion and Order Granting Defendant’s Motion to Dismiss (ED Mich June 5, 2020) to Defendants’ Whitmer, Nessel, And Gordon’s Joint Notice of Supplemental Authority Regarding their Motions to Dismiss, R 37-1, 06/11/2020	83c–89c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Defendants Whitmer, Nessel, and Gordon’s Joint Motion for Reconsideration Regarding Certification , R 38, 06/11/20	90c–98c
<i>Grand Health</i> (USDC-WD No. 1:20-cv-414) Exhibit A, Barachkov v Davis , 580 Fed Appx 288 (6th Cir 2014) to Defendants Whitmer, Nessel, and Gordon’s Joint Motion for Reconsideration Regarding Certification, R 38-1, 06/11/20	99c–110c
<i>Cassell v Snyders</i> , 2020 WL 2112374 (ND Ill, May 3, 2020)	111c–124c
<i>Colvin v Inslee</i> , 2020 WL 4211571, opinion of the Washington Supreme Court, issued July 23, 2020 (Case No. 98317-8)	125c–137c

VOLUME II	Page No.
Executive Order 21 (03/23/2020) (COVID-19) Temporary requirement to suspend activities that are not necessary to sustain or protect life	138c–145c
Executive Order 59 (04/24/2020) (COVID-19) Temporary requirement to suspend activities that are not necessary to sustain or protect life Rescission of Executive Order 2020-42	146c–157c
Executive Order 70 (05/04/2020) (COVID-19) Temporary requirement to suspend activities that are not necessary to sustain or protect life Rescission of Executive Order 2020-59	158c–171c
Executive Order 77 (05/07/2020) (COVID-19) Temporary requirement to suspend certain activities that are not necessary to sustain or protect life Rescission of Executive Order 2020-70	172c–188c
Executive Order 91 (05/18/2020) (COVID-19) Safeguards to protect Michigan's workers from COVID-19	189c–200c
Executive Order 92 (05/18/2020) (COVID-19) Temporary requirement to suspend certain activities that are not necessary to sustain or protect life Rescission of Executive Orders 2020-77 and 2020-90	201c–213c
Executive Order 110 (06/01/2020) (COVID-19) Temporary restriction of gatherings, events and businesses. Rescission of Executive Order 2020-69 and 2020-96	214c–220c
Executive Order 114 (06/05/2020) (COVID-19) Safeguards to protect Michigan's workers from COVID-19 Rescission of Executive Order 2020-97pdf document	221c–236c
Executive Order 115 (05/05/2020) (COVID-19) Temporary restrictions on certain events, gatherings, and businesses	237c–242c
Executive Order 143 (07/02/2020) (COVID-19) Closing indoor service at bars	243c–247c

Executive Order 145 (07/09/2020) (COVID-19) Safeguards to protect Michigan's workers from COVID-19 Rescission of Executive Order 2020-114	248c–265c
Executive Order 153 (07/17/2020) (COVID-19) Rescission of Executive Order 2020-147	266c–270c



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EXECUTIVE ORDER

No. 2020-21

Temporary requirement to suspend activities that are not necessary to sustain or protect life

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. Older adults and those with chronic health conditions are at particular risk, and there is an increased risk of rapid spread of COVID-19 among persons in close proximity to one another. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to “cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

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

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.
2. Subject to the exceptions in section 7, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.
3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.
4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.
 - (a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9.
 - (b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm.

5. Businesses and operations that employ critical infrastructure workers may continue in-person operations, subject to the following conditions:
 - (a) Consistent with sections 8 and 9, businesses and operations must determine which of their workers are critical infrastructure workers and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm. Businesses and operations need not designate:

- (1) Workers in health care and public health.
- (2) Workers who perform necessary government activities, as described in section 6.
- (3) Workers and volunteers described in section 9(d).
- (b) In-person activities that are not necessary to sustain or protect life must be suspended until normal operations resume.
- (c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons. Those practices and measures include, but are not limited to:
 - (1) Restricting the number of workers present on premises to no more than is strictly necessary to perform the business's or operation's critical infrastructure functions.
 - (2) Promoting remote work to the fullest extent possible.
 - (3) Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible, including for customers who are standing in line.
 - (4) Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.
 - (5) Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person who is known or suspected to have COVID-19.
 - (6) Any other social distancing practices and mitigation measures recommended by the Centers for Disease Control.
6. All in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to supporting those businesses and operations that are necessary to sustain or protect life, are suspended.
 - (a) For purposes of this order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders.
 - (b) Such activities also include, but are not limited to, public transit, trash pick-up and disposal, activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor recreation.

- (c) For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b). Workers performing such activities need not be designated.
- (d) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 5(c).

7. Exceptions.

- (a) Individuals may leave their home or place of residence, and travel as necessary:
 - (1) To engage in outdoor activity, including walking, hiking, running, cycling, or any other recreational activity consistent with remaining at least six feet from people from outside the individual's household.
 - (2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) may leave their home for work without a designation.)
 - (3) To conduct minimum basic operations, as described in section 4(b), after being designated to perform such work by their employers.
 - (4) To perform necessary government activities, as described in section 6.
 - (5) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including procedures that, in accordance with a duly implemented nonessential procedures postponement plan, have not been postponed).
 - (6) To obtain necessary services or supplies for themselves, their family or household members, and their vehicles. *Individuals must secure such services or supplies via delivery to the maximum extent possible.* As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences.
 - (7) To care for a family member or a family member's pet in another household.

- (8) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
 - (9) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
 - (10) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
 - (11) To work or volunteer for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
- (b) Individuals may also travel:
- (1) To return to a home or place of residence from outside this state.
 - (2) To leave this state for a home or residence elsewhere.
 - (3) To travel between two residences in this state.
 - (4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.
8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response ([available here](#)). Such workers include some workers in each of the following sectors:
- (a) Health care and public health.
 - (b) Law enforcement, public safety, and first responders.
 - (c) Food and agriculture.
 - (d) Energy.
 - (e) Water and wastewater.
 - (f) Transportation and logistics.
 - (g) Public works.
 - (h) Communications and information technology, including news media.
 - (i) Other community-based government operations and essential functions.

- (j) Critical manufacturing.
 - (k) Hazardous materials.
 - (l) Financial services.
 - (m) Chemical supply chains and safety.
 - (n) Defense industrial base.
9. For purposes of this order, critical infrastructure workers also include:
- (a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers as defined in this order. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of critical infrastructure workers.
 - (b) Workers at designated suppliers and distribution centers, as described below.
 - (1) A business or operation that employs critical infrastructure workers may designate suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the work of its critical infrastructure workers.
 - (2) Such suppliers, distribution centers, or service providers may designate workers as critical infrastructure workers *only* to the extent those workers are necessary to enable, support, or facilitate the work of the original operation's or business's critical infrastructure workers.
 - (3) Designated suppliers, distribution centers, and service providers may in turn designate additional suppliers, distribution centers, and service providers whose continued operation is necessary to enable, support, or facilitate the work of their critical infrastructure workers.
 - (4) Such additional suppliers, distribution centers, and service providers may designate workers as critical infrastructure workers *only* to the extent that those workers are necessary to enable, support, or facilitate the work of the critical infrastructure workers at the supplier, distribution center, or service provider that has designated them.
 - (5) Businesses, operations, suppliers, distribution centers, and service providers must make all designations in writing to the entities they are designating, whether by electronic message, public website, or other appropriate means. Such designations may be made orally until March 31, 2020 at 11:59 pm.

- (6) Businesses, operations, suppliers, distribution centers, and service providers that abuse their designation authority shall be subject to sanctions to the fullest extent of the law.
 - (c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.
 - (d) Workers and volunteers for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
 - (e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.
10. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, a place of religious worship, when used for religious worship, is not subject to penalty under section 14.
 11. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.
 12. This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.
 13. The governor will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, she will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health-care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.
 14. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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

Date: March 23, 2020

Time: 10:39 am



GRETCHEN WHITMER
GOVERNOR

By the Governor:



JOCYLYN BENSON
SECRETARY OF STATE



FILED WITH SECRETARY OF STATE

ON 3/23/2020 AT 11:51 Am



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

RECEIVED by MSC 8/6/2020 2:03:54 PM

SECRETARY OF SENATE
2020 APR 24 AM 10:30

EXECUTIVE ORDER

No. 2020-59

**Temporary requirement to suspend activities that
are not necessary to sustain or protect life**

Rescission of Executive Order 2020-42

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under 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.

In the three weeks that followed, the virus spread across Michigan, bringing deaths in the hundreds, confirmed cases in the thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe, and then extended that order through April 30, 2020, with Executive Order 2020-42. The orders limited gatherings and travel, and required all workers who are not necessary to sustain or protect life to stay home.

The measures put in place by Executive Orders 2020-21 and 2020-42 have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on April 23, 2020, Michigan reported 35,291 confirmed cases and 2,977 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. But in doing so, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone. Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-42, amend their scope, and extend their duration to May 15, 2020, unless modified earlier. With this order, Executive Order 2020-42 is rescinded.

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

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.
2. Subject to the exceptions in section 7 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.
3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.
4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.
 - (a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9 of this order:

- (b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work.

Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 11 of this order.

- (c) Workers who perform resumed activities are defined in section 10 of this order.
5. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:
- (a) Consistent with sections 8, 9, and 10 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work. Businesses and operations need not designate:
 - (1) Workers in health care and public health.
 - (2) Workers who perform necessary government activities, as described in section 6 of this order.
 - (3) Workers and volunteers described in section 9(d) of this order.
 - (b) In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.
 - (c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in section 11 of this order. Stores that are open for in-

person sales must also adhere to the rules described in section 12 of this order.

- (d) Any business or operation that employs workers who perform resumed activities under section 10(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.
6. All in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to support those businesses and operations that are maintaining in-person activities under this order, are suspended.
- (a) For purposes of this order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders.
 - (b) Such activities also include, but are not limited to, public transit, trash pick-up and disposal (including recycling and composting), activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.
 - (c) For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b) of this order. Workers performing such activities need not be designated.
 - (d) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 11 of this order.
7. Exceptions.
- (a) Individuals may leave their home or place of residence, and travel as necessary:
 - (1) To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
 - (2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) of this order may leave their home for work without being designated.)

- (3) To conduct minimum basic operations, as described in section 4(b) of this order, after being designated to perform such work by their employers.
- (4) To perform resumed activities, as described in section 10 of this order, after being designated to perform such work by their employers.
- (5) To perform necessary government activities, as described in section 6 of this order.
- (6) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including in-person procedures or veterinary services that, in accordance with a duly implemented non-essential procedure or veterinary services postponement plan, have not been postponed).
- (7) To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
 - (A) Individuals must secure such services or supplies via delivery to the maximum extent possible. As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences or motor vehicles.
 - (B) Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 9(i) of this order, or to have a motor vehicle or bicycle repaired or maintained.
 - (C) Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
- (8) To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
- (9) To care for a family member or a family member's pet in another household.
- (10) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.

- (11) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
 - (12) To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
 - (13) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
 - (14) To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
 - (15) To attend a funeral, provided that no more than 10 people are in attendance.
 - (16) To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
- (b) Individuals may also travel:
- (1) To return to a home or place of residence from outside this state.
 - (2) To leave this state for a home or residence elsewhere.
 - (3) Between two residences in this state, including moving to a new residence.
 - (4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.
- (c) All other travel is prohibited, including all travel to vacation rentals.
8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available [here](#)). This order does *not* adopt any subsequent guidance document released by this same agency.

Consistent with the March 19, 2020 guidance document, critical infrastructure workers include some workers in each of the following sectors:

- (a) Health care and public health.
- (b) Law enforcement, public safety, and first responders.
- (c) Food and agriculture.
- (d) Energy.
- (e) Water and wastewater.
- (f) Transportation and logistics.
- (g) Public works.
- (h) Communications and information technology, including news media.
- (i) Other community-based government operations and essential functions.
- (j) Critical manufacturing.
- (k) Hazardous materials.
- (l) Financial services.
- (m) Chemical supply chains and safety.
- (n) Defense industrial base.

9. For purposes of this order, critical infrastructure workers also include:

- (a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
- (b) Workers at suppliers, distribution centers, or service providers, as described below.
 - (1) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided

- that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
- (2) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subprovision (1) of this subsection may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (3) Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (4) Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.
- (c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.
 - (d) Workers and volunteers for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
 - (e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.
 - (f) Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
 - (g) Workers at laundromats, coin laundries, and dry cleaners.

- (h) Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
 - (i) Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.
10. For purposes of this order, workers who perform resumed activities are defined as follows:
- (a) Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
 - (b) Workers who perform bicycle maintenance or repair.
 - (c) Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.
 - (d) Maintenance workers and groundskeepers who are necessary to maintain the safety and sanitation of places of outdoor recreation not otherwise closed under Executive Order 2020-43 or any order that may follow from it, provided that the places and their workers do not provide goods, equipment, supplies, or services to individuals, and subject to the enhanced social-distancing rules described in section 11(h) of this order.
 - (e) Workers for moving or storage operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.
11. Businesses, operations, and government agencies that remain open for in-person work must adhere to sound social distancing practices and measures, which include but are not limited to:
- (a) Developing a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available [here](#). Such plan must be available at company headquarters or the worksite.
 - (b) Restricting the number of workers present on premises to no more than is strictly necessary to perform the in-person work permitted under this order.
 - (c) Promoting remote work to the fullest extent possible.
 - (d) Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible.

- (e) Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.
 - (f) Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.
 - (g) Any other social distancing practices and mitigation measures recommended by the CDC.
 - (h) For businesses and operations whose in-person work is permitted under sections 10(c) through 10(e) of this order, the following additional measures must also be taken:
 - (1) Barring gatherings of any size in which people cannot maintain six feet of distance from one another.
 - (2) Limiting in-person interaction with clients and patrons to the maximum extent possible, and barring any such interaction in which people cannot maintain six feet of distance from one another.
 - (3) Providing personal protective equipment such as gloves, goggles, face shields, and face masks as appropriate for the activity being performed.
 - (4) Adopting protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning of tools, equipment, and frequently touched surfaces.
12. Any store that remains open for in-store sales under section 9(f) or section 10(c) of this order:
- (a) Must establish lines to regulate entry in accordance with subsection (b) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.
 - (b) Must adhere to the following restrictions:
 - (1) For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.

- (2) For stores of more than 50,000 square feet, must:
 - (A) Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
 - (B) Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.
 - (3) The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.
 - (c) May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.
 - (d) Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.
13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.
14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.
15. Effective on April 26, 2020 at 11:59 pm:
- (a) Any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.
 - (b) All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
 - (c) Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public.
 - (d) The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to persons who wear a mask under this order.

- 16. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place. No individual is subject to penalty under section 20 of this order for violating section 15(a) of this order.
- 17. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.
- 18. This order takes effect immediately, unless otherwise specified in this order, and continues through May 15, 2020 at 11:59 pm. Executive Order 2020-42 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.
- 19. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.
- 20. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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

Date: April 24, 2020

Time: 11:00 am



GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

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SECRETARY OF SENATE
2020 MAY 4 AM 9:47

EXECUTIVE ORDER

No. 2020-70

**Temporary requirement to suspend activities that
are not necessary to sustain or protect life**

Rescission of Executive Order 2020-59

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under 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.

In the weeks that followed, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations,

and directives having the force and effect of law.” MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42 and 2020-59, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by Executive Orders 2020-21, 2020-42, and 2020-59 have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on April 30, 2020, Michigan reported 41,379 confirmed cases and 3,789 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-59 and amend their scope. With Executive Order 2020-59, I ordered that certain previously suspended work and activities could resume, based on an evaluation of public health metrics and an assessment of the statewide risks and benefits. That evaluation remains ongoing, and based upon it, I find that we will soon be positioned to allow another segment of previously suspended work to resume. This work is permitted to resume on May 7, 2020, and includes construction, real-estate activities, and work that is traditionally and primarily performed outdoors. This work, like the resumed activities allowed under Executive Order 2020-59, will be subject to stringent precautionary measures. This partial and incremental reopening will allow my public health team to evaluate the effects of allowing these activities to resume, to assess the capacity of the health care system to respond adequately to any increases in infections, and to prepare for any increase in patients presenting to a health-care facility or provider. With this order, Executive Order 2020-59 is rescinded. This order will remain in effect until May 15, 2020.

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

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.
2. Subject to the exceptions in section 7 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any

number of people occurring among persons not part of a single household are prohibited.

3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.
4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.
 - (a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9 of this order.
 - (b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work.

Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 11 of this order.

- (c) Workers who perform resumed activities are defined in section 10 of this order.
5. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:
 - (a) Consistent with sections 8, 9, and 10 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave

the home or place of residence for work. Businesses and operations need not designate:

- (1) Workers in health care and public health.
 - (2) Workers who perform necessary government activities, as described in section 6 of this order.
 - (3) Workers and volunteers described in section 9(d) of this order.
- (b) In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.
 - (c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in section 11 of this order. Stores that are open for in-person sales must also adhere to the rules described in section 12 of this order.
 - (d) Any business or operation that employs workers who perform resumed activities under section 10(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.
6. All in-person government activities at whatever level (state, county, or local) are suspended unless:
- (a) They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 8 and 9 of this order.
 - (b) They are performed by workers who are permitted to resume work under section 10 of this order.
 - (c) They are necessary to support the activities of workers described in sections 8, 9, and 10 of this order, or to enable transactions that support businesses or operations that employ such workers.
 - (d) They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.
 - (e) For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b) of this order. Workers performing such activities need not be designated.

- (f) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 11 of this order.

7. Exceptions.

- (a) Individuals may leave their home or place of residence, and travel as necessary:
 - (1) To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
 - (2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) of this order may leave their home for work without being designated.)
 - (3) To conduct minimum basic operations, as described in section 4(b) of this order, after being designated to perform such work by their employers.
 - (4) To perform resumed activities, as described in section 10 of this order, after being designated to perform such work by their employers.
 - (5) To perform necessary government activities, as described in section 6 of this order.
 - (6) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including in-person procedures or veterinary services that, in accordance with a duly implemented non-essential procedure or veterinary services postponement plan, have not been postponed).
 - (7) To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
 - (A) Individuals must secure such services or supplies via delivery to the maximum extent possible. As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the

- safety, sanitation, and basic operation of their residences or motor vehicles.
- (B) Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 9(i) of this order, or to have a motor vehicle or bicycle repaired or maintained.
 - (C) Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
- (8) To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
 - (9) To care for a family member or a family member's pet in another household.
 - (10) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
 - (11) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
 - (12) To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
 - (13) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
 - (14) To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
 - (15) To attend a funeral, provided that no more than 10 people are in attendance.
 - (16) To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
 - (17) To view a real-estate listing by appointment, as permitted under section 10(h) of this order.

- (b) Individuals may also travel:
 - (1) To return to a home or place of residence from outside this state.
 - (2) To leave this state for a home or residence elsewhere.
 - (3) Between two residences in this state, including moving to a new residence.
 - (4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.
 - (c) All other travel is prohibited, including all travel to vacation rentals.
8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available [here](#)). This order does *not* adopt any subsequent guidance document released by this same agency.

Consistent with the March 19, 2020 guidance document, critical infrastructure workers include some workers in each of the following sectors:

- (a) Health care and public health.
- (b) Law enforcement, public safety, and first responders.
- (c) Food and agriculture.
- (d) Energy.
- (e) Water and wastewater.
- (f) Transportation and logistics.
- (g) Public works.
- (h) Communications and information technology, including news media.
- (i) Other community-based government operations and essential functions.
- (j) Critical manufacturing.
- (k) Hazardous materials.
- (l) Financial services.
- (m) Chemical supply chains and safety.

- (n) Defense industrial base.
9. For purposes of this order, critical infrastructure workers also include:
- (a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
 - (b) Workers at suppliers, distribution centers, or service providers, as described below.
 - (1) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (2) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subprovision (1) of this subsection may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (3) Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (4) Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.
 - (c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.
 - (d) Workers and volunteers for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy

individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

- (e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.
- (f) Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
- (g) Workers at laundromats, coin laundries, and dry cleaners.
- (h) Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
- (i) Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.

10. For purposes of this order, workers who perform resumed activities are defined as follows:

- (a) Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
- (b) Workers who perform bicycle maintenance or repair.
- (c) Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.
- (d) Maintenance workers and groundskeepers who are necessary to maintain the safety and sanitation of places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it, provided that the places and their workers do not provide goods, equipment, supplies, or services to individuals, and subject to the enhanced social-distancing rules described in section 11(h) of this order.
- (e) Workers for moving or storage operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.
- (f) Effective at 12:01 am on May 7, 2020, and subject to the enhanced social-distancing rules described in section 11(h) of this order, workers who perform

work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and similar workers.

- (g) Effective at 12:01 am on May 7, 2020, workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers), subject to the enhanced social-distancing rules described in section 11(i) of this order.
- (h) Effective at 12:01 am on May 7, 2020, workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:
 - (1) Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time. No in-person open houses are permitted.
 - (2) Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.
- (i) Effective at 12:01 am on May 7, 2020, workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.

11. Businesses, operations, and government agencies that remain open for in-person work must, at a minimum:

- (a) Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available [here](#). Such plan must be available at company headquarters or the worksite.
- (b) Restrict the number of workers present on premises to no more than is strictly necessary to perform the in-person work permitted under this order.
- (c) Promote remote work to the fullest extent possible.
- (d) Keep workers and patrons who are on premises at least six feet from one another to the maximum extent possible.
- (e) Increase standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

- (f) Adopt policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.
- (g) Adopt any other social distancing practices and mitigation measures recommended by the CDC.
- (h) Businesses or operations whose in-person work is permitted under sections 10(c) through 10(f) of this order must also:
 - (1) Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.
 - (2) Limit in-person interaction with clients and patrons to the maximum extent possible, and barring any such interaction in which people cannot maintain six feet of distance from one another.
 - (3) Provide personal protective equipment such as gloves, goggles, face shields, and face masks as appropriate for the activity being performed.
 - (4) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning of tools, equipment, and frequently touched surfaces.
- (i) Businesses or operations in the construction industry must also:
 - (1) Adhere to all of the provisions in subsection (h) of this section.
 - (2) Designate a site-specific supervisor to monitor and oversee the implementation of COVID-19 control strategies developed under subsection (a) of this section. The supervisor must remain on-site at all times during activities. An on-site worker may be designated to perform the supervisory role.
 - (3) Conduct a daily entry screening protocol for workers and visitors entering the worksite, including a questionnaire covering symptoms and exposure to people with possible COVID-19, together with, if possible, a temperature screening.
 - (4) Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in subprovision (3) of this subsection, or in the alternative issue stickers or other indicators to workers to show that they received a screening before entering the worksite that day.
 - (5) Require face shields or masks to be worn when workers cannot consistently maintain six feet of separation from other workers.

- (6) Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled masks.
 - (7) Encourage or require the use of work gloves, as appropriate, to prevent skin contact with contaminated surfaces.
 - (8) Identify choke points and high-risk areas where workers must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.
 - (9) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by workers.
 - (10) Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among workers at the worksite.
 - (11) Restrict unnecessary movement between project sites.
 - (12) Create protocols for minimizing personal contact upon delivery of materials to the worksite.
12. Any store that remains open for in-store sales under section 9(f) or section 10(c) of this order:
- (a) Must establish lines to regulate entry in accordance with subsection (b) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.
 - (b) Must adhere to the following restrictions:
 - (1) For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.
 - (2) For stores of more than 50,000 square feet, must:
 - (A) Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
 - (B) Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.

- (3) The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.
 - (c) May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.
 - (d) Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.
- 13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.
- 14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.
- 15. Rules governing face coverings.
 - (a) Any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.
 - (b) All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
 - (c) Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public.
 - (d) The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.
- 16. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place. No individual is subject to penalty under section 20 of this order for violating section 15(a) of this order.

17. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.
18. This order takes effect immediately, unless otherwise specified in this order, and continues through May 15, 2020 at 11:59 pm. Executive Order 2020-59 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.
19. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.
20. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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

Date: May 1, 2020

Time: 2:49 pm



GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

GRETCHEN WHITMER
GOVERNOR

SECRETARY OF SENATE
2020 MAY 7 PM3:30

EXECUTIVE ORDER

No. 2020-77

**Temporary requirement to suspend certain activities that
are not necessary to sustain or protect life**

Rescission of Executive Order 2020-70

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under 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.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations,

and directives having the force and effect of law.” MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, and 2020-70, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by Executive Orders 2020-21, 2020-42, 2020-59, and 2020-70 have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on May 6, 2020, Michigan reported 45,054 confirmed cases and 4,250 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-70 and amend their scope. With Executive Order 2020-70, I ordered that certain previously suspended work and activities could resume, based on an evaluation of public health metrics and an assessment of the statewide risks and benefits. That evaluation remains ongoing, and based upon it, I find that we will soon be positioned to allow another segment of previously suspended work to resume: manufacturing work. This work, like the resumed activities allowed under Executive Order 2020-70, will be subject to stringent precautionary measures. This partial and incremental reopening will allow my public health team to evaluate the effects of allowing these activities to resume, to assess the capacity of the health care system to respond adequately to any increases in infections, and to prepare for any increase in patients presenting to a health-care facility or provider. With this order, Executive Order 2020-70 is rescinded. This order will remain in effect until May 28, 2020.

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

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.
2. Subject to the exceptions in section 7 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any

number of people occurring among persons not part of a single household are prohibited.

3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.
4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.
 - (a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9 of this order.
 - (b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work.

Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 11 of this order.

- (c) Workers who perform resumed activities are defined in section 10 of this order.
5. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:
 - (a) Consistent with sections 8, 9, and 10 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave

the home or place of residence for work. Businesses and operations need not designate:

- (1) Workers in health care and public health.
 - (2) Workers who perform necessary government activities, as described in section 6 of this order.
 - (3) Workers and volunteers described in section 9(d) of this order.
- (b) In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.
 - (c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in section 11 of this order. Stores that are open for in-person sales must also adhere to the rules described in section 12 of this order.
 - (d) Any business or operation that employs workers who perform resumed activities under section 10(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.
6. All in-person government activities at whatever level (state, county, or local) are suspended unless:
- (a) They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 8 and 9 of this order.
 - (b) They are performed by workers who are permitted to resume work under section 10 of this order.
 - (c) They are necessary to support the activities of workers described in sections 8, 9, and 10 of this order, or to enable transactions that support businesses or operations that employ such workers.
 - (d) They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.
 - (e) For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b) of this order. Workers performing such activities need not be designated.

- (f) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 11 of this order.

7. Exceptions.

- (a) Individuals may leave their home or place of residence, and travel as necessary:
 - (1) To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
 - (2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) of this order may leave their home for work without being designated.)
 - (3) To conduct minimum basic operations, as described in section 4(b) of this order, after being designated to perform such work by their employers.
 - (4) To perform resumed activities, as described in section 10 of this order, after being designated to perform such work by their employers.
 - (5) To perform necessary government activities, as described in section 6 of this order.
 - (6) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including in-person procedures or veterinary services that, in accordance with a duly implemented non-essential procedure or veterinary services postponement plan, have not been postponed).
 - (7) To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
 - (A) Individuals must secure such services or supplies via delivery to the maximum extent possible. As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the

- safety, sanitation, and basic operation of their residences or motor vehicles.
- (B) Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 9(i) of this order, or to have a motor vehicle or bicycle repaired or maintained.
 - (C) Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
- (8) To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
 - (9) To care for a family member or a family member's pet in another household.
 - (10) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
 - (11) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
 - (12) To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
 - (13) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
 - (14) To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
 - (15) To attend a funeral, provided that no more than 10 people are in attendance.
 - (16) To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
 - (17) To view a real-estate listing by appointment, as permitted under section 10(g) of this order.

- (18) To participate in training, credentialing, or licensing activities permitted under section 10(i) of this order.
 - (b) Individuals may also travel:
 - (1) To return to a home or place of residence from outside this state.
 - (2) To leave this state for a home or residence elsewhere.
 - (3) Between two residences in this state, including moving to a new residence.
 - (4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.
 - (c) All other travel is prohibited, including all travel to vacation rentals.
8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available [here](#)). This order does *not* adopt any subsequent guidance document released by this same agency.

Consistent with the March 19, 2020 guidance document, critical infrastructure workers include some workers in each of the following sectors:

- (a) Health care and public health.
- (b) Law enforcement, public safety, and first responders.
- (c) Food and agriculture.
- (d) Energy.
- (e) Water and wastewater.
- (f) Transportation and logistics.
- (g) Public works.
- (h) Communications and information technology, including news media.
- (i) Other community-based government operations and essential functions.
- (j) Critical manufacturing.
- (k) Hazardous materials.
- (l) Financial services.

- (m) Chemical supply chains and safety.
 - (n) Defense industrial base.
9. For purposes of this order, critical infrastructure workers also include:
- (a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
 - (b) Workers at suppliers, distribution centers, or service providers, as described below.
 - (1) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (2) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subprovision (1) of this subsection may designate their workers as critical infrastructure workers provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (3) Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (4) Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.
 - (c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.

- (d) Workers and volunteers for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
 - (e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.
 - (f) Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
 - (g) Workers at laundromats, coin laundries, and dry cleaners.
 - (h) Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
 - (i) Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.
10. For purposes of this order, workers who perform resumed activities are defined as follows:
- (a) Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
 - (b) Workers who perform bicycle maintenance or repair.
 - (c) Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations, subject to the enhanced social-distancing rules described in section 11(i) of this order.
 - (d) Workers for moving or storage operations, subject to the enhanced social-distancing rules described in section 11(i) of this order.
 - (e) Subject to the enhanced social-distancing rules described in section 11(i) of this order, workers who perform work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and outdoor workers at places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it.

- (f) Workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers), subject to the workplace safeguards described in section 11(j) of this order.
- (g) Workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:
 - (1) Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time. No in-person open houses are permitted.
 - (2) Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.
- (h) Workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.
- (i) Workers necessary to train, credential, and license first responders (e.g., police officers, fire fighters, paramedics) and health-care workers, including certified nursing assistants, provided that as much instruction as possible is provided remotely.
- (j) Workers necessary to perform start-up activities at manufacturing facilities, including activities necessary to prepare the facilities to follow the workplace safeguards described in section 11(k) of this order.
- (k) Effective at 12:01 am on May 11, 2020, workers necessary to perform manufacturing activities, subject to the workplace safeguards described in section 11(k) of this order. Manufacturing work may not commence under this subsection until the facility at which the work will be performed has been prepared to follow the workplace safeguards described in section 11(k) of this order.
- (l) Consistent with section 9(b) of this order, workers at suppliers, distribution centers, or service providers whose in-person presence is necessary to enable, support, or facilitate another business's or operation's resumed activities, including workers at suppliers, distribution centers, or service providers along the supply chain whose in-person presence is necessary enable, support, or facilitate the necessary work of another supplier, distribution center, or service provider in enabling, supporting, or facilitating another business's or operation's resumed activities. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.

11. Businesses, operations, and government agencies that remain open for in-person work must, at a minimum:
 - (a) Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available [here](#). Such plan must be available at company headquarters or the worksite.
 - (b) Restrict the number of workers present on premises to no more than is strictly necessary to perform the in-person work permitted under this order.
 - (c) Promote remote work to the fullest extent possible.
 - (d) Keep workers and patrons who are on premises at least six feet from one another to the maximum extent possible.
 - (e) Require masks to be worn when workers cannot consistently maintain six feet of separation from other individuals in the workplace, and consider face shields when workers cannot consistently maintain three feet of separation from other individuals in the workplace.
 - (f) Increase standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.
 - (g) Adopt policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.
 - (h) Adopt any other social distancing practices and mitigation measures recommended by the CDC.
 - (i) Businesses or operations whose in-person work is permitted under sections 10(c) through 10(e) of this order must also:
 - (1) Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.
 - (2) Limit in-person interaction with clients and patrons to the maximum extent possible, and bar any such interaction in which people cannot maintain six feet of distance from one another.
 - (3) Provide personal protective equipment such as gloves, goggles, face shields, and face masks as appropriate for the activity being performed.
 - (4) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough

cleaning and disinfection of tools, equipment, and frequently touched surfaces.

- (j) Businesses or operations in the construction industry must also:
- (1) Adhere to all of the provisions in subsection (i) of this section.
 - (2) Designate a site-specific supervisor to monitor and oversee the implementation of COVID-19 control strategies developed under subsection (a) of this section. The supervisor must remain on-site at all times during activities. An on-site worker may be designated to perform the supervisory role.
 - (3) Conduct a daily entry screening protocol for workers, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.
 - (4) Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in subprovision (3) of this subsection, or in the alternative issue stickers or other indicators to workers to show that they received a screening before entering the worksite that day.
 - (5) Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled masks.
 - (6) Encourage or require the use of work gloves, as appropriate, to prevent skin contact with contaminated surfaces.
 - (7) Identify choke points and high-risk areas where workers must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.
 - (8) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by workers.
 - (9) Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among workers at the worksite.
 - (10) Restrict unnecessary movement between project sites.
 - (11) Create protocols for minimizing personal contact upon delivery of materials to the worksite.

- (k) Manufacturing facilities must also:
- (1) Conduct a daily entry screening protocol for workers, contractors, suppliers, and any other individuals entering the facility, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with temperature screening as soon as no-touch thermometers can be obtained.
 - (2) Create dedicated entry point(s) at every facility for daily screening as provided in subprovision (1) of this subsection, and ensure physical barriers are in place to prevent anyone from bypassing the screening.
 - (3) Suspend all non-essential in-person visits, including tours.
 - (4) Train workers on, at a minimum:
 - (A) Routes by which the virus causing COVID-19 is transmitted from person to person.
 - (B) Distance that the virus can travel in the air, as well as the time it remains viable in the air and on environmental surfaces.
 - (C) Symptoms of COVID-19.
 - (D) Steps the worker must take to notify the business or operation of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19.
 - (E) Measures that the facility is taking to prevent worker exposure to the virus, as described in the COVID-19 preparedness and response plan required under section 11(a) of this order.
 - (F) Rules that the worker must follow in order to prevent exposure to and spread of the virus.
 - (G) The use of personal protective equipment, including the proper steps for putting it on and taking it off.
 - (5) Reduce congestion in common spaces wherever practicable by, for example, closing salad bars and buffets within cafeterias and kitchens, requiring individuals to sit at least six feet from one another, placing markings on the floor to allow social distancing while standing in line, offering boxed food via delivery or pick-up points, and reducing cash payments.
 - (6) Implement rotational shift schedules where possible (e.g., increasing the number of shifts, alternating days or weeks) to reduce the number of workers in the facility at the same time.

- (7) Stagger start times and meal times.
 - (8) Install temporary physical barriers, where practicable, between work stations and cafeteria tables.
 - (9) Create protocols for minimizing personal contact upon delivery of materials to the facility.
 - (10) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible.
 - (11) Frequently and thoroughly clean and disinfect high-touch surfaces, paying special attention to parts, products, and shared equipment (e.g., tools, machinery, vehicles).
 - (12) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by workers, and discontinue use of hand dryers.
 - (13) Notify plant leaders and potentially exposed individuals upon identification of a positive case of COVID-19 in the facility, as well as maintain a central log for symptomatic workers or workers who received a positive test for COVID-19.
 - (14) Send potentially exposed individuals home upon identification of a positive case of COVID-19 in the facility.
 - (15) Encourage workers to self-report to plant leaders as soon as possible after developing symptoms of COVID-19.
 - (16) Shut areas of the manufacturing facility for cleaning and disinfection, as necessary, if a worker goes home because he or she is displaying symptoms of COVID-19.
12. Any store that remains open for in-store sales under section 9(f) or section 10(c) of this order:
- (a) Must establish lines to regulate entry in accordance with subsection (b) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.
 - (b) Must adhere to the following restrictions:
 - (1) For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of

- the total occupancy limits established by the State Fire Marshal or a local fire marshal.
- (2) For stores of more than 50,000 square feet, must:
 - (A) Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
 - (B) Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.
 - (3) The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.
- (c) May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.
 - (d) Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.
13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.
14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.
15. Rules governing face coverings.
- (a) Except as provided in subsection (b) of this section, any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.
 - (b) An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes.
 - (c) All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
 - (d) Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire

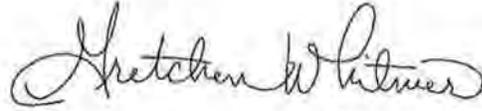
fighters, paramedics), and other critical workers who interact with the public.

- (e) The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.
- 16. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place. No individual is subject to penalty under section 20 of this order for engaging in or traveling to engage in religious worship at a place of religious worship, or for violating section 15(a) of this order.
- 17. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority. Similarly, nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances.
- 18. This order takes effect immediately, unless otherwise specified in this order, and continues through May 28, 2020 at 11:59 pm. Executive Order 2020-70 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.
- 19. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.
- 20. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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

Date: May 7, 2020

Time: 3:00 pm



GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST
LT. GOVERNOR

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SECRETARY OF SENATE
2020 MAY 18 PM 1:36

EXECUTIVE ORDER

No. 2020-91

Safeguards to protect Michigan's workers from COVID-19

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under 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.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, and 2020-77, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on May 17, 2020, Michigan reported 51,142 confirmed cases and 4,891 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We have now begun the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

In particular, businesses must do their part to protect their employees, their patrons, and their communities. Many businesses have already done so by implementing robust safeguards to prevent viral transmission. But we can and must do more: no one should feel unsafe at work. With this order, I am creating an enforceable set of workplace standards that apply to all businesses across the state. These standards will have the force and effect of agency rules and will be vigorously enforced by the agencies that oversee compliance with other health-and-safety rules. Any failure to abide by the rules will also constitute a failure to provide a workplace that is free from recognized hazards within the meaning of the Michigan Occupational Safety and Health Act, MCL 408.1011.

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

1. All businesses or operations that are permitted to require their employees to leave the homes or residences for work under Executive Order 2020-92, and any order that follows it, must, at a minimum:
 - (a) Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available [here](#). By June 1, 2020, or within two weeks of resuming in-person activities, whichever is later, a business's or operation's plan must be made readily available to employees, labor unions, and customers, whether via website, internal network, or by hard copy.
 - (b) Designate one or more worksite supervisors to implement, monitor, and report on the COVID-19 control strategies developed under subsection (a). The supervisor must remain on-site at all times when employees are present on site. An on-site employee may be designated to perform the supervisory role.

- (c) Provide COVID-19 training to employees that covers, at a minimum:
 - (1) Workplace infection-control practices.
 - (2) The proper use of personal protective equipment.
 - (3) Steps the employee must take to notify the business or operation of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19.
 - (4) How to report unsafe working conditions.
- (d) Conduct a daily entry self-screening protocol for all employees or contractors entering the workplace, including, at a minimum, a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19.
- (e) Keep everyone on the worksite premises at least six feet from one another to the maximum extent possible, including through the use of ground markings, signs, and physical barriers, as appropriate to the worksite.
- (f) Provide non-medical grade face coverings to their employees, with supplies of N95 masks and surgical masks reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers.
- (g) Require face coverings to be worn when employees cannot consistently maintain six feet of separation from other individuals in the workplace, and consider face shields when employees cannot consistently maintain three feet of separation from other individuals in the workplace.
- (h) Increase facility cleaning and disinfection to limit exposure to COVID-19, especially on high-touch surfaces (e.g., door handles), paying special attention to parts, products, and shared equipment (e.g., tools, machinery, vehicles).
- (i) Adopt protocols to clean and disinfect the facility in the event of a positive COVID-19 case in the workplace.
- (j) Make cleaning supplies available to employees upon entry and at the worksite and provide time for employees to wash hands frequently or to use hand sanitizer.
- (k) When an employee is identified with a confirmed case of COVID-19, within 24 hours, notify both:
 - (1) The local public health department, and
 - (2) Any co-workers, contractors, or suppliers who may have come into contact with the person with a confirmed case of COVID-19.

- (l) Follow Executive Order 2020-36, and any executive orders that follow it, that prohibit discharging, disciplining, or otherwise retaliating against employees who stay home or who leave work when they are at particular risk of infecting others with COVID-19.
 - (m) Establish a response plan for dealing with a confirmed infection in the workplace, including protocols for sending employees home and for temporary closures of all or part of the worksite to allow for deep cleaning.
 - (n) Restrict business-related travel for employees to essential travel only.
 - (o) Encourage employees to use personal protective equipment and hand sanitizer on public transportation.
 - (p) Promote remote work to the fullest extent possible.
 - (q) Adopt any additional infection-control measures that are reasonable in light of the work performed at the worksite and the rate of infection in the surrounding community.
2. Businesses or operations whose work is primarily and traditionally performed outdoors must:
- (a) Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.
 - (b) Limit in-person interaction with clients and patrons to the maximum extent possible, and bar any such interaction in which people cannot maintain six feet of distance from one another.
 - (c) Provide and require the use of personal protective equipment such as gloves, goggles, face shields, and face coverings, as appropriate for the activity being performed.
 - (d) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning and disinfection of tools, equipment, and frequently touched surfaces.
3. Businesses or operations in the construction industry must:
- (a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.
 - (b) Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in sub-provision (b) of this section, or in the alternative issue stickers or other indicators to employees to show that they received a screening before entering the worksite that day.

- (c) Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled face coverings.
 - (d) Require the use of work gloves where appropriate to prevent skin contact with contaminated surfaces.
 - (e) Identify choke points and high-risk areas where employees must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.
 - (f) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees.
 - (g) Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among employees at the worksite.
 - (h) Restrict unnecessary movement between project sites.
 - (i) Create protocols for minimizing personal contact upon delivery of materials to the worksite.
4. Manufacturing facilities must:
- (a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering the facility, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with temperature screening as soon as no-touch thermometers can be obtained.
 - (b) Create dedicated entry point(s) at every facility for daily screening as provided in sub-provision (a) of this section, and ensure physical barriers are in place to prevent anyone from bypassing the screening.
 - (c) Suspend all non-essential in-person visits, including tours.
 - (d) Train employees on, at a minimum:
 - (1) Routes by which the virus causing COVID-19 is transmitted from person to person.
 - (2) Distance that the virus can travel in the air, as well as the time it remains viable in the air and on environmental surfaces.
 - (3) The use of personal protective equipment, including the proper steps for putting it on and taking it off.

- (e) Reduce congestion in common spaces wherever practicable by, for example, closing salad bars and buffets within cafeterias and kitchens, requiring individuals to sit at least six feet from one another, placing markings on the floor to allow social distancing while standing in line, offering boxed food via delivery or pick-up points, and reducing cash payments.
 - (f) Implement rotational shift schedules where possible (e.g., increasing the number of shifts, alternating days or weeks) to reduce the number of employees in the facility at the same time.
 - (g) Stagger meal and break times, as well as start times at each entrance, where possible.
 - (h) Install temporary physical barriers, where practicable, between work stations and cafeteria tables.
 - (i) Create protocols for minimizing personal contact upon delivery of materials to the facility.
 - (j) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible.
 - (k) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees, and discontinue use of hand dryers.
 - (l) Notify plant leaders and potentially exposed individuals upon identification of a positive case of COVID-19 in the facility, as well as maintain a central log for symptomatic employees or employees who received a positive test for COVID-19.
 - (m) Send potentially exposed individuals home upon identification of a positive case of COVID-19 in the facility.
 - (n) Require employees to self-report to plant leaders as soon as possible after developing symptoms of COVID-19.
 - (o) Shut areas of the manufacturing facility for cleaning and disinfection, as necessary, if an employee goes home because he or she is displaying symptoms of COVID-19.
5. Research laboratories, but not laboratories that perform diagnostic testing, must:
- (a) Assign dedicated entry point(s) and/or times into lab buildings.
 - (b) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.

- (c) Create protocols and/or checklists as necessary to conform to the facility's COVID-19 preparedness and response plan under section 1(a).
 - (d) Suspend all non-essential in-person visitors (including visiting scholars and undergraduate students) until further notice.
 - (e) Establish and implement a plan for distributing face coverings.
 - (f) Limit the number of people per square feet of floor space permitted in a particular laboratory at one time.
 - (g) Close open workspaces, cafeterias, and conference rooms.
 - (h) As necessary, use tape on the floor to demarcate socially distanced workspaces and to create one-way traffic flow.
 - (i) Require all office and dry lab work to be conducted remotely.
 - (j) Minimize the use of shared lab equipment and shared lab tools and create protocols for disinfecting lab equipment and lab tools.
 - (k) Provide disinfecting supplies and require employees to wipe down their work stations at least twice daily.
 - (l) Implement an audit and compliance procedure to ensure that cleaning criteria are followed.
 - (m) Establish a clear reporting process for any symptomatic individual or any individual with a confirmed case of COVID-19, including the notification of lab leaders and the maintenance of a central log.
 - (n) Clean and disinfect the work site when an employee is sent home with symptoms or with a confirmed case of COVID-19.
 - (o) Send any potentially exposed co-workers home if there is a positive case in the facility.
 - (p) Restrict all non-essential travel, including in-person conference events.
6. Retail stores that are open for in-store sales must:
- (a) Create communications material for customers (e.g., signs or pamphlets) to inform them of changes to store practices and to explain the precautions the store is taking to prevent infection.
 - (b) Establish lines to regulate entry in accordance with subsection (c) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone

call, to enable social distancing and to accommodate seniors and those with disabilities.

- (c) Adhere to the following restrictions:
 - (1) For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal. Stores of more than 50,000 square feet must:
 - (A) Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
 - (B) Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.
 - (2) The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.
- (d) Post signs at store entrance(s) instructing customers of their legal obligation to wear a face covering when inside the store.
- (e) Post signs at store entrance(s) informing customers not to enter if they are or have recently been sick.
- (f) Design spaces and store activities in a manner that encourages employees and customers to maintain six feet of distance from one another.
- (g) Install physical barriers at checkout or other service points that require interaction, including plexiglass barriers, tape markers, or tables, as appropriate.
- (h) Establish an enhanced cleaning and sanitizing protocol for high-touch areas like restrooms, credit-card machines, keypads, counters, shopping carts, and other surfaces.
- (i) Train employees on:
 - (1) Appropriate cleaning procedures, including training for cashiers on cleaning between customers.
 - (2) How to manage symptomatic customers upon entry or in the store.
- (j) Notify employees if the employer learns that an individual (including a customer or supplier) with a confirmed case of COVID-19 has visited the store.

(k) Limit staffing to the minimum number necessary to operate.

7. Offices must:

- (a) Assign dedicated entry point(s) for all employees to reduce congestion at the main entrance.
- (b) Provide visual indicators of appropriate spacing for employees outside the building in case of congestion.
- (c) Take steps to reduce entry congestion and to ensure the effectiveness of screening (e.g., by staggering start times, adopting a rotational schedule in only half of employees are in the office at a particular time).
- (d) Require face coverings in shared spaces, including during in-person meetings and in restrooms and hallways.
- (e) Increase distancing between employees by spreading out workspaces, staggering workspace usage, restricting non-essential common space (e.g., cafeterias), providing visual cues to guide movement and activity (e.g., restricting elevator capacity with markings, locking conference rooms).
- (f) Turn off water fountains.
- (g) Prohibit social gatherings and meetings that do not allow for social distancing or that create unnecessary movement through the office.
- (h) Provide disinfecting supplies and require employees wipe down their work stations at least twice daily.
- (i) Post signs about the importance of personal hygiene.
- (j) Disinfect high-touch surfaces in offices (e.g., whiteboard markers, restrooms, handles) and minimize shared items when possible (e.g., pens, remotes, whiteboards).
- (k) Institute cleaning and communications protocols when employees are sent home with symptoms.
- (l) Notify employees if the employer learns that an individual (including a customer, supplier, or visitor) with a confirmed case of COVID-19 has visited the office.
- (m) Suspend all nonessential visitors.
- (n) Restrict all non-essential travel, including in-person conference events.

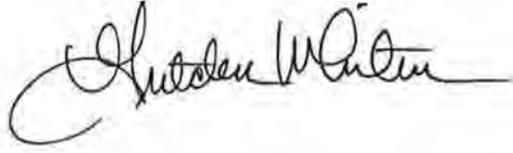
8. Restaurants and bars must:

- (a) Limit capacity to 50% of normal seating.

- (b) Require six feet of separation between parties or groups at different tables or bar tops (e.g., spread tables out, use every other table, remove or put up chairs or barstools that are not in use).
- (c) Create communications material for customers (e.g., signs, pamphlets) to inform them of changes to restaurant or bar practices and to explain the precautions that are being taken to prevent infection.
- (d) Close waiting areas and ask customers to wait in cars for a call when their table is ready.
- (e) Close self-serve food or drink options, such as buffets, salad bars, and drink stations.
- (f) Provide physical guides, such as tape on floors or sidewalks and signage on walls to ensure that customers remain at least six feet apart in any lines.
- (g) Post sign(s) at store entrance(s) informing customers not to enter if they are or have recently been sick.
- (h) Post sign(s) instructing customers to wear face coverings until they get to their table.
- (i) Require hosts and servers to wear face coverings in the dining area.
- (j) Require employees to wear face coverings and gloves in the kitchen area when handling food, consistent with guidelines from the Food and Drug Administration ("FDA").
- (k) Limit shared items for customers (e.g., condiments, menus) and clean high-contact areas after each customer (e.g., tables, chairs, menus, payment tools, condiments).
- (l) Train employees on:
 - (1) Appropriate use of personal protective equipment in conjunction with food safety guidelines.
 - (2) Food safety health protocols (e.g., cleaning between customers, especially shared condiments).
 - (3) How to manage symptomatic customers upon entry or in the restaurant.
- (m) Notify employees if the employer learns that an individual (including an employee, customer, or supplier) with a confirmed case of COVID-19 has visited the store.

- (n) Close restaurant immediately if an employee shows multiple symptoms of COVID-19 (fever, atypical shortness of breath, atypical cough) and perform a deep clean, consistent with guidance from FDA and the Center for Disease Control. Such cleaning may occur overnight.
 - (o) Require a doctor's written release to return to work if an employee has a confirmed case of COVID-19.
 - (p) Install physical barriers, such as sneeze guards and partitions at cash registers, bars, host stands, and other areas where maintaining physical distance of six feet is difficult.
 - (q) To the maximum extent possible, limit the number of employees in shared spaces, including kitchens, break rooms, and offices, to maintain at least a six-foot distance between employees.
9. Employers must maintain a record of the requirements set forth in Sections 1(c), (d), and (k).
10. The rules described in sections 1 through 9 have the force and effect of regulations adopted by the departments and agencies with responsibility for overseeing compliance with workplace health-and-safety standards and are fully enforceable by such agencies. Any challenge to penalties imposed by a department or agency for violating any of the rules described in sections 1 through 9 of this order will proceed through the same administrative review process as any challenge to a penalty imposed by the department or agency for a violation of its rules.
11. Any business or operation that violates the rules in sections 1 through 9 has failed to provide a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to an employee, within the meaning of the Michigan Occupational Safety and Health Act, MCL 408.1011.
12. Nothing in this order shall be taken to limit or affect any rights or remedies otherwise available under law.

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



Date: May 18, 2020

Time: 1:15 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-92

**Temporary requirement to suspend certain activities that
are not necessary to sustain or protect life**

Rescission of Executive Orders 2020-77 and 2020-90

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under 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.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of

SECRETARY OF SENATE
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emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, and 2020-77, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by Executive Orders 2020-21, 2020-42, 2020-59, 2020-70, and 2020-77 have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on May 17, 2020, Michigan reported 51,142 confirmed cases and 4,891 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-77. The order is being reissued to omit worker safeguards that were included in prior versions of this order but which have now been adopted in Executive Order 2020-91, a standalone order on worker protection. It has also been amended to allow, in two regions, social gatherings of up to 10 people and to permit the reopening of retail stores, offices, and restaurants and bars with limited seating. Finally, the order incorporates and replaces Executive Order 2020-90, which allowed research laboratories to resume activities.

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

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.
2. For purposes of this order, Michigan comprises eight separate regions:
 - (a) Region 1 includes the following counties: Monroe, Washtenaw, Livingston, Genesee, Lapeer, Saint Clair, Oakland, Macomb, and Wayne.
 - (b) Region 2 includes the following counties: Mason, Lake, Osceola, Clare, Oceana, Newaygo, Mecosta, Isabella, Muskegon, Montcalm, Ottawa, Kent, and Ionia.
 - (c) Region 3 includes the following counties: Allegan, Barry, Van Buren, Kalamazoo, Calhoun, Berrien, Cass, Saint Joseph, and Branch.

- (d) Region 4 includes the following counties: Oscoda, Alcona, Ogemaw, Iosco, Gladwin, Arenac, Midland, Bay, Saginaw, Tuscola, Sanilac, and Huron.
 - (e) Region 5 includes the following counties: Gratiot, Clinton, Shiawassee, Eaton, and Ingham.
 - (f) Region 6 includes the following counties: Manistee, Wexford, Missaukee, Roscommon, Benzie, Grand Traverse, Kalkaska, Crawford, Leelanau, Antrim, Otsego, Montmorency, Alpena, Charlevoix, Cheboygan, Presque Isle, and Emmet.
 - (g) Region 7 includes the following counties: Hillsdale, Lenawee, and Jackson.
 - (h) Region 8 includes the following counties: Gogebic, Ontonagon, Houghton, Keweenaw, Iron, Baraga, Dickinson, Marquette, Menominee, Delta, Alger, Schoolcraft, Luce, Mackinac, and Chippewa.
3. Subject to the exceptions in section 8 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.
4. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.
5. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.
- (a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 9 and 10 of this order.
 - (b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work.

Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in Executive Order 2020-91 and any orders that follow or replace it.

- (c) Workers who perform resumed activities are defined in section 11 of this order.
6. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:
- (a) Consistent with sections 9, 10, and 11 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work. Businesses and operations need not designate:
 - (1) Workers in health care and public health.
 - (2) Workers who perform necessary government activities, as described in section 7 of this order.
 - (3) Workers and volunteers described in section 10(d) of this order.
 - (b) In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.
 - (c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in Executive Order 2020-91 and any orders that follow or replace it.
 - (d) Any business or operation that employs workers who perform resumed activities under section 11(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.
7. All in-person government activities at whatever level (state, county, or local) are suspended unless:
- (a) They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 9 and 10 of this order.

- (b) They are performed by workers who are permitted to resume work under section 11 of this order.
- (c) They are necessary to support the activities of workers described in sections 9, 10, and 11 of this order, or to enable transactions that support businesses or operations that employ such workers.
- (d) They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.
- (e) For purposes of this order, necessary government activities include minimum basic operations, as described in 5(b) of this order. Workers performing such activities need not be designated.
- (f) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in Executive Order 2020-91 and any orders that follow or replace it.

8. Exceptions.

- (a) Individuals may leave their home or place of residence, and travel as necessary:
 - (1) To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
 - (2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 6(a) of this order may leave their home for work without being designated.)
 - (3) To conduct minimum basic operations, as described in section 5(b) of this order, after being designated to perform such work by their employers.
 - (4) To perform resumed activities, as described in section 11 of this order, after being designated to perform such work by their employers.
 - (5) To perform necessary government activities, as described in section 7 of this order.
 - (6) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a

medical emergency or to preserve the health and safety of a household or family member (including in-person procedures or veterinary services that, in accordance with a duly implemented non-essential procedure or veterinary services postponement plan, have not been postponed).

- (7) To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
 - (A) Individuals must secure such services or supplies via delivery to the maximum extent possible. As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences or motor vehicles.
 - (B) Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 10(i) of this order, or to have a motor vehicle or bicycle repaired or maintained.
 - (C) Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
- (8) To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
- (9) To care for a family member or a family member's pet in another household.
- (10) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.
- (11) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
- (12) To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
- (13) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
- (14) To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
- (15) To attend a funeral, provided that no more than 10 people are in attendance.

- (16) To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
 - (17) To view a real-estate listing by appointment, as permitted under section 11(g) of this order.
 - (18) To participate in training, credentialing, or licensing activities permitted under section 11(i) of this order.
 - (19) For individuals in Regions 6 or 8, to go to a restaurant or a retail store or to attend a social gathering of up to 10 people.
- (b) Individuals may also travel:
- (1) To return to a home or place of residence from outside this state.
 - (2) To leave this state for a home or residence elsewhere.
 - (3) Between two residences in this state, including moving to a new residence.
 - (4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.
- (c) All other travel is prohibited, including all travel to vacation rentals.
9. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available [here](#)). This order does *not* adopt any subsequent guidance document released by this same agency.

Consistent with the March 19, 2020 guidance document, critical infrastructure workers include some workers in each of the following sectors:

- (a) Health care and public health.
- (b) Law enforcement, public safety, and first responders.
- (c) Food and agriculture.
- (d) Energy.
- (e) Water and wastewater.
- (f) Transportation and logistics.
- (g) Public works.

- (h) Communications and information technology, including news media.
 - (i) Other community-based government operations and essential functions.
 - (j) Critical manufacturing.
 - (k) Hazardous materials.
 - (l) Financial services.
 - (m) Chemical supply chains and safety.
 - (n) Defense industrial base.
10. For purposes of this order, critical infrastructure workers also include:
- (a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
 - (b) Workers at suppliers, distribution centers, or service providers, as described below.
 - (1) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (2) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in sub-provision (1) of this subsection may designate their workers as critical infrastructure workers provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
 - (3) Consistent with the scope of work permitted under sub-provision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

- (4) Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.
 - (c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.
 - (d) Workers and volunteers for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
 - (e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.
 - (f) Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
 - (g) Workers at laundromats, coin laundries, and dry cleaners.
 - (h) Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.
 - (i) Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.
11. For purposes of this order, workers who perform resumed activities are defined as follows:
- (a) Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.
 - (b) Workers who perform bicycle maintenance or repair.
 - (c) Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations.
 - (d) Workers for moving or storage operations.

- (e) Workers who perform work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and outdoor workers at places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it.
- (f) Workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers).
- (g) Workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:
 - (1) Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time. No in-person open houses are permitted.
 - (2) Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.
- (h) Workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.
- (i) Workers necessary to train, credential, and license first responders (e.g., police officers, fire fighters, paramedics) and health-care workers, including certified nursing assistants, provided that as much instruction as possible is provided remotely.
- (j) Workers necessary to perform manufacturing activities. Manufacturing work may not commence under this subsection until the facility at which the work will be performed has been prepared to follow the workplace safeguards described in section 4 of Executive Order 2020-91 and any orders that follow or replace it.
- (k) Workers necessary to conduct research activities in a laboratory setting.
- (l) For Regions 6 and 8, beginning at 12:01 am on May 22, workers necessary to perform retail activities. For purposes of this order, retail activities are defined to exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that follow or replace it.
- (m) For Regions 6 and 8, beginning at 12:01 am on May 22, workers who work in an office setting, but only to the extent that such work is not capable of being performed remotely.
- (n) For Regions 6 and 8, beginning at 12:01 am on May 22, workers in restaurants or bars, subject to the capacity constraints and workplace standards described in Executive Order 2020-91. Nothing in this subsection should be taken to abridge or otherwise modify the existing power of a local government to impose further restrictions on restaurants or bars.

- (o) Workers necessary to prepare a workplace to follow the workplace standards described in Executive Order 2020-91.
 - (p) Consistent with section 10(b) of this order, workers at suppliers, distribution centers, or service providers whose in-person presence is necessary to enable, support, or facilitate another business's or operation's resumed activities, including workers at suppliers, distribution centers, or service providers along the supply chain whose in-person presence is necessary to enable, support, or facilitate the necessary work of another supplier, distribution center, or service provider in enabling, supporting, or facilitating another business's or operation's resumed activities. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.
12. Any store that is open for in-store sales under section 10(f) or section 11(c) of this executive order:
- (a) May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.
 - (b) Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.
13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.
14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.
15. Rules governing face coverings.
- (a) Except as provided in subsection (b) of this section, any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.
 - (b) An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes or while seated at a restaurant or bar.
 - (c) All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.
 - (d) Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters,

paramedics), and other critical workers who interact with the public.

- (e) The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.
- 16. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place. No individual is subject to penalty under section 20 of this order for engaging in or traveling to engage in religious worship at a place of religious worship, or for violating section 15(a) of this order.
- 17. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority. Similarly, nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances.
- 18. This order takes effect immediately, unless otherwise specified in this order, and continues through May 28, 2020 at 11:59 pm. Executive Orders 2020-77 and 2020-90 are rescinded. All references to those orders in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.
- 19. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.
- 20. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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



Date: May 18, 2020

Time: 1:15 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

SECRETARY OF SENATE
2020 JUN 1 PM3:02

EXECUTIVE ORDER

No. 2020-110

Temporary restrictions on certain events, gatherings, and businesses

Rescission of Executive Orders 2020-69 and 2020-96

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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 are being challenged on appeal.

On May 22, 2020, I issued Executive Order 2020-99, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to “cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it was reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, and 2020-96, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day continues to drop. Although the virus remains aggressive and persistent—on May 31, 2020, Michigan reported 57,397 confirmed cases and 5,491 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We are now in the process of gradually resuming in-person work and activities. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

With this order, I find it reasonable and necessary to move the state to Stage 4 of the Michigan Safe Start Plan. As a result, Michiganders are no longer required to stay home. Instead, certain businesses will remain closed and specific activities that present a

heightened risk of infection will remain prohibited. Any work that is capable of being performed remotely must be performed remotely.

Under this order, retailers will be allowed to resume operations on June 4. Restaurants and bars may reopen fully on June 8. Swimming pools and day camps for kids will also be permitted to reopen on the same day. Those businesses and activities will be subject to safety guidance to mitigate the risk of infection. Other businesses and activities that necessarily involve close contact and shared surfaces, including gyms, hair salons, indoor theaters, tattoo parlors, casinos, and similar establishments, will remain closed for the time being.

Michiganders must continue to wear face coverings when in enclosed public spaces and should continue to take all reasonable precautions to protect themselves, their co-workers, their loved ones, and their communities. Indoor social gatherings and events of more than 10 people are prohibited. Outdoor social gatherings and events are permitted so long as people maintain six feet of distance from one another and the assemblage consists of no more than 100 people.

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

1. For purposes of this order, Michigan comprises eight separate regions.
 - (a) Region 1 includes the following counties: Monroe, Washtenaw, Livingston, Genesee, Lapeer, Saint Clair, Oakland, Macomb, and Wayne.
 - (b) Region 2 includes the following counties: Mason, Lake, Osceola, Clare, Oceana, Newaygo, Mecosta, Isabella, Muskegon, Montcalm, Ottawa, Kent, and Ionia.
 - (c) Region 3 includes the following counties: Allegan, Barry, Van Buren, Kalamazoo, Calhoun, Berrien, Cass, Saint Joseph, and Branch.
 - (d) Region 4 includes the following counties: Oscoda, Alcona, Ogemaw, Iosco, Gladwin, Arenac, Midland, Bay, Saginaw, Tuscola, Sanilac, and Huron.
 - (e) Region 5 includes the following counties: Gratiot, Clinton, Shiawassee, Eaton, and Ingham.
 - (f) Region 6 includes the following counties: Manistee, Wexford, Missaukee, Roscommon, Benzie, Grand Traverse, Kalkaska, Crawford, Leelanau, Antrim, Otsego, Montmorency, Alpena, Charlevoix, Cheboygan, Presque Isle, and Emmet.
 - (g) Region 7 includes the following counties: Hillsdale, Lenawee, and Jackson.
 - (h) Region 8 includes the following counties: Gogebic, Ontonagon, Houghton, Keweenaw, Iron, Baraga, Dickinson, Marquette, Menominee, Delta, Alger, Schoolcraft, Luce, Mackinac, and Chippewa.

2. Any work that is capable of being performed remotely (i.e., without the worker leaving his or her home or place of residence) must be performed remotely.
3. Any business or operation that requires its employees to leave their home or place of residence for work is subject to the rules on workplace safeguards in Executive Order 2020-97 or any order that may follow from it.
4. Any individual who leaves his or her home or place of residence must:
 - (a) Follow social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.
 - (b) Wear a face covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space, unless the individual is unable medically to tolerate a face covering.
 - (1) An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes. An individual may also remove a face covering to eat or drink when seated at a restaurant or bar.
 - (2) Businesses and building owners, and those authorized to act on their behalf, are permitted to deny entry or access to any individual who refuses to comply with the rule in this subsection (b). Businesses and building owners will not be subject to a claim that they have violated the covenant of quiet enjoyment, to a claim of frustration of purpose, or to similar claims for denying entry or access to a person who refuses to comply with this subsection (b).
 - (3) Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public.
 - (4) The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.
5. Indoor social gatherings and events among persons not part of a single household are permitted, but may not exceed 10 people.
6. Outdoor social gatherings and events among persons not part of a single household are permitted, but only to the extent that:
 - (a) The gathering or event does not exceed 100 people, and
 - (b) People not part of the same household maintain six feet of distance from one another.

7. Unless otherwise prohibited by local regulation, outdoor parks and recreational facilities may be open, provided that they make any reasonable modifications necessary to enable employees and patrons not part of the same household to maintain six feet of distance from one another, and provided that areas in which social distancing cannot be maintained be closed, subject to guidance issued by the Department of Health and Human Services.
8. Unless otherwise prohibited by local regulation, public swimming pools, as defined by MCL 333.12521(d), may open as of June 8, 2020, provided that they are outdoors and limit capacity to 50% of the bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code, and subject to guidance issued by the Department of Health and Human Services. Indoor public swimming pools must remain closed.
9. Day camps for children, as defined by Rule 400.11101(i) of the Michigan Administrative Code, may open as of June 8, 2020, subject to guidance issued by the Department of Licensing and Regulatory Affairs. Residential, travel, and troop camps within the meaning of Rule 400.11101(n), (p), or (q) of the Michigan Administrative Code must remain closed for the time being.
10. Unless otherwise prohibited by local regulation, libraries and museums may open as of June 8, 2020, subject to the rules governing retail stores described in Executive Order 2020-97 or any order that may follow from it.
11. Stores that were closed under Executive Order 2020-96 (or that were open only by appointment under the same order) must remain closed to the public (or open only by appointment) until June 4 at 12:01 am. Such stores may then resume normal operations, subject to local regulation and to the capacity constraints and workplace standards described in Executive Order 2020-97 or any order that may follow from it.
12. Subject to the exceptions in section 14, the following places are closed to ingress, egress, use, and occupancy by members of the public:
 - (a) Indoor theaters, cinemas, and performance venues.
 - (b) Indoor gymnasiums, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and the like.
 - (c) Facilities offering non-essential personal care services, including hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services that involve close contact of persons.
 - (d) Casinos licensed by the Michigan Gaming Control Board, racetracks licensed by the Michigan Gaming Control Board, and Millionaire Parties licensed by the Michigan Gaming Control Board.

- (e) Indoor services or facilities, or outdoor services or facilities involving close contact of persons, for amusement or other recreational or entertainment purposes, such as amusement parks, arcades, bingo halls, bowling alleys, indoor climbing facilities, indoor dance areas, skating rinks, trampoline parks, and other similar recreational or entertainment facilities.
13. Unless otherwise prohibited by local regulation, restaurants, food courts, cafes, coffeehouses, bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and like places may be open to the public as follows:
- (a) For delivery service, window service, walk-up service, drive-through service, or drive-up service, and may permit up to five members of the public at one time for the purpose of picking up their food or beverage orders, so long as those individuals are at least six feet apart from one another while on premises.
 - (b) In Regions 1, 2, 3, 4, 5, and 7, beginning at 12:01 am on June 8, 2020, for outdoor and indoor seating, subject to the capacity constraints and workplace standards described in Executive Order 2020-97 or any order that may follow from it.
 - (c) In Regions 6 and 8, for outdoor and indoor seating, subject to the capacity constraints and workplace standards described in Executive Order 2020-97 or any order that may follow from it.
14. The restrictions imposed by sections 12 and 13 of this order do not apply to any of the following:
- (a) Outdoor fitness classes, athletic practices, training sessions, or games, provided that coaches, spectators, and participants not from the same household maintain six feet of distance from one another at all times during such activities, and that equipment and supplies are shared to the minimum extent possible and are subject to frequent and thorough disinfection and cleaning.
 - (b) Services necessary for medical treatment as determined by a licensed medical provider.
 - (c) Health care facilities, residential care facilities, congregate care facilities, and juvenile justice facilities.
 - (d) Crisis shelters or similar institutions.
 - (e) Food courts inside the secured zones of airports.
 - (f) Employees, contractors, vendors, or suppliers who enter, use, or occupy the places described in section 12 of this order in their professional capacity.
15. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority. Similarly, nothing in this order shall be taken to abridge

protections guaranteed by the state or federal constitution under these emergency circumstances.

16. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 19 of this order for allowing religious worship at such place. No individual is subject to penalty under section 19 of this order for engaging in religious worship at a place of religious worship, or for violating the face covering requirement of section 4(b) of this order.
17. Executive Orders 2020-69 and 2020-96 are rescinded. Except as specified, nothing in this order supersedes any other executive order. This order takes effect immediately unless otherwise specified.
18. In determining whether to maintain, intensify, or relax the restrictions in this order, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.
19. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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



Date: June 1, 2020

Time: 2:27 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

RECEIVED by MSC 8/6/2020 2:03:54 PM

EXECUTIVE ORDER

No. 2020-114

Safeguards to protect Michigan's workers from COVID-19

Rescission of Executive Order 2020-97

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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 are being challenged on appeal.

On May 22, 2020, I issued Executive Order 2020-99, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to “cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it was reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, and 2020-96, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day continues to drop. Although the virus remains aggressive and persistent—on June 4, 2020, Michigan reported 58,241 confirmed cases and 5,595 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We are now in the process of gradually resuming in-person work and activities. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

In particular, businesses must do their part to protect their employees, their patrons, and their communities. Many businesses have already done so by implementing robust safeguards to prevent viral transmission. But we can and must do more: no one should feel

unsafe at work. With Executive Orders 2020-91 and 2020-97, I created an enforceable set of workplace standards that apply to all businesses across the state. I am now amending those standards to include new provisions governing in-home services, personal care services, sporting and entertainment venues, and gyms.

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

1. All businesses or operations that require their employees to leave the homes or residences for work must, at a minimum:
 - (a) Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration (“OSHA”) and available [here](#). Within two weeks of resuming in-person activities, a business’s or operation’s plan must be made readily available to employees, labor unions, and customers, whether via website, internal network, or by hard copy.
 - (b) Designate one or more worksite supervisors to implement, monitor, and report on the COVID-19 control strategies developed under subsection (a). The supervisor must remain on-site at all times when employees are present on site. An on-site employee may be designated to perform the supervisory role.
 - (c) Provide COVID-19 training to employees that covers, at a minimum:
 - (1) Workplace infection-control practices.
 - (2) The proper use of personal protective equipment.
 - (3) Steps the employee must take to notify the business or operation of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19.
 - (4) How to report unsafe working conditions.
 - (d) Conduct a daily entry self-screening protocol for all employees or contractors entering the workplace, including, at a minimum, a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19.
 - (e) Keep everyone on the worksite premises at least six feet from one another to the maximum extent possible, including through the use of ground markings, signs, and physical barriers, as appropriate to the worksite.
 - (f) Provide non-medical grade face coverings to their employees, with supplies of N95 masks and surgical masks reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers.
 - (g) Require face coverings to be worn when employees cannot consistently maintain six feet of separation from other individuals in the workplace, and consider face

- shields when employees cannot consistently maintain three feet of separation from other individuals in the workplace.
- (h) Increase facility cleaning and disinfection to limit exposure to COVID-19, especially on high-touch surfaces (e.g., door handles), paying special attention to parts, products, and shared equipment (e.g., tools, machinery, vehicles).
 - (i) Adopt protocols to clean and disinfect the facility in the event of a positive COVID-19 case in the workplace.
 - (j) Make cleaning supplies available to employees upon entry and at the worksite and provide time for employees to wash hands frequently or to use hand sanitizer.
 - (k) When an employee is identified with a confirmed case of COVID-19:
 - (1) Immediately notify the local public health department, and
 - (2) Within 24 hours, notify any co-workers, contractors, or suppliers who may have come into contact with the person with a confirmed case of COVID-19.
 - (l) An employer will allow employees with a confirmed or suspected case of COVID-19 to return to the workplace only after they are no longer infectious according to the latest guidelines from the Centers for Disease Control and Prevention ("CDC") and they are released from any quarantine or isolation by the local public health department.
 - (m) Follow Executive Order 2020-36, and any executive orders that follow it, that prohibit discharging, disciplining, or otherwise retaliating against employees who stay home or who leave work when they are at particular risk of infecting others with COVID-19.
 - (n) Establish a response plan for dealing with a confirmed infection in the workplace, including protocols for sending employees home and for temporary closures of all or part of the workplace to allow for deep cleaning.
 - (o) Restrict business-related travel for employees to essential travel only.
 - (p) Encourage employees to use personal protective equipment and hand sanitizer on public transportation.
 - (q) Promote remote work to the fullest extent possible.
 - (r) Adopt any additional infection-control measures that are reasonable in light of the work performed at the worksite and the rate of infection in the surrounding community.

2. Businesses or operations whose work is primarily and traditionally performed outdoors must:
 - (a) Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.
 - (b) Limit in-person interaction with clients and patrons to the maximum extent possible, and bar any such interaction in which people cannot maintain six feet of distance from one another.
 - (c) Provide and require the use of personal protective equipment such as gloves, goggles, face shields, and face coverings, as appropriate for the activity being performed.
 - (d) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning and disinfection of tools, equipment, and frequently touched surfaces.
3. Businesses or operations in the construction industry must:
 - (a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.
 - (b) Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in sub-provision (b) of this section, or in the alternative issue stickers or other indicators to employees to show that they received a screening before entering the worksite that day.
 - (c) Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled face coverings.
 - (d) Require the use of work gloves where appropriate to prevent skin contact with contaminated surfaces.
 - (e) Identify choke points and high-risk areas where employees must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.
 - (f) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees.
 - (g) Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among employees at the worksite.
 - (h) Restrict unnecessary movement between project sites.

- (i) Create protocols for minimizing personal contact upon delivery of materials to the worksite.
4. Manufacturing facilities must:
- (a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering the facility, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with temperature screening as soon as no-touch thermometers can be obtained.
 - (b) Create dedicated entry point(s) at every facility for daily screening as provided in sub-provision (a) of this section, and ensure physical barriers are in place to prevent anyone from bypassing the screening.
 - (c) Suspend all non-essential in-person visits, including tours.
 - (d) Train employees on, at a minimum:
 - (1) Routes by which the virus causing COVID-19 is transmitted from person to person.
 - (2) Distance that the virus can travel in the air, as well as the time it remains viable in the air and on environmental surfaces.
 - (3) The use of personal protective equipment, including the proper steps for putting it on and taking it off.
 - (e) Reduce congestion in common spaces wherever practicable by, for example, closing salad bars and buffets within cafeterias and kitchens, requiring individuals to sit at least six feet from one another, placing markings on the floor to allow social distancing while standing in line, offering boxed food via delivery or pick-up points, and reducing cash payments.
 - (f) Implement rotational shift schedules where possible (e.g., increasing the number of shifts, alternating days or weeks) to reduce the number of employees in the facility at the same time.
 - (g) Stagger meal and break times, as well as start times at each entrance, where possible.
 - (h) Install temporary physical barriers, where practicable, between work stations and cafeteria tables.
 - (i) Create protocols for minimizing personal contact upon delivery of materials to the facility.
 - (j) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible.

- (k) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees, and discontinue use of hand dryers.
 - (l) Notify plant leaders and potentially exposed individuals upon identification of a positive case of COVID-19 in the facility, as well as maintain a central log for symptomatic employees or employees who received a positive test for COVID-19.
 - (m) Send potentially exposed individuals home upon identification of a positive case of COVID-19 in the facility.
 - (n) Require employees to self-report to plant leaders as soon as possible after developing symptoms of COVID-19.
 - (o) Shut areas of the manufacturing facility for cleaning and disinfection, as necessary, if an employee goes home because he or she is displaying symptoms of COVID-19.
5. Research laboratories, but not laboratories that perform diagnostic testing, must:
- (a) Assign dedicated entry point(s) and/or times into lab buildings.
 - (b) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.
 - (c) Create protocols and/or checklists as necessary to conform to the facility's COVID-19 preparedness and response plan.
 - (d) Suspend all non-essential in-person visitors (including undergraduate students) until further notice.
 - (e) Establish and implement a plan for distributing face coverings.
 - (f) Limit the number of people per square feet of floor space permitted in a particular laboratory at one time.
 - (g) Close open workspaces, cafeterias, and conference rooms.
 - (h) As necessary, use tape on the floor to demarcate socially distanced workspaces and to create one-way traffic flow.
 - (i) Require all office and dry lab work to be conducted remotely.
 - (j) Minimize the use of shared lab equipment and shared lab tools and create protocols for disinfecting lab equipment and lab tools.

- (k) Provide disinfecting supplies and require employees to wipe down their work stations at least twice daily.
 - (l) Implement an audit and compliance procedure to ensure that cleaning criteria are followed.
 - (m) Establish a clear reporting process for any symptomatic individual or any individual with a confirmed case of COVID-19, including the notification of lab leaders and the maintenance of a central log.
 - (n) Clean and disinfect the work site when an employee is sent home with symptoms or with a confirmed case of COVID-19.
 - (o) Send any potentially exposed co-workers home if there is a positive case in the facility.
 - (p) Restrict all non-essential work travel, including in-person conference events.
6. Retail stores that are open for in-store sales, as well as libraries and museums, must:
- (a) Create communications material for customers (e.g., signs or pamphlets) to inform them of changes to store practices and to explain the precautions the store is taking to prevent infection.
 - (b) Establish lines to regulate entry in accordance with subsection (c) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.
 - (c) Except in Regions 6 and 8, adhere to the following restrictions:
 - (1) For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal. Stores of more than 50,000 square feet must:
 - (A) Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
 - (B) Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions, including but not limited to heart disease, diabetes, and lung disease.

- (2) The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.
 - (d) Post signs at store entrance(s) instructing customers of their legal obligation to wear a face covering when inside the store.
 - (e) Post signs at store entrance(s) informing customers not to enter if they are or have recently been sick.
 - (f) Design spaces and store activities in a manner that encourages employees and customers to maintain six feet of distance from one another.
 - (g) Install physical barriers at checkout or other service points that require interaction, including plexiglass barriers, tape markers, or tables, as appropriate.
 - (h) Establish an enhanced cleaning and sanitizing protocol for high-touch areas like restrooms, credit-card machines, keypads, counters, shopping carts, and other surfaces.
 - (i) Train employees on:
 - (1) Appropriate cleaning procedures, including training for cashiers on cleaning between customers.
 - (2) How to manage symptomatic customers upon entry or in the store.
 - (j) Notify employees if the employer learns that an individual (including a customer or supplier) with a confirmed case of COVID-19 has visited the store.
 - (k) Limit staffing to the minimum number necessary to operate.
7. Offices must:
- (a) Assign dedicated entry point(s) for all employees to reduce congestion at the main entrance.
 - (b) Provide visual indicators of appropriate spacing for employees outside the building in case of congestion.
 - (c) Take steps to reduce entry congestion and to ensure the effectiveness of screening (e.g., by staggering start times, adopting a rotational schedule in only half of employees are in the office at a particular time).
 - (d) Require face coverings in shared spaces, including during in-person meetings and in restrooms and hallways.

- (e) Increase distancing between employees by spreading out workspaces, staggering workspace usage, restricting non-essential common space (e.g., cafeterias), providing visual cues to guide movement and activity (e.g., restricting elevator capacity with markings).
 - (f) Prohibit social gatherings and meetings that do not allow for social distancing or that create unnecessary movement through the office. Use virtual meetings whenever possible.
 - (g) Provide disinfecting supplies and require employees wipe down their work stations at least twice daily.
 - (h) Post signs about the importance of personal hygiene.
 - (i) Disinfect high-touch surfaces in offices (e.g., whiteboard markers, restrooms, handles) and minimize shared items when possible (e.g., pens, remotes, whiteboards).
 - (j) Institute cleaning and communications protocols when employees are sent home with symptoms.
 - (k) Notify employees if the employer learns that an individual (including a customer, supplier, or visitor) with a confirmed case of COVID-19 has visited the office.
 - (l) Suspend all nonessential visitors.
 - (m) Restrict all non-essential travel, including in-person conference events.
8. Restaurants and bars must:
- (a) Limit capacity to 50% of normal seating.
 - (b) Require six feet of separation between parties or groups at different tables or bar tops (e.g., spread tables out, use every other table, remove or put up chairs or barstools that are not in use).
 - (c) Create communications material for customers (e.g., signs, pamphlets) to inform them of changes to restaurant or bar practices and to explain the precautions that are being taken to prevent infection.
 - (d) Close waiting areas and ask customers to wait in cars for a notification when their table is ready.
 - (e) Close self-serve food or drink options, such as buffets, salad bars, and drink stations.
 - (f) Provide physical guides, such as tape on floors or sidewalks and signage on walls to ensure that customers remain at least six feet apart in any lines.

- (g) Post sign(s) at store entrance(s) informing customers not to enter if they are or have recently been sick.
 - (h) Post sign(s) instructing customers to wear face coverings until they get to their table.
 - (i) Require hosts, servers, and staff to wear face coverings in the dining area.
 - (j) Require employees to wear face coverings and gloves in the kitchen area when handling food, consistent with guidelines from the Food and Drug Administration ("FDA").
 - (k) Limit shared items for customers (e.g., condiments, menus) and clean high-contact areas after each customer (e.g., tables, chairs, menus, payment tools).
 - (l) Train employees on:
 - (1) Appropriate use of personal protective equipment in conjunction with food safety guidelines.
 - (2) Food safety health protocols (e.g., cleaning between customers, especially shared condiments).
 - (3) How to manage symptomatic customers upon entry or in the restaurant.
 - (m) Notify employees if the employer learns that an individual (including an employee, customer, or supplier) with a confirmed case of COVID-19 has visited the store.
 - (n) Close restaurant immediately if an employee shows symptoms of COVID-19, defined as either the new onset of cough or new onset of chest tightness or two of the following: fever (measured or subjective), chills, rigors, myalgia, headache, sore throat, or olfactory/taste disorder(s), and perform a deep clean, consistent with guidance from the FDA and the CDC. Such cleaning may occur overnight.
 - (o) Install physical barriers, such as sneeze guards and partitions at cash registers, bars, host stands, and other areas where maintaining physical distance of six feet is difficult.
 - (p) To the maximum extent possible, limit the number of employees in shared spaces, including kitchens, host stands, break rooms, and offices, to maintain at least a six-foot distance between employees.
9. Outpatient health-care facilities, including clinics, primary care physician offices, or dental offices, and also including veterinary clinics, must:
- (a) Post signs at entrance(s) instructing patients to wear a face covering when inside.

- (b) Limit waiting-area occupancy to the number of individuals who can be present while staying six feet away from one another and ask patients, if possible, to wait in cars for their appointment to be called.
 - (c) Mark waiting rooms to enable six feet of social distancing (e.g., by placing X's on the ground and/or removing seats in the waiting room).
 - (d) Enable contactless sign-in (e.g., sign in on phone app) as soon as practicable.
 - (e) Add special hours for highly vulnerable patients, including the elderly and those with chronic conditions.
 - (f) Conduct a common screening protocol for all patients, including a temperature check and questions about COVID-19 symptoms.
 - (g) Place hand sanitizer and face coverings at patient entrance(s).
 - (h) Require employees to make proper use of personal protective equipment in accordance with guidance from the CDC and OSHA.
 - (i) Require patients to wear a face covering when in the facility, except as necessary for identification or to facilitate an examination or procedure.
 - (j) Install physical barriers at sign-in, temperature screening, or other service points that normally require personal interaction (e.g., plexiglass, cardboard, tables).
 - (k) Employ telehealth and telemedicine to the greatest extent possible.
 - (l) Limit the number of appointments to maintain social distancing and allow adequate time between appointments for cleaning.
 - (m) Employ specialized procedures for patients with high temperatures or respiratory symptoms (e.g., special entrances, having them wait in their car) to avoid exposing other patients in the waiting room.
 - (n) Deep clean examination rooms after patients with respiratory symptoms and clean rooms between all patients.
 - (o) Establish procedures for building disinfection in accordance with CDC guidance if it is suspected that an employee or patient has COVID-19 or if there is a confirmed case.
10. All businesses or operations that provide in-home services, including cleaners, repair persons, painters, and the like, must:
- (a) Require their employees (or, if a sole-owned business, the business owner) to perform a daily health screening prior to going to the job site.

- (b) Maintain accurate appointment record, including date and time of service, name of client, and contact information, to aid with contact tracing.
 - (c) Limit direct interaction with customers by using electronic means of communication whenever possible.
 - (d) Prior to entering the home, inquire with the customer whether anyone in the household has been diagnosed with COVID-19, is experiencing symptoms of COVID-19, or has had close contact with someone who has been diagnosed with COVID-19. If so, the business or operation must reschedule for a different time.
 - (e) Limit the number of employees inside a home to the minimum number necessary to perform the work in a timely fashion.
 - (f) Gloves should be worn when practical and disposed of in accordance with guidance from the CDC.
11. All businesses or operations that provide barbering, cosmetology services, body art services (including tattooing and body piercing), tanning services, massage services, or similar personal-care services must:
- (a) Maintain accurate appointment and walk-in records, including date and time of service, name of client, and contact information, to aid with contact tracing.
 - (b) Post sign(s) at store entrance(s) informing customers not to enter if they are or have recently been sick.
 - (c) Restrict entry to customers, to a caregiver of those customers, or to the minor dependents of those customers.
 - (d) Require in-use workstations to be separated by at least six feet from one another and, if feasible, separate workstations with physical barriers (e.g., plexiglass, strip curtains).
 - (e) Limit waiting-area occupancy to the number of individuals who can be present while staying six feet away from one another and ask customers, if possible, to wait in cars for their appointment to be called.
 - (f) Discontinue all self-service refreshments.
 - (g) Discard magazines in waiting areas and other nonessential, shared items that cannot be disinfected.
 - (h) Mark waiting areas to enable six feet of social distancing (e.g., by placing X's on the ground and/or removing seats in the waiting room).
 - (i) Require employees to make proper use of personal protective equipment in accordance with guidance from the CDC and OSHA.

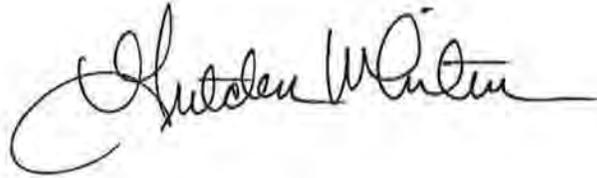
- (j) Require employees and customers to wear a face covering at all times, except that customers may temporarily remove a face covering when receiving a service that requires its removal. During services that require a customer to remove their face covering, an employee must wear a face shield or goggles in addition to the face covering.
 - (k) Install physical barriers, such as sneeze guards and partitions at cash registers, where maintaining physical distance of six feet is difficult.
 - (l) Cooperate with the local public health department if a confirmed case of COVID-19 is identified in the facility.
12. Sports and entertainment facilities, including arenas, cinemas, concert halls, performance venues, sporting venues, stadiums and theaters, as well as places of public amusement, such as amusement parks, arcades, bingo halls, bowling alleys, night clubs, skating rinks, and trampoline parks, must:
- (a) Post signs outside of entrances informing customers not to enter if they are or have recently been sick.
 - (b) Encourage or require patrons to wear face coverings.
 - (c) Establish crowd-limiting measures to meter the flow of patrons (e.g., digital queuing, delineated waiting areas, parking instructions, social distance markings on ground or cones to designate social distancing, etc.).
 - (d) Use physical dividers, marked floors, signs, and other physical and visual cues to maintain six feet of distance between persons.
 - (e) Limit seating occupancy to the extent necessary to enable patrons not of the same household to maintain six feet of distance from others (e.g., stagger group seating upon reservation, close off every other row, etc.).
 - (f) For sports and entertainment facilities, establish safe exit procedures for patrons (e.g., dismiss groups based on ticket number, row, etc.).
 - (g) For sports and entertainment facilities, to the extent feasible, adopt specified entry and exit times for vulnerable populations, as well as specified entrances and exits.
 - (h) Train employees who interact with patrons (e.g., ushers) on how to:
 - (1) Monitor and enforce compliance with the facility's COVID-19 protocols.
 - (2) Help patrons who become symptomatic.
 - (i) Frequently disinfect high-touch surfaces during events or, as necessary, throughout the day.

- (j) Disinfect and deep clean the facility after each event or, as necessary, throughout the day.
 - (k) Close self-serve food or drink options, such as buffets, salad bars, and drink stations.
13. Gymnasiums, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and like facilities must:
- (a) Post sign(s) outside of entrance(s) informing individuals not to enter if they are or have recently been sick.
 - (b) Maintain accurate records, including date and time of event, name of attendee(s), and contact information, to aid with contact tracing.
 - (c) To the extent feasible, configure workout stations or implement protocols to enable ten feet of distance between individuals during exercise sessions (or six feet of distance with barriers).
 - (d) Reduce class sizes, as necessary, to enable at least six feet of separation between individuals.
 - (e) Provide equipment cleaning products throughout the gym or exercise facility for use on equipment.
 - (f) Make hand sanitizer, disinfecting wipes, soap and water, or similar disinfectant readily available.
 - (g) Regularly disinfect exercise equipment, including immediately after use. If patrons are expected to disinfect, post signs encouraging patrons to disinfect equipment.
 - (h) Ensure that ventilation systems operate properly.
 - (i) Increase introduction and circulation of outdoor air as much as possible by opening windows and doors, using fans, or other methods.
 - (j) Regularly clean and disinfect public areas, locker rooms, and restrooms.
 - (k) Close steam rooms and saunas.
14. Employers must maintain a record of the requirements set forth in Sections 1(c), (d), and (k).
15. The rules described in sections 1 through 14 have the force and effect of regulations adopted by the departments and agencies with responsibility for overseeing compliance with workplace health-and-safety standards and are fully enforceable by such agencies. Any challenge to penalties imposed by a department or agency for violating any of the rules described in sections 1 through 14 of this order will

proceed through the same administrative review process as any challenge to a penalty imposed by the department or agency for a violation of its rules.

16. Any business or operation that violates the rules in sections 1 through 14 has failed to provide a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to an employee, within the meaning of the Michigan Occupational Safety and Health Act, MCL 408.1011.
17. Executive Order 2020-109, which establishes temporary safety measures for food-selling establishments and pharmacies, does not terminate until the end of the states of emergency and disaster declared in Executive Order 2020-99 or the end of any subsequently declared states of disaster or emergency arising out of the COVID-19 pandemic, whichever comes later.
18. Nothing in this order shall be taken to limit or affect any rights or remedies otherwise available under law.

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



Date: June 5, 2020

Time: 10:30 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

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SECRETARY OF SENATE
2020 JUN 5 AM 11:01

EXECUTIVE ORDER

No. 2020-115

Temporary restrictions on certain events, gatherings, and businesses

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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 are being challenged on appeal.

On May 22, 2020, I issued Executive Order 2020-99, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That

order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to “cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it was reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, and 2020-96, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day continues to drop. Although the virus remains aggressive and persistent—on June 4, 2020, Michigan reported 58,241 confirmed cases and 5,595 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We are now in the process of gradually resuming in-person work and activities. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

Regions 6 and 8 have significantly fewer new cases per million each day than other regions in the state and have not shown an increase in viral activity in response to earlier relaxations of my orders. Taking into account the public health data and the ongoing costs of continued restrictions, I find it reasonable and necessary to move Regions 6 and 8 to Stage 5 of the Michigan Safe Start Plan as of June 10. Gyms, hair salons, indoor theaters,

tattoo parlors, and similar establishments will be permitted to reopen, subject to strict workplace safeguards. Indoor social gatherings and organized events of up to 50 people will be allowed, as will outdoor social gatherings and organized events of up to 250 people.

In addition, I find it reasonable and necessary to allow personal care services—including hair and nail salons—to reopen statewide as of June 15. This constitutes a partial step along the path of an orderly transition to Stage 5 for those parts of the state outside Regions 6 and 8.

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

1. For purposes of this order, Michigan comprises eight separate regions.
 - (a) Region 1 includes the following counties: Monroe, Washtenaw, Livingston, Genesee, Lapeer, Saint Clair, Oakland, Macomb, and Wayne.
 - (b) Region 2 includes the following counties: Mason, Lake, Osceola, Clare, Oceana, Newaygo, Mecosta, Isabella, Muskegon, Montcalm, Ottawa, Kent, and Ionia.
 - (c) Region 3 includes the following counties: Allegan, Barry, Van Buren, Kalamazoo, Calhoun, Berrien, Cass, Saint Joseph, and Branch.
 - (d) Region 4 includes the following counties: Oscoda, Alcona, Ogemaw, Iosco, Gladwin, Arenac, Midland, Bay, Saginaw, Tuscola, Sanilac, and Huron.
 - (e) Region 5 includes the following counties: Gratiot, Clinton, Shiawassee, Eaton, and Ingham.
 - (f) Region 6 includes the following counties: Manistee, Wexford, Missaukee, Roscommon, Benzie, Grand Traverse, Kalkaska, Crawford, Leelanau, Antrim, Otsego, Montmorency, Alpena, Charlevoix, Cheboygan, Presque Isle, and Emmet.
 - (g) Region 7 includes the following counties: Hillsdale, Lenawee, and Jackson.
 - (h) Region 8 includes the following counties: Gogebic, Ontonagon, Houghton, Keweenaw, Iron, Baraga, Dickinson, Marquette, Menominee, Delta, Alger, Schoolcraft, Luce, Mackinac, and Chippewa.
2. As of 12:01 am on June 15, 2020, subsection 12(c) of Executive Order 2020-110, which restricts the operation of facilities offering non-essential personal care services, is rescinded.
3. As of 12:01 am on June 10, 2020, individuals and businesses in Regions 6 and 8 are no longer subject to Executive Order 2020-110 and are instead subject to the rules described in this order.
4. Work that can be performed remotely (i.e., without the worker leaving his or her home or place of residence) should be performed remotely.

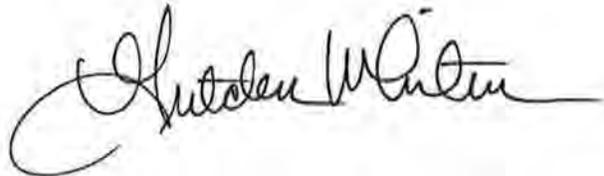
5. Any business or operation that requires its employees to leave their home or place of residence for work is subject to the rules on workplace safeguards in Executive Order 2020-114 or any order that may follow from it.
6. Any individual who leaves his or her home or place of residence must:
 - (a) Follow social distancing measures recommended by the Centers for Disease Control and Prevention (“CDC”), including remaining at least six feet from people from outside the individual’s household to the extent feasible under the circumstances.
 - (b) Wear a face covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space, unless the individual is unable medically to tolerate a face covering.
 - (1) An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes. An individual may also remove a face covering to eat or drink when seated at a restaurant or bar.
 - (2) Businesses and building owners, and those authorized to act on their behalf, are permitted to deny entry or access to any individual who refuses to comply with the rule in this subsection (b). Businesses and building owners will not be subject to a claim that they have violated the covenant of quiet enjoyment, to a claim of frustration of purpose, or to similar claims for denying entry or access to a person who refuses to comply with this subsection (b).
 - (3) Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public.
 - (4) The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.
7. Rules on Gatherings, Performances, and Events
 - (a) A social gathering or organized event among persons not part of the same household is permitted, but only to the extent that:
 - (1) Persons not part of the same household maintain six feet of distance from one another.
 - (2) If it is indoors, the gathering or event does not exceed 50 people.
 - (3) If it is outdoors, the gathering or event does not exceed 250 people.

- (b) Notwithstanding the restrictions in subsection (a), an arcade, bowling alley, cinema, climbing facility, convention center, performance space, meeting hall, night club, sports arena, theater, or similar venue may, if it is indoors, be open to spectators or patrons, but only to the extent that it:
 - (1) Enables persons not part of the same household to maintain six feet of distance from one another at all times while in the venue.
 - (2) Limits the number of people in the venue to 25% of its maximum capacity or to 250, whichever is smaller. For purposes of this order, each separate auditorium or screening room is a separate venue.
 - (c) Notwithstanding the restrictions in subsection (a), a concert space, race track, sports arena, stadium, or similar venue may, if it is outdoors, be open to spectators or patrons, but only to the extent that it:
 - (1) Enables persons not part of the same household to maintain six feet of distance from one another at all times while in the venue.
 - (2) Limits the number of people in the venue to 25% of its maximum capacity or to 500, whichever is smaller.
 - (d) Subsection (a) does not apply to the incidental gathering of persons in a shared space, including an airport, bus station, factory floor, restaurant, shopping mall, public pool, or workplace.
8. Unless otherwise prohibited by local regulation, outdoor parks and recreational facilities may be open, provided that they make any reasonable modifications necessary to enable employees and patrons not part of the same household to maintain six feet of distance from one another, and provided that areas in which social distancing cannot be maintained be closed, subject to guidance issued by the Department of Health and Human Services.
9. Unless otherwise prohibited by local regulation, public swimming pools, as defined by MCL 333.12521(d), may be open, subject to guidance issued by the Department of Health and Human Services, provided that:
- (a) If they are outdoors, they limit capacity to 50% of the bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.
 - (b) If they are indoors, they limit capacity to 25% of the bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.
10. Residential, travel, and troop camps within the meaning of Rule 400.11101(n), (p), or (q) of the Michigan Administrative Code remain closed for the time being.
11. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority. Similarly, nothing in this order shall be taken to abridge

protections guaranteed by the state or federal constitution under these emergency circumstances.

12. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 15 of this order for allowing religious worship at such place. No individual is subject to penalty under section 15 of this order for engaging in religious worship at a place of religious worship, or for violating the face covering requirement of section 6(b) of this order.
13. Except as specified, nothing in this order supersedes any other executive order. This order takes effect immediately unless otherwise specified.
14. In determining whether to maintain, intensify, or relax the restrictions in this order, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.
15. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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



Date: June 5, 2020

Time: 10:32 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-143

Closing indoor service at bars

SENATE JOURNAL
JUL 2 2020 AM 11:57

RECEIVED by MSC 8/6/2020 2:03:54 PM

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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 EPA, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the EMA.

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 are being challenged on appeal.

On June 18, 2020, I issued Executive Order 2020-127, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature had declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to “cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law,” MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it was reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, 2020-96, and 2020-110, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective. Although the virus remains aggressive and persistent—on June 30, 2020, Michigan reported 373 new confirmed cases—the strain on our health care system has relented, even as our testing capacity has increased. Where Michigan was once among the states most heavily hit, our per-capita case rate is now roughly equivalent to the national average.

Our progress in suppressing COVID-19, however, appears to have stalled out. Over the past week, every region in Michigan has seen an uptick in new cases, and daily case counts now exceed 20 cases per million in the Grand Rapids, Lansing, and Kalamazoo regions. A relatively large proportion of these new cases are occurring among young people: nearly one quarter of diagnoses in June were in people aged 20 to 29, up from roughly 16% in May.

That shift aligns with national trends.

As bars have reopened for indoor service across the country, they have been linked to a growing number of large outbreaks—especially among young people. Here in Michigan, for example, health officials in Ingham County have linked 107 confirmed COVID-19 cases to an outbreak in a single bar in East Lansing. Similar super-spreader events have been documented in bars in Florida, Louisiana, Texas, and elsewhere.

Bars have many features that facilitate the spread of COVID-19: they are often crowded, indoors, and poorly ventilated. They encourage mingling among groups and facilitate close contact over an extended period of time. They are noisy, requiring raised voices and allowing for more projection of viral droplets. And they serve alcohol, which reduces inhibitions and decreases compliance with mask use and physical distancing rules. As Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, said yesterday in a hearing before the U.S. Senate, “Congregation at a bar, inside, is bad news.”

To protect our state from a new wave of infections and to increase the likelihood that we can reopen schools in the fall, this order closes bars and nightclubs for indoor service in those regions that are in Phase 4 of the Michigan Safe Start Plan. Restaurants can remain open for indoor service, but alcohol can be served only to patrons who are seated at socially distanced tables. Common areas where people stand and congregate within restaurants must be closed. Restaurants and bars may remain open for outdoor seating, but only for seated customers at socially distanced tables.

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

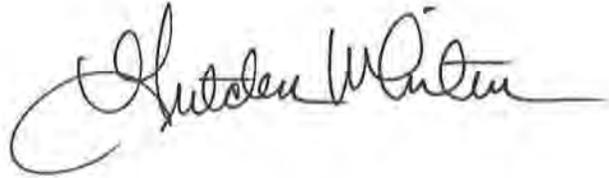
1. Food service establishments, as defined in section 1107(t) of the Michigan Food Law, 2000 PA 92, as amended, MCL 289.1107(t), that hold on-premises retailer licenses to sell alcoholic beverages must close for indoor service if they earn more than 70% of their gross receipts from sales of alcoholic beverages.
2. Any food service establishment that serves alcoholic beverages for on-premises consumption must, both indoors and outdoors:
 - (a) Require patrons to wear a face covering except when seated at their table or bar top (unless the patron is unable medically to tolerate a face covering);
 - (b) Require patrons to remain seated at their tables or bar tops, except to enter or exit the premises, to order food, or to use the restroom;
 - (c) Sell alcoholic beverages only via table service, not via orders at the bar except to patrons seated at the bar;
 - (d) Prohibit access to common areas in which people can congregate, dance, or otherwise mingle; and
 - (e) Follow all of the applicable workplace safeguards established in Executive Order 2020-114 and any order that may follow from it, including the provisions limiting capacity to 50% of normal seating and requiring six feet of separation between

parties or groups at different tables or bar tops.

3. Food service establishments that are closed for indoor service under section 1 of this order but open for outdoor service must:
 - (a) Prohibit patrons from entering the establishment, except to walk through in order to access the outdoor area, to leave the establishment, or to use the restroom; and
 - (b) Require patrons to wear a face covering while inside, except for patrons who are unable medically to tolerate a face covering.
4. Dance and topless activity permits issued under subsections 2 or 3 of section 916 of the Michigan Liquor Control Code, 1998 PA 58, as amended, MCL 436.1916(2) and (3), are temporarily suspended. Combination dance–entertainment permits and topless activity–entertainment permits issued under subsection 4 of section 916 of the Michigan Liquor Control Code, MCL 436.1916(4), are suspended to the extent they allow dancing and topless activity, but remain valid to the extent they allow other entertainment.
5. In enforcing the Michigan Liquor Control Code, the Michigan Liquor Control Commission will consider whether the public health, safety or welfare requires summary, temporary suspension of a license under section 92 of the Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.292(2).
6. For purposes of calculating its percentage of gross receipts from sales of alcoholic beverages under section 1, a food service establishment must use:
 - (a) Gross receipts from 2019; or
 - (b) If the establishment was not in operation in 2019, gross receipts from the date the establishment opened in 2020.
7. Nothing in this order should be taken to prevent food service establishments from selling alcoholic beverages for off-premises consumption to patrons who are not seated at a table, or to require such patrons to remain seated when ordering such beverages.
8. Nothing in this order should be taken to prevent the holder of a social district license under section 551 of the Michigan Liquor Control Code, 1998 PA 58, as amended by Enrolled House Bill 5781 (100th Legislature, Regular Session of 2020), to be codified at MCL 436.1551:
 - (a) From selling alcoholic beverages for consumption in a commons area within a designated social district to patrons who are not seated at a table; or
 - (b) To require such patrons to remain seated when ordering such beverages.

9. Nothing in this order should be taken to limit the authority of local health departments to adopt more stringent measures to curtail the spread of COVID-19 at food service establishments.
10. This order does not apply in Regions 6 and 8, as those regions are defined by section 1 of Executive Order 2020-110 or any order that follows from it.
11. This order takes effect at 11:00 pm on July 1, 2020.
12. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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



Date: July 1, 2020

Time: 3:31 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

SENATE JOURNAL
JUL 9 2020 PM 3:39

EXECUTIVE ORDER

No. 2020-145

Safeguards to protect Michigan's workers from COVID-19

Rescission of Executive Order 2020-114

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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 EPA, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the EMA.

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 are being challenged on appeal.

On June 18, 2020, I issued Executive Order 2020-127, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature had declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to “cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it was reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, 2020-96, and 2020-110, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective. Although the virus remains aggressive and persistent—on July 8, Michigan reported a total of 67,237 confirmed cases and 6,015 deaths—the strain on our health care system has relented, even as our testing capacity has increased. Where Michigan was once among the states most heavily hit, our per-capita case rate is now roughly equivalent to the national average.

Our progress in suppressing COVID-19, however, appears to have stalled out. Over the past week, every region in Michigan has seen an uptick in new cases, and daily case counts now

exceed 20 cases per million in the Grand Rapids, Lansing, and Kalamazoo regions. A relatively large proportion of these new cases are occurring among young people: nearly one quarter of diagnoses in June were in people aged 20 to 29, up from roughly 16% in May. That shift aligns with national trends.

In particular, businesses must do their part to protect their employees, their patrons, and their communities. Many businesses have already done so by implementing robust safeguards to prevent viral transmission. But we can and must do more: no one should feel unsafe at work. With Executive Orders 2020-91, 2020-97, and 2020-114, I created workplace standards that apply to all businesses across the state.

I am now amending those standards to make a series of changes. First, and most significantly, I have created new workplace rules governing meat and poultry processing plants. As the Centers for Disease Control and Prevention have recently confirmed, these plants have been the source of a number of outbreaks both in Michigan and across the nation. Second, the order omits sections that have been enjoined by a Michigan court and clarifies that violating any part of this executive order constitutes a misdemeanor. Third, the order requires all businesses and operations to provide any communication and training on COVID-19 in the languages that are common in their employee population. Fourth, the order updates the rules on restaurants and bars to track new safeguards added by Executive Order 2020-143. With this order, Executive Order 2020-114 is rescinded.

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

1. All businesses or operations that require their employees to leave the homes or residences for work must, at a minimum:
 - (a) Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration (“OSHA”) and available here. Within two weeks of resuming in-person activities, a business’s or operation’s plan must be made readily available to employees, labor unions, and customers, whether via website, internal network, or by hard copy.
 - (b) Designate one or more worksite supervisors to implement, monitor, and report on the COVID-19 control strategies developed under subsection (a). The supervisor must remain on-site at all times when employees are present on site. An on-site employee may be designated to perform the supervisory role.
 - (c) Provide COVID-19 training to employees that covers, at a minimum:
 - (1) Workplace infection-control practices.
 - (2) The proper use of personal protective equipment.
 - (3) Steps the employee must take to notify the business or operation of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19.
 - (4) How to report unsafe working conditions.

- (d) Provide any communication and training on COVID-19 infection control practices in the primary languages common in the employee population.
- (e) Place posters in the languages common in the employee population that encourage staying home when sick, cough and sneeze etiquette, and proper hand hygiene practices.
- (f) Conduct a daily entry self-screening protocol for all employees or contractors entering the workplace, including, at a minimum, a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19.
- (g) Keep everyone on the worksite premises at least six feet from one another to the maximum extent possible, including through the use of ground markings, signs, and physical barriers, as appropriate to the worksite.
- (h) Provide non-medical grade face coverings to their employees, with supplies of N95 masks and surgical masks reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers.
- (i) Require face coverings to be worn when employees cannot consistently maintain six feet of separation from other individuals in the workplace, and consider face shields when employees cannot consistently maintain three feet of separation from other individuals in the workplace.
- (j) Require face coverings in shared spaces, including during in-person meetings and in restrooms and hallways.
- (k) Increase facility cleaning and disinfection to limit exposure to COVID-19, especially on high-touch surfaces (e.g., door handles), paying special attention to parts, products, and shared equipment (e.g., tools, machinery, vehicles).
- (l) Adopt protocols to clean and disinfect the facility in the event of a positive COVID-19 case in the workplace.
- (m) Make cleaning supplies available to employees upon entry and at the worksite and provide time for employees to wash hands frequently or to use hand sanitizer.
- (n) When an employee is identified with a confirmed case of COVID-19:
 - (1) Immediately notify the local public health department, and
 - (2) Within 24 hours, notify any co-workers, contractors, or suppliers who may have come into contact with the person with a confirmed case of COVID-19.

- (o) An employer will allow employees with a confirmed or suspected case of COVID-19 to return to the workplace only after they are no longer infectious according to the latest guidelines from the Centers for Disease Control and Prevention ("CDC") and they are released from any quarantine or isolation by the local public health department.
 - (p) Follow Executive Order 2020-36, and any executive orders that follow it, that prohibit discharging, disciplining, or otherwise retaliating against employees who stay home or who leave work when they are at particular risk of infecting others with COVID-19.
 - (q) Establish a response plan for dealing with a confirmed infection in the workplace, including protocols for sending employees home and for temporary closures of all or part of the workplace to allow for deep cleaning.
 - (r) Restrict business-related travel for employees to essential travel only.
 - (s) Encourage employees to use personal protective equipment and hand sanitizer on public transportation.
 - (t) Promote remote work to the fullest extent possible.
 - (u) Adopt any additional infection-control measures that are reasonable in light of the work performed at the worksite and the rate of infection in the surrounding community.
2. Businesses or operations whose work is primarily and traditionally performed outdoors must:
- (a) Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.
 - (b) Limit in-person interaction with clients and patrons to the maximum extent possible, and bar any such interaction in which people cannot maintain six feet of distance from one another.
 - (c) Provide and require the use of personal protective equipment such as gloves, goggles, face shields, and face coverings, as appropriate for the activity being performed.
 - (d) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning and disinfection of tools, equipment, and frequently touched surfaces.
3. Businesses or operations in the construction industry must:
- (a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire

covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.

- (b) Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in sub-provision (b) of this section, or in the alternative issue stickers or other indicators to employees to show that they received a screening before entering the worksite that day.
 - (c) Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled face coverings.
 - (d) Require the use of work gloves where appropriate to prevent skin contact with contaminated surfaces.
 - (e) Identify choke points and high-risk areas where employees must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.
 - (f) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees.
 - (g) Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among employees at the worksite.
 - (h) Restrict unnecessary movement between project sites.
 - (i) Create protocols for minimizing personal contact upon delivery of materials to the worksite.
4. Manufacturing facilities must:
- (a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering the facility, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with temperature screening.
 - (b) Create dedicated entry point(s) at every facility for daily screening as provided in sub-provision (a) of this section, and ensure physical barriers are in place to prevent anyone from bypassing the screening.
 - (c) Suspend all non-essential in-person visits, including tours.
 - (d) Train employees on, at a minimum:
 - (1) Routes by which the virus causing COVID-19 is transmitted from person to person.

- (2) Distance that the virus can travel in the air, as well as the time it remains viable in the air and on environmental surfaces.
 - (3) The use of personal protective equipment, including the proper steps for putting it on and taking it off.
- (e) Reduce congestion in common spaces wherever practicable by, for example, closing salad bars and buffets within cafeterias and kitchens, requiring individuals to sit at least six feet from one another, placing markings on the floor to allow social distancing while standing in line, offering boxed food via delivery or pick-up points, and reducing cash payments.
 - (f) Implement rotational shift schedules where possible (e.g., increasing the number of shifts, alternating days or weeks) to reduce the number of employees in the facility at the same time.
 - (g) Stagger meal and break times, as well as start times at each entrance, where possible.
 - (h) Install temporary physical barriers, where practicable, between work stations and cafeteria tables.
 - (i) Create protocols for minimizing personal contact upon delivery of materials to the facility.
 - (j) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible.
 - (k) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees, and discontinue use of hand dryers.
 - (l) Notify plant leaders and potentially exposed individuals upon identification of a positive case of COVID-19 in the facility, as well as maintain a central log for symptomatic employees or employees who received a positive test for COVID-19.
 - (m) Send potentially exposed individuals home upon identification of a positive case of COVID-19 in the facility.
 - (n) Require employees to self-report to plant leaders as soon as possible after developing symptoms of COVID-19.
 - (o) Shut areas of the manufacturing facility for cleaning and disinfection, as necessary, if an employee goes home because he or she is displaying symptoms of COVID-19.
5. Research laboratories, but not laboratories that perform diagnostic testing, must:
- (a) Assign dedicated entry point(s) and/or times into lab buildings.

- (b) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.
 - (c) Create protocols and/or checklists as necessary to conform to the facility's COVID-19 preparedness and response plan.
 - (d) Suspend all non-essential in-person visitors until further notice.
 - (e) Establish and implement a plan for distributing face coverings.
 - (f) Limit the number of people per square feet of floor space permitted in a particular laboratory at one time.
 - (g) Close open workspaces, cafeterias, and conference rooms.
 - (h) As necessary, use tape on the floor to demarcate socially distanced workspaces and to create one-way traffic flow.
 - (i) Require all office and dry lab work to be conducted remotely.
 - (j) Minimize the use of shared lab equipment and shared lab tools and create protocols for disinfecting lab equipment and lab tools.
 - (k) Provide disinfecting supplies and require employees to wipe down their work stations at least twice daily.
 - (l) Implement an audit and compliance procedure to ensure that cleaning criteria are followed.
 - (m) Establish a clear reporting process for any symptomatic individual or any individual with a confirmed case of COVID-19, including the notification of lab leaders and the maintenance of a central log.
 - (n) Clean and disinfect the work site when an employee is sent home with symptoms or with a confirmed case of COVID-19.
 - (o) Send any potentially exposed co-workers home if there is a positive case in the facility.
 - (p) Restrict all non-essential work travel, including in-person conference events.
6. Retail stores that are open for in-store sales, as well as libraries and museums, must:
- (a) Create communications material for customers (e.g., signs or pamphlets) to inform them of changes to store practices and to explain the precautions the store is taking to prevent infection.

- (b) Establish lines to regulate entry in accordance with subsection (c) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.
- (c) Except in Regions 6 and 8, adhere to the following restrictions:
 - (1) Stores of less than 50,000 square feet of customer floor space must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.
 - (2) Stores of more than 50,000 square feet must:
 - (A) Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
 - (B) Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions such as heart disease, diabetes, and lung disease.
 - (3) The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.
- (d) Post signs at store entrance(s) instructing customers of their legal obligation to wear a face covering when inside the store.
- (e) Post signs at store entrance(s) informing customers not to enter if they are or have recently been sick.
- (f) Design spaces and store activities in a manner that encourages employees and customers to maintain six feet of distance from one another.
- (g) Install physical barriers at checkout or other service points that require interaction, including plexiglass barriers, tape markers, or tables, as appropriate.
- (h) Establish an enhanced cleaning and sanitizing protocol for high-touch areas like restrooms, credit-card machines, keypads, counters, shopping carts, and other surfaces.

- (i) Train employees on:
 - (1) Appropriate cleaning procedures, including training for cashiers on cleaning between customers.
 - (2) How to manage symptomatic customers upon entry or in the store.
 - (j) Notify employees if the employer learns that an individual (including a customer or supplier) with a confirmed case of COVID-19 has visited the store.
 - (k) Limit staffing to the minimum number necessary to operate.
7. Offices must:
- (a) Assign dedicated entry point(s) for all employees to reduce congestion at the main entrance.
 - (b) Provide visual indicators of appropriate spacing for employees outside the building in case of congestion.
 - (c) Take steps to reduce entry congestion and to ensure the effectiveness of screening (e.g., by staggering start times, adopting a rotational schedule in only half of employees are in the office at a particular time).
 - (d) Increase distancing between employees by spreading out workspaces, staggering workspace usage, restricting non-essential common space (e.g., cafeterias), providing visual cues to guide movement and activity (e.g., restricting elevator capacity with markings).
 - (e) Prohibit social gatherings and meetings that do not allow for social distancing or that create unnecessary movement through the office. Use virtual meetings whenever possible.
 - (f) Provide disinfecting supplies and require employees wipe down their work stations at least twice daily.
 - (g) Post signs about the importance of personal hygiene.
 - (h) Disinfect high-touch surfaces in offices (e.g., whiteboard markers, restrooms, handles) and minimize shared items when possible (e.g., pens, remotes, whiteboards).
 - (i) Institute cleaning and communications protocols when employees are sent home with symptoms.
 - (j) Notify employees if the employer learns that an individual (including a customer, supplier, or visitor) with a confirmed case of COVID-19 has visited the office.
 - (k) Suspend all nonessential visitors.

- (l) Restrict all non-essential travel, including in-person conference events.
8. Restaurants and bars must:
- (a) Limit capacity to 50% of normal seating.
 - (b) Require six feet of separation between parties or groups at different tables or bar tops (e.g., spread tables out, use every other table, remove or put up chairs or barstools that are not in use).
 - (c) Require patrons to wear a face covering except when seated at their table or bar top (unless the patron is unable medically to tolerate a face covering).
 - (d) Require patrons to remain seated at their tables or bar tops, except to enter or exit the premises, to order food, or to use the restroom.
 - (e) Sell alcoholic beverages only via table service, not via orders at the bar except to patrons seated at the bar.
 - (f) Prohibit access to common areas in which people can congregate, dance, or otherwise mingle.
 - (g) Create communications material for customers (e.g., signs, pamphlets) to inform them of changes to restaurant or bar practices and to explain the precautions that are being taken to prevent infection.
 - (h) Close waiting areas and ask customers to wait in cars for a notification when their table is ready.
 - (i) Close self-serve food or drink options, such as buffets, salad bars, and drink stations.
 - (j) Provide physical guides, such as tape on floors or sidewalks and signage on walls to ensure that customers remain at least six feet apart in any lines.
 - (k) Post sign(s) at store entrance(s) informing customers not to enter if they are or have recently been sick.
 - (l) Post sign(s) instructing customers to wear face coverings until they get to their table.
 - (m) Require hosts, servers, and staff to wear face coverings in the dining area.
 - (n) Require employees to wear face coverings and gloves in the kitchen area when handling food, consistent with guidelines from the Food and Drug Administration ("FDA").

- (o) Limit shared items for customers (e.g., condiments, menus) and clean high-contact areas after each customer (e.g., tables, chairs, menus, payment tools).
 - (p) Train employees on:
 - (1) Appropriate use of personal protective equipment in conjunction with food safety guidelines.
 - (2) Food safety health protocols (e.g., cleaning between customers, especially shared condiments).
 - (3) How to manage symptomatic customers upon entry or in the restaurant.
 - (q) Notify employees if the employer learns that an individual (including an employee, customer, or supplier) with a confirmed case of COVID-19 has visited the store.
 - (r) Close restaurant immediately if an employee shows symptoms of COVID-19, defined as either the new onset of cough or new onset of chest tightness or two of the following: fever (measured or subjective), chills, rigors, myalgia, headache, sore throat, or olfactory/taste disorder(s), and perform a deep clean, consistent with guidance from the FDA and the CDC. Such cleaning may occur overnight.
 - (s) Install physical barriers, such as sneeze guards and partitions at cash registers, bars, host stands, and other areas where maintaining physical distance of six feet is difficult.
 - (t) To the maximum extent possible, limit the number of employees in shared spaces, including kitchens, host stands, break rooms, and offices, to maintain at least a six-foot distance between employees.
9. Outpatient health-care facilities, including clinics, primary care physician offices, or dental offices, and also including veterinary clinics, must:
- (a) Post signs at entrance(s) instructing patients to wear a face covering when inside.
 - (b) Limit waiting-area occupancy to the number of individuals who can be present while staying six feet away from one another and ask patients, if possible, to wait in cars for their appointment to be called.
 - (c) Mark waiting rooms to enable six feet of social distancing (e.g., by placing X's on the ground and/or removing seats in the waiting room).
 - (d) Enable contactless sign-in (e.g., sign in on phone app) as soon as practicable.
 - (e) Add special hours for highly vulnerable patients, including the elderly and those with chronic conditions.

- (f) Conduct a common screening protocol for all patients, including a temperature check and questions about COVID-19 symptoms.
 - (g) Place hand sanitizer and face coverings at patient entrance(s).
 - (h) Require employees to make proper use of personal protective equipment in accordance with guidance from the CDC and OSHA.
 - (i) Require patients to wear a face covering when in the facility, except as necessary for identification or to facilitate an examination or procedure.
 - (j) Install physical barriers at sign-in, temperature screening, or other service points that normally require personal interaction (e.g., plexiglass, cardboard, tables).
 - (k) Employ telehealth and telemedicine to the greatest extent possible.
 - (l) Limit the number of appointments to maintain social distancing and allow adequate time between appointments for cleaning.
 - (m) Employ specialized procedures for patients with high temperatures or respiratory symptoms (e.g., special entrances, having them wait in their car) to avoid exposing other patients in the waiting room.
 - (n) Deep clean examination rooms after patients with respiratory symptoms and clean rooms between all patients.
 - (o) Establish procedures for building disinfection in accordance with CDC guidance if it is suspected that an employee or patient has COVID-19 or if there is a confirmed case.
10. All businesses or operations that provide in-home services, including cleaners, repair persons, painters, and the like, must:
- (a) Require their employees (or, if a sole-owned business, the business owner) to perform a daily health screening prior to going to the job site.
 - (b) Maintain accurate appointment record, including date and time of service, name of client, and contact information, to aid with contact tracing.
 - (c) Limit direct interaction with customers by using electronic means of communication whenever possible.
 - (d) Prior to entering the home, inquire with the customer whether anyone in the household has been diagnosed with COVID-19, is experiencing symptoms of COVID-19, or has had close contact with someone who has been diagnosed with COVID-19. If so, the business or operation must reschedule for a different time.

- (e) Limit the number of employees inside a home to the minimum number necessary to perform the work in a timely fashion.
 - (f) Gloves should be worn when practical and disposed of in accordance with guidance from the CDC.
11. All businesses or operations that provide barbering, cosmetology services, body art services (including tattooing and body piercing), tanning services, massage services, or similar personal-care services must:
- (a) Maintain accurate appointment and walk-in records, including date and time of service, name of client, and contact information, to aid with contact tracing.
 - (b) Post sign(s) at store entrance(s) informing customers not to enter if they are or have recently been sick.
 - (c) Restrict entry to customers, to a caregiver of those customers, or to the minor dependents of those customers.
 - (d) Require in-use workstations to be separated by at least six feet from one another and, if feasible, separate workstations with physical barriers (e.g., plexiglass, strip curtains).
 - (e) Limit waiting-area occupancy to the number of individuals who can be present while staying six feet away from one another and ask customers, if possible, to wait in cars for their appointment to be called.
 - (f) Discontinue all self-service refreshments.
 - (g) Discard magazines in waiting areas and other nonessential, shared items that cannot be disinfected.
 - (h) Mark waiting areas to enable six feet of social distancing (e.g., by placing X's on the ground and/or removing seats in the waiting room).
 - (i) Require employees to make proper use of personal protective equipment in accordance with guidance from the CDC and OSHA.
 - (j) Require employees and customers to wear a face covering at all times, except that customers may temporarily remove a face covering when receiving a service that requires its removal. During services that require a customer to remove their face covering, an employee must wear a face shield or goggles in addition to the face covering.
 - (k) Install physical barriers, such as sneeze guards and partitions at cash registers, where maintaining physical distance of six feet is difficult.
 - (l) Cooperate with the local public health department if a confirmed case of COVID-19 is identified in the facility.

12. Sports and entertainment facilities, including arenas, cinemas, concert halls, performance venues, sporting venues, stadiums and theaters, as well as places of public amusement, such as amusement parks, arcades, bingo halls, bowling alleys, night clubs, skating rinks, and trampoline parks, must:
 - (a) Post signs outside of entrances informing customers not to enter if they are or have recently been sick.
 - (b) Encourage or require patrons to wear face coverings.
 - (c) Establish crowd-limiting measures to meter the flow of patrons (e.g., digital queuing, delineated waiting areas, parking instructions, social distance markings on ground or cones to designate social distancing, etc.).
 - (d) Use physical dividers, marked floors, signs, and other physical and visual cues to maintain six feet of distance between persons.
 - (e) Limit seating occupancy to the extent necessary to enable patrons not of the same household to maintain six feet of distance from others (e.g., stagger group seating upon reservation, close off every other row, etc.).
 - (f) For sports and entertainment facilities, establish safe exit procedures for patrons (e.g., dismiss groups based on ticket number, row, etc.).
 - (g) For sports and entertainment facilities, to the extent feasible, adopt specified entry and exit times for vulnerable populations, as well as specified entrances and exits.
 - (h) Train employees who interact with patrons (e.g., ushers) on how to:
 - (1) Monitor and enforce compliance with the facility's COVID-19 protocols.
 - (2) Help patrons who become symptomatic.
 - (i) Frequently disinfect high-touch surfaces during events or, as necessary, throughout the day.
 - (j) Disinfect and deep clean the facility after each event or, as necessary, throughout the day.
 - (k) Close self-serve food or drink options, such as buffets, salad bars, and drink stations.

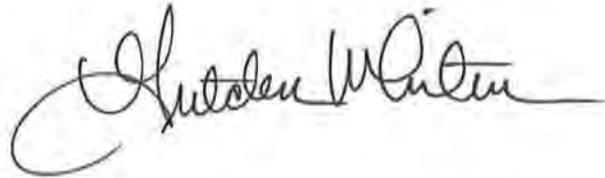
13. Gymnasiums, fitness centers, recreation centers, exercise facilities, exercise studios, and like facilities must:
 - (a) Post sign(s) outside of entrance(s) informing individuals not to enter if they are or have recently been sick.

- (b) Maintain accurate records, including date and time of event, name of attendee(s), and contact information, to aid with contact tracing.
 - (c) To the extent feasible, configure workout stations or implement protocols to enable ten feet of distance between individuals during exercise sessions (or six feet of distance with barriers).
 - (d) Reduce class sizes, as necessary, to enable at least six feet of separation between individuals.
 - (e) Provide equipment cleaning products throughout the gym or exercise facility for use on equipment.
 - (f) Make hand sanitizer, disinfecting wipes, soap and water, or similar disinfectant readily available.
 - (g) Regularly disinfect exercise equipment, including immediately after use. If patrons are expected to disinfect, post signs encouraging patrons to disinfect equipment.
 - (h) Ensure that ventilation systems operate properly.
 - (i) Increase introduction and circulation of outdoor air as much as possible by opening windows and doors, using fans, or other methods.
 - (j) Regularly clean and disinfect public areas, locker rooms, and restrooms.
 - (k) Close steam rooms and saunas.
14. Meat and poultry processing plants must:
- (a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering the facility, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with temperature screening.
 - (b) Create at least one dedicated entry point at every facility for daily screening as provided in sub-provision (a) of this section, and ensure physical barriers are in place to prevent anyone from bypassing the screening.
 - (c) Configure communal work environments so that employees are spaced at least six feet apart in all directions (e.g., side-to-side and when facing one another).
 - (d) Require employees to wear a face covering whenever present at the facility, except when removal is necessary to eat or drink.

- (e) Provide clean cloth face coverings (or disposable mask options) for employees to use when the coverings become wet, soiled, or otherwise visibly contaminated over the course of a workday.
- (f) Use face shields in addition to face coverings as necessary when engineering and administrative controls are difficult to maintain and there may be exposure to other workplace hazards, such as splashes or sprays of liquids on processing lines
- (g) Install physical barriers, such as strip curtains, plexiglass, or other impermeable dividers or partitions, to separate meat and poultry processing employees from each other.
- (h) Take measures to ensure adequate ventilation in work areas to help minimize employees' potential exposures.
- (i) Encourage single-file movement with a six-foot distance between each employee through the facility.
- (j) Stagger employees' arrival, departure, break, and lunch times to avoid congregations of employees in parking areas, locker rooms, lunch areas, and near time clocks.
- (k) Provide visual cues (e.g., floor markings, signs) as a reminder to employees to maintain social distancing.
- (l) Designate employees to monitor and facilitate social distancing on the processing floor.
- (m) Reduce processing capacity or modify the processing or production lines and/or stagger workers across shifts to minimize the number of employees in the facility at any one time.
- (n) Adopt sick leave policies that discourage employees from entering the workplace while sick and modify any incentive programs that penalize employees for taking sick leave.
- (o) Group employees together in cohorts, if feasible, in a manner that allows a group of employees to be assigned to the same shifts with the same coworkers, so as to minimize contacts between employees in each cohort.
- (p) If an employee becomes or reports being sick, disinfect the workstation used and any tools handled by the employee.
- (q) Provide personal protective equipment that is disposable (preferred) or, if reusable equipment is provided, ensure proper disinfection and storage in a clean location when not in use.

15. Employers must maintain a record of the requirements set forth in Sections 1(c) (training), (d) (screening protocol), and (k) (required notifications).
16. Executive Order 2020-114 is rescinded.
17. Nothing in this order shall be taken to limit or affect any rights or remedies otherwise available under law.
18. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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



Date: July 9, 2020

Time: 2:16 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

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SECRETARY OF STATE
2020 JUL 17 AM 3:01

EXECUTIVE ORDER

No. 2020-153

Masks

Rescission of Executive Order 2020-147

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. 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 under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And 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 EPA, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the EMA.

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 are being challenged on appeal.

On June 18, 2020, I issued Executive Order 2020-127, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature had declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to “cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it was reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, 2020-92, 2020-96, and 2020-110, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective. Although the virus remains aggressive and persistent—on July 16, Michigan reported a total of 71,842 confirmed cases and 6,101 deaths—the strain on our health care system has relented, even as our testing capacity has increased. Where Michigan was once among the states most heavily hit, our per-capita case rate is now roughly equivalent to the national average.

Our progress in suppressing COVID-19, however, appears to have stalled. Over the past two weeks, every region in Michigan has seen an uptick in new cases, and daily case counts now exceed 20 cases per million in all but one region in the state. Research confirms that a big part of the reason is spotty compliance with my requirement, issued in prior orders, that individuals wear face coverings in public spaces. [A study](#) on different regions in

Germany, for example, suggests that the adoption of mandatory mask ordinances decreased the daily growth rate of COVID-19 infections by 40%. Modeling from the University of Washington similarly indicates that more than 40,000 lives would be spared nationwide if 95% of the population wore a mask while in public. And a study conducted by Goldman Sachs concluded that a federal mask mandate could save the U.S. economy from taking a 5% hit to GDP.

Wearing a mask is an effective and low-cost way to protect ourselves and our families from a deadly disease. It should be—and is—the responsibility of every Michigander. Last week, I issued a mask order requiring individuals to wear a face covering whenever they are in an indoor public space or in a crowded outdoor space. As significantly, the order required any business that is open to the public to refuse entry and service to people who refuse to wear a face covering. No shirts, no shoes, no mask—no service.

This order reissues the original order and makes several minor changes. First, it provides that wearing a mask at a polling place for purposes of voting in an election is not required, though wearing a mask to protect yourself and others is strongly encouraged. Second, the order clarifies that businesses may not assume that an unmasked customer cannot medically tolerate a face covering, though they may accept a customer's verbal representation to that effect. Third, the order addresses the interaction between the mask order and prior Safe Start orders that also required face coverings in indoor public spaces. Finally, the order clarifies that public safety officers must wear a face covering unless doing so would seriously interfere in the performance of their responsibilities.

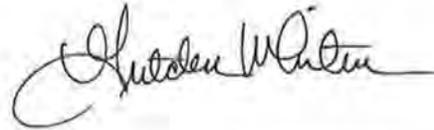
Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Any individual who leaves their home or place of residence must wear a face covering over their nose and mouth:
 - (a) When in any indoor public space;
 - (b) When outdoors and unable to consistently maintain a distance of six feet or more from individuals who are not members of their household; and
 - (c) When waiting for or riding on public transportation, while in a taxi or ride-sharing vehicle, or when using a private car service as a means of hired transportation.
2. Although a face covering is strongly encouraged even for individuals not required to wear one, the requirement to wear a face covering does not apply to individuals who:
 - (a) Are younger than five years old (and, per guidance from the Centers for Disease Control and Prevention ("CDC"), children under the age of two should not wear a mask);
 - (b) Cannot medically tolerate a face covering;
 - (c) Are eating or drinking while seated at a food service establishment;

- (d) Are exercising when wearing a face covering would interfere with the activity;
 - (e) Are receiving a service for which temporary removal of the face covering is necessary;
 - (f) Are entering a business or are receiving a service and are asked to temporarily remove a face covering for identification purposes;
 - (g) Are communicating with someone who is deaf, deafblind, or hard of hearing and where the ability to see the mouth is essential to communication;
 - (h) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a mask would seriously interfere in the performance of their public safety responsibilities;
 - (i) Are at a polling place for purposes of voting in an election;
 - (j) Are officiating at a religious service; or
 - (k) Are giving a speech for broadcast or to an audience, provided that the audience is at least six feet away from the speaker.
3. To protect workers, shoppers, and the community, no business, government office, or operation that is open to the public may provide service to a customer or allow a customer to enter its premises, unless the customer is wearing a face covering as required by this order.
- (a) Businesses that are open to the public must post signs at entrance(s) instructing customers of their legal obligation to wear a face covering while inside. The Michigan Department of Labor and Economic Opportunity may, in its discretion, require such businesses to post signs developed and made available by the Department, or conforming to requirements established by the Department.
 - (b) A department or agency that learns that a licensee is in violation of this section will consider whether the public health, safety or welfare requires summary, temporary suspension of the business's license to operate (including but not limited to a liquor license) under section 92 of the Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.292(2).
 - (c) A business may not assume that someone who enters the business without a face covering falls in one of the exceptions specified in section 2 of this order, including the exception for individuals who cannot medically tolerate a face covering. A business may, however, accept a customer's verbal representation that they are not wearing a face covering because they fall within a specified exception.

4. For purposes of this order, neither child care centers nor day, residential, travel, or troop camps, as defined by Rule 400.11101 of the Michigan Administrative Code, are considered public spaces.
5. The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.
6. Nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances, and no individual is subject to penalty under section 8 of this order for removing a mask while engaging in religious worship at a house of religious worship. Consistent with guidance from the CDC, congregants are strongly encouraged to wear face coverings during religious services.
7. This order takes effect immediately and Executive Order 2020-147 is rescinded. This order also rescinds:
 - (a) The portions of Executive Orders 2020-110 and 2020-115 pertaining to face coverings; and
 - (b) Section 16 of Executive Order 2020-110 and section 12 of Executive Order 2020-115, but only to the extent they provide that failure to comply with the requirement to wear a face covering is not a misdemeanor.
8. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor, but no term of confinement may be imposed for a violation of section 1 of this order.

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



Date: July 17, 2020

Time: 1:19 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE