

IN THE UNITED STATES DISTRICT COURT
FOR THE 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,

Case No. 1:20-cv-00414

vs.

Hon. Paul L. Maloney

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,

**PLAINTIFFS' REPLY REGARDING
MOTION FOR PRELIMINARY
INJUNCTION & REQUEST FOR
SCHEDULING CONFERENCE IN
LIEU OF PRELIMINARY
INJUNCTION HEARING**

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Introduction

In several of the other cases filed in this Court in which plaintiffs sought a preliminary injunction to enjoin Governor Whitmer’s coronavirus-related executive orders, the Governor issued new executive orders permitting the plaintiffs’ conduct shortly before this Court was scheduled to hear and decide the plaintiffs’ motions for injunctive relief. The same happened here. The Plaintiffs filed their motion for preliminary injunction on Monday, May 18, 2020. On May 19, this Court scheduled a preliminary injunction hearing for May 28 and ordered the Governor to file a response brief by May 22. (Order, DE 13, PageID.438). On May 21, Governor Whitmer issued EO 2020-96, which will rescind the Governor’s prohibition of “non-essential” medical procedures, but only on May 29, the day *after* the Court’s scheduled hearing. The Defendants then filed briefs on May 22, asserting that the Plaintiffs’ claims have been mooted.

The Defendants are wrong. This case is far from moot. Governor Whitmer has repeatedly expressed concerns about a “second wave” of COVID-19 infections. In the Governor’s latest declaration of a state of emergency—EO 2020-99 issued just this past Friday, May 22, 2020—she argues that statewide stay-home measures continue to be necessary, not only to prepare for that second wave of infections, but also to address widespread economic, health, and social harms of the pandemic. Likewise, the Governor’s MI Safe Start Plan for reopening the economy warns that the Governor may need to revert to an earlier phase of the shutdown, possibly restricting “non-essential” procedures again as she did in EO 2020-17, if the risk increases or if people stop adhering to safe practices. Absent a ruling from this Court, Governor Whitmer can simply issue another executive order that re-imposes her ban on non-essential medical procedures. And in any event, Governor Whitmer’s executive orders still impose numerous requirements upon the Plaintiffs’ provision and receipt of medical care.

The Plaintiffs recognize, however, that the Governor's recent executive order reduces the exigency for preliminary injunctive relief. The Plaintiffs therefore withdraw their motion for a preliminary injunction, reserving the right to re-file it should the need arise. Because the Court has already scheduled proceedings to occur in this case at 9:00 a.m. on May 28, 2020, the Plaintiffs respectfully request that this Court hold a scheduling conference at that date and time so that the parties and the Court can determine, based on the unique posture of this case, the most efficient manner in which to proceed to judgment.

Argument

I. The Plaintiffs respectfully request that the Court hold a scheduling conference on May 28 in lieu of a preliminary injunction hearing.

With the Plaintiffs' motion for preliminary injunction withdrawn, this Court need not go forward with the preliminary injunction hearing scheduled at 9:00 a.m. on May 28, 2020. (Order, DE 13, PageID.438). The Plaintiffs respectfully request that the Court instead hold an initial status or scheduling conference with the parties at that date and time in order to determine how best to streamline the issues for this Court's resolution.

The parties have submitted substantial briefing on several significant issues. Some of the issues of state law are potentially wending their way through the Michigan state courts. Further, several cases challenging various aspects of Governor Whitmer's executive orders have been filed in this Court. A scheduling conference would assist the Court and the parties to discuss and determine how to present the relevant issues and facts to the Court in the manner that would be most efficient and streamlined for the Court, particularly in view of other pending litigation.

II. Neither this case nor the preliminary injunction motion is moot.

Even though Plaintiffs have withdrawn their request for a preliminary injunction, Plaintiffs address a few points in response to the Defendants' arguments:

First, the issues before the Court are not moot. Governor Whitmer’s new Stay Home, Stay Safe order—EO 2020-96 (**Exhibit 1**)—does not lift the restrictions on non-essential medical procedures imposed by EO 2020-17 until May 29, the day after the Court’s scheduled preliminary-injunction hearing.¹ Even if EO 2020-96 mooted anything—and it does not, for the reasons stated below—it does not rescind the relevant order until the hearing is already over.

Second, even under EO 2020-96, the Plaintiffs will be subject to a host of new sanitation and workflow requirements under EO 2020-97 (**Exhibit 2**), with which they must comply. Governor Whitmer’s executive orders therefore still directly burden the Plaintiffs.

Third, the Defendants are entirely off track in arguing that their “voluntary cessation” of their activity moots the claim. “The heavy burden of demonstrating mootness rests on the party claiming mootness.” *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003). A defendant’s decision to voluntarily cease the challenged activity does not automatically moot a claim. “It is well settled that ‘a defendants voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.’ ... ‘[I]f it did, the courts would be compelled to leave [t]he defendant ... free to return to his old ways.’ ” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (citation omitted). Instead, a case is mooted only if “subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,” *id.*, and “interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

¹ Delaying the rescission of EO 2020-17 produces odd results: For example, there are counties in northern lower Michigan and the Upper Peninsula (identified as regions 6 and 8 under EO 2020-96) where Michiganders today can enjoy a drink at a bar or dinner at a restaurant, yet the same individuals cannot undergo knee or bariatric surgery there or anywhere in the State.

Where a governmental defendant changes its conduct by adopting a new regulation through a formal legislative process, the Sixth Circuit accords some solicitude to the government's assertion that it will not repeat its conduct, reasoning that the government will not likely be able to immediately revert to its prior position. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019). But a different rule applies if the processes leading to the governmental actor's change in conduct were "ad hoc, discretionary, and easily reversible actions." *Id.* In other words, "[i]f the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Id.* at 768-69. *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (changing a policy at the direction of the governor did not moot the case); *Carpenter-Barker v. Ohio Dep't of Medicaid*, 752 F. App'x 215, 222-23 (6th Cir. 2018) (finding the case not mooted by voluntary cessation where rulemaking authority lay solely with the defendant).

That is precisely the case here. Governor Whitmer has sole discretion to issue these orders and may do so at any time. There is no formal legislative process or any other cumbersome process to slow down or modulate the issuance of her executive orders. None of the Governor's current coronavirus-related orders has come with any advanced warning; they are simply announced at the Governor's prerogative and often take effect immediately upon issuance.

There is also every reason to suspect that Governor Whitmer may again prohibit non-essential medical procedures. Governor Whitmer's latest declaration of emergency—contained in EO 2020-99—warns of a "second wave" of coronavirus cases in Michigan: "A second wave of COVID-19 cases continues to pose a deadly threat to the people of this state. As various sectors of Michigan's economy begin to reopen, we must be able to respond nimbly to new data

about transmission and health risks of the virus.” (**Exhibit 3**). As pointed out in the Plaintiffs’ prior pleadings, Governor Whitmer’s phased reopening plans for Michigan specifically reference the possibility of re-closing operations in the event of a second wave, and Governor Whitmer has also likened the reopening of the State to a “dial,” which can be turned backwards as easily as it is turned forwards. (Plaintiffs’ Br., DE 10, PageID.253-254).

Governor Whitmer’s prolific issuance of executive orders shows just how easy that may be. In less than three months, Governor Whitmer has issued 97 executive orders related to the coronavirus pandemic—an astonishing average of more than one executive order per day. The Stay at Home orders themselves have gone through nine iterations: EOs 2020-21, 2020-42, 2020-59, 2020-70, 2020-77, 2020-90, 2020-91 & -92, 2020-96 & -97, and 2020-100. Assuming that Governor Whitmer is correct that she is entitled to proclaim an emergency under Michigan law and extend it for as long as she chooses, nothing stops the Governor from re-imposing a ban that again prohibits the Plaintiffs from receiving and providing non-essential medical care. This case is far from being moot.

III. The Defendants are wrong on the merits.

Due to the Governor’s decision to re-permit the provision of non-essential medical care, the Plaintiffs expect that the parties will conduct discovery and fully brief the merits of the claims afterwards. At this point, it suffices to observe that the Defendants are wrong on the merits.

In their state-law claims, Plaintiffs asserted that the Governor’s executive orders are impermissible under two Michigan statutes: the Emergency Powers of the Governor Act of 1945 (the “EPGA”) and the Emergency Management Act of 1976 (the “EMA”). Last week, the Michigan Court of Claims correctly ruled that the executive orders violated the EMA. Although the Court of Claims upheld the Governor’s authority under the EPGA, the court emphasized that

the EPGA allows the Governor to issue only “reasonable” orders that are “necessary” under the circumstances. (Ex. L to Governor’s Br., DE 17-15, PageID.709).

As pointed out in the Plaintiffs’ motion, Governor Whitmer admitted on May 1, 2020 that there was no longer a need to prohibit non-essential medical procedures, and she encouraged patients to have joint replacement surgeries performed—even though her own executive orders prohibited providers from performing those surgeries on pain of criminal penalty. (Plaintiffs’ Br., DE 10, PageID.242-243). Despite having admitted that there was no basis to prevent these procedures from occurring after May 1, Governor Whitmer chose to continue to criminalize these procedures for another full month: until May 29. It was neither reasonable nor necessary for her to do so.

Neither of the Defendants’ briefs responds to this point or even acknowledges the Governor’s comments. Instead, they ask the Court to avoid deciding the issue altogether, citing a hodge-podge of abstention and discretionary doctrines. But none of the abstention doctrines squarely applies. And despite the Governor’s insistence in her brief that the state-law issues be decided in state courts, her position in current state-court litigation is the opposite: the Governor argued in the Court of Claims that the Michigan Legislature lacked standing to prosecute the claims in state court. (Ex. L to Governor’s Br., DE 17-15, PageID.696). The Governor, in other words, is asking this Court to defer to the state court’s resolution of these questions on the merits, but is simultaneously asking the state courts to dismiss the current litigation without reaching the merits. The Defendants cannot have it both ways.

Nor would it serve any purpose for this Court to decline to exercise jurisdiction over portions of the Plaintiffs’ state-law claims under the Declaratory Judgment Act. Even if the Court declined jurisdiction over the claims for declaratory relief, the Court would still need to

resolve the Plaintiffs' claims for permanent injunctive relief and damages, which would require the same substantive analysis. The Court would also need to resolve the Plaintiffs' federal claims, which turn on many of the same facts.

Nor would it be practical for the Court to refuse to exercise supplemental jurisdiction over the state-law claims, because there is substantial factual overlap between the state-law and the federal claims. Many of the facts that are relevant to whether the Governor's conduct was "reasonable" and "necessary" under the EPGA are the same facts that are relevant to Plaintiffs' federal claims as well. For example, the Plaintiffs' substantive due process claim alleges that the Governor's conduct was overbroad and unreasonable, especially given the Governor's admission that the prohibition was no longer necessary at least a month before she determined to rescind it.

The Defendants' responses to the remainder of the Plaintiffs' claims are similarly uninspired. They claim that the Governor's orders are not unconstitutionally vague because they gave broad discretion to licensed medical providers about whether and how to comply with them—which is almost the textbook definition of a vague criminal law. They agree that no procedural due process was provided to the Plaintiffs but assert that none is necessary—even if, presumably, the pandemic lasts for years to come.

The Defendants' reliance upon *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), does not get them very far, either. The Defendants cite *Jacobson* in support of the argument that the State's conduct taken in response to a pandemic is virtually unreviewable by a court. (Governor's Br., DE 17-2, PageID.581). But the Defendants have been telling the Michigan Court of Claims a different story: In that forum, Governor Whitmer has argued that the EPGA limits the Governor only to reasonable and necessary actions—an eminently reviewable standard. And, in

fact, *Jacobson*—which involved only a compulsory smallpox vaccination, not a months-long shutdown of the entire economic and social activity of a State—does not advocate limitless deference to the executive in an epidemic. Instead, a regulation “purporting to have been enacted to protect the public health, the public morals, or the public safety” is valid only if it has a “real or substantial relation to those objects.” *Jacobson*, 197 U.S. at 31. “[The] acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.” *Id.* at 28. The executive orders that are at issue in this case go well beyond the scope of permissible state action in response to an epidemic.

Conclusion

The Plaintiffs agree to withdraw their motion for a preliminary injunction. The Plaintiffs respectfully request that the Court hold a scheduling conference on May 28, 2020 to discuss the most efficient manner of presenting the remaining issues to the Court for decision.

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Dated: May 26, 2020

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EXHIBIT

1



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-96

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

Rescission of Executive Orders 2020-17, 2020-34, and 2020-92

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, 2020-77, and 2020-92, 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 20, 2020, Michigan reported 53,009 confirmed cases and 5,060 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.

With this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-92, while also allowing gatherings of no more than ten people statewide, effective immediately, and permitting retailers and motor vehicle dealerships to see customers by appointment, beginning on May 26, 2020. In addition, because our health-care capacity has improved with respect to personal protective equipment, available beds, personnel, ventilators, and necessary supplies, I find it reasonable to rescind Executive Orders 2020-17 and 2020-34, which required health-care and veterinary facilities to implement plans to postpone some medical and dental procedures. Those rescissions will take effect on May 29.

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 2020-97 and any orders that may follow from 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 2020-97 and any orders that may follow from 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 2020-97 and any orders that may follow from 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 for themselves or a household or family member.

- (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 go to a motor vehicle dealership showroom by appointment, as permitted under section 11(p) of this order.
 - (C) Individuals may leave the home to have a bicycle repaired or maintained.
 - (D) 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.
 - (20) To go to a retail store by appointment, as permitted under section 11(q) of this order.
 - (21) To attend a social gathering of no more than 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 until May 26, 2020 at 12:01 am.
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 2020-97 and any orders that may follow from 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, 2020, workers necessary to perform retail activities. For purposes of this order, retail activities are defined:
 - (1) As the selling of goods and the rendering of services incidental to the sale of the goods (e.g., any packaging and processing to allow for or facilitate the sale and delivery of the goods).
 - (2) To exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that may follow from it.
- (m) For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, 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, 2020, workers in restaurants or bars, subject to the capacity constraints and workplace standards described in Executive Order 2020-97. 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. For restaurants and bars subject to this subsection, this subsection supersedes the limitations placed on those restaurants and bars by Executive Order 2020-69 and any order that may follow from it.
 - (o) Workers necessary to prepare a workplace to follow the workplace standards described in Executive Order 2020-97 and to otherwise ready the workplace for reopening.
 - (p) Beginning at 12:01 am on May 26, 2020, workers at motor vehicle dealerships, provided that showrooms are open only by appointment.
 - (q) Beginning at 12:01 am on May 26, 2020, workers necessary to perform retail activities by appointment, provided that the store is limited to 10 customers at any one time. For purposes of this order, retail activities are defined:
 - (1) As the selling of goods and the rendering of services incidental to the sale of the goods (e.g., any packaging and processing to allow for or facilitate the sale and delivery of the goods).
 - (2) To exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that may follow from it.
 - (r) 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), section 11(c), or section 11(q) 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. An individual may also remove a face covering 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. Except as otherwise expressly stated in this order, 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 22 of this order for allowing religious worship at such place. No individual is subject to penalty under section 22 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.

19. Executive Order 2020-17, which imposed temporary requirements regarding the postponement of non-essential medical and dental procedures, is rescinded as of May 28, 2020 at 11:59 pm. Executive Order 2020-34, which imposed temporary requirements regarding the postponement of veterinary services, is rescinded as of May 28, 2020 at 11:59 pm. Outpatient health-care facilities, including veterinary offices, are subject to the workplace safety rules described in Executive Order 2020-97.
20. Executive Orders 2020-92 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.
21. 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.
22. 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 21 2020

Time: 9:49 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

EXHIBIT

2



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-97

Safeguards to protect Michigan's workers from COVID-19

Rescission of Executive Order 2020-91

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, 2020-77, and 2020-92, 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 20, 2020, Michigan reported 53,009 confirmed cases and 5,060 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 Executive Order 2020-91, 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 outpatient health-care facilities.

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) 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”).

- (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 worksite 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 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 work 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 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, 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 the U.S. Occupational Health and Safety Administration.
 - (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. Employers must maintain a record of the requirements set forth in Sections 1(c), (d), and (k).
11. The rules described in sections 1 through 10 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 10 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.
12. Any business or operation that violates the rules in sections 1 through 10 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.
13. 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 21, 2020

Time: 9:49 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

EXHIBIT

3



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-99

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

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

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

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

On April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

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

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

My administration has also moved quickly to mitigate the economic and social harms of this pandemic. Through my orders, we have placed strict rules on businesses to prevent price gouging, put a temporary hold on evictions for families that cannot make their rent, expanded eligibility for unemployment benefits, provided protections to workers who stay home when they or their close contacts are sick, and created a structure through which our schools can continue to provide their students with the highest level of educational opportunities possible under the difficult circumstances now before us.

These statewide measures have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over. Though its pace of growth has showed signs of slowing, the virus remains aggressive and persistent: to date, there have been 53,510 confirmed cases of COVID-19 in Michigan, and 5,129 deaths from the disease. There remains no treatment for the virus; it remains easy to transmit, passing from asymptomatic individuals and surviving on surfaces for days; and we still lack adequate means to fully test for it and trace its spread. COVID-19 remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit southeast Michigan hardest, the disease is now spreading more quickly in other parts of the state. For instance, cases in some counties in western and mid-Michigan are now doubling approximately every 10 days.

Michigan's Safer at Home orders have aimed to reduce the spread of COVID-19 within the state. As summer approaches, Michigan's more rural counties are beginning to see more out-of-town visitors. The residents of these rural counties are among the most vulnerable to COVID-19, with older populations and rates of chronic illness among the highest in the state. Twenty-one of Michigan's eighty-three counties—all rural—have a median age over 50, and nearly 30% of Michigan's rural population is 65 or older. These rural areas tend to be miles away from larger hospitals with the personnel, beds, and equipment to fight this virus.

The economic and social harms from this pandemic likewise persist. Michigan has experienced an uptick in individuals reaching out to domestic violence hotlines and many shelters across Michigan are already over capacity. Due to the pandemic and the responsive measures necessary to address it, businesses and government agencies have had to quickly and dramatically adjust how they work. Where working from home is not possible, businesses have closed or significantly restricted their normal operations.

The economic damage—already severe—will continue to compound with time. Between March 15 and May 13, Michigan had 1.8 million initial unemployment claims—the fifth-highest nationally, amounting to nearly 36% of the Michigan workforce. During this crisis, Michigan has often processed more unemployment claims in a single day than in the most painful week of the Great Recession, and the state has already reached its highest unemployment rate since the Great Depression (22.7% in April). Between March 15 and May 21, Michigan paid out over \$7 billion in benefits to eligible Michiganders. The Michigan Department of Treasury predicts that this year the state will lose between \$1 and \$3 billion in revenue. As a result, local governments will struggle to provide essential services to their communities and many families in Michigan will struggle to pay their bills or even put food on the table.

So too will the pandemic continue to disrupt our homes and our educational, civic, social, and religious institutions. Transitioning almost overnight to a distance-learning environment has placed strain on educators, students, and parents alike. The closure of museums and theaters limits people's ability to enrich themselves through the arts. And curtailing gatherings has left many seeking new ways to connect with their community during these challenging times.

A second wave of COVID-19 cases continues to pose a deadly threat to the people of this state. As various sectors of Michigan's economy begin to reopen, we must be able to respond nimbly to new data about transmission and health risks of the virus. Over the past months, researchers have discovered that COVID-19 can attack not only the lungs, but also the heart, brain, kidneys, liver, and blood. While older individuals are at higher risk of contracting and dying from COVID-19, studies have shown that the disease may increase the severity of strokes in younger people.

The health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster. While the virus has afflicted some regions of the state more severely than others, the extent of the virus's spread, coupled with its elusiveness and its ease of transmission, render the virus difficult to contain and threaten the entirety of this state. Michigan's fatality rate from COVID-19 remains the highest among neighboring states and sits around three percentage points higher than the national average. The underlying health factors that contribute to the severity of COVID-19 in Michigan remain present, as does the disease.

Although local health departments have some limited capacity to respond to cases as they arise within their jurisdictions, state emergency operations are necessary to bring this pandemic under control in Michigan and to build and maintain infrastructure to stop the spread of COVID-19, trace infections, and quickly direct additional resources to hot-spots as they emerge. State assistance to bolster health care capacity and flexibility also has been, and will continue to be, critical to saving lives, protecting public health and safety, and

averting catastrophe. Moreover, state disaster and emergency recovery efforts remain necessary not only to support Michiganders in need due to the economic effects of this pandemic, but also to ensure that the prospect of lost income does not impel workers who may be infected to report to work.

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

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

1. The COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan.
2. This order constitutes a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. Subject to the ongoing litigation, and the possibility that current rulings may be overturned or otherwise altered on appeal, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act of 1976 when emergency and disaster conditions exist yet the legislature has not granted an extension request, this order constitutes a state of emergency and state of disaster declaration under that act.
3. This order is effective immediately and continues through June 19, 2020 at 11:59 pm. I will evaluate the continuing need for this order prior to its expiration.
4. Executive Orders 2020-67 and 2020-68 are rescinded. All previous orders that rested on those orders now rest on this order.

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



Date: May 22, 2020

Time: 4:49 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE