# GOVERNOR WHITMER'S "STAY AT HOME" EXECUTIVE ORDER

*What it means for Churches and Religious Organizations*

On March 23, 2020, Governor Whitmer enacted Executive Order 2020-21. [1] This Executive Order ("Order"), with limited exceptions, requires Michigan citizens to *stay at home*. The reasons for the "stay at home" order include:

- suppressing the spread of COVID-19,
- preventing an overwhelmed state health care system,
- allowing time for the production of critical medical equipment, and
- avoiding needless deaths.

This Order stays in effect until April 13, 2020, unless extended by the Governor.

## CONSTITUTIONAL AND STATUTORY AUTHORIZATION RELIED UPON BY THE GOVERNOR

Whenever government acts, some constitutional or statutory authority must authorize the action. According to the Governor, Michigan's 1963 Constitution authorizes her actions:

> Section 51 of article 4 of the Michigan Constitution of 1963 declares the public health and general welfare of the people of the State of Michigan as matters of primary public concern.
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> Section 8 of article 5 of the Michigan Constitution of 1963 places each principal department of state government under the supervision of the governor unless otherwise provided.
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> Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.
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> Section 8 of article 5 of the Michigan Constitution of 1963 obligates the governor to take care that the laws be faithfully executed.

The Governor also specifically relies upon the following statutory law:

> 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).

[1] Please read the entire Executive Order for a more complete understanding of the Governor's mandate and exceptions. EO 2020-21. For additional information see Michigan.gov/coronavirus.

## REGULATED ACTIVITY

Relying upon the above indicated provisions, the Governor orders everyone living in Michigan to "stay at home." The Order further prohibits "all public and private gatherings of *any number of people* occurring among persons not part of a single household." *(Emphasis added)*. The Order additionally requires everyone who leaves their home to:

> *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.*

## EXCEPTIONS TO THE "STAY AT HOME" ORDER

A number of exceptions to the Governor's mandate exist. The Order permits residents to leave their home and travel as necessary in certain situations. For example, under the Order you may engage in certain types of "outdoor activities," such as walking, hiking, biking, etc. as long as you maintain six feet of distance from other people. Likewise, the Order also permits you to acquire essential services and supplies like food. Similarly, the Order allows you to perform tasks necessary to your health and safety, or to the health and safety of your family. Other exceptions exist for "Critical Infrastructure Workers" and certain government activities.

Ironically, at a time when we need God the most, the Governor's Order considers the Church's work non-essential. Nonetheless, pastors and churches might find some legal support for their activity in the Order. For example, the Order says "an entity" may "conduct operations" that require workers to leave their homes "to the extent that those workers are necessary to conduct minimum basic operations." For a church, minimum basic operations arguably requires teaching God's Word.[2]

Workers *necessary to conduct minimum basic operations* include those whose "in-person presence is strictly necessary" to allow the operation to, for example, "maintain the value of equipment, ensure security, process transactions (e.g., payroll and employee benefits), or facilitate the ability of other workers to work remotely." *(Emphasis added)*. Thus, a good argument exists that this provision covers Church workers necessary to live-stream the teaching of God's Word.

Each operation "must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation." "[O]perations must make such designations in writing, whether by electronic message, public website, or other appropriate means.[3] Thus, an exception allows a person to leave their home to conduct minimum basic operations for a church, religious organization, or business, after being designated to perform such work by their employer.

Another relevant exception allows one to leave their home "[t]o care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons." The Church and other religious entities regularly

[2] See e.g., Matt 28:16-20
[3] The Order, however, allows oral designations until March 31, 2020 at 11:59 pm.

engage in all these activities. When we do so, this provision should apply.

Additionally, a person may leave their home:

> *[t]o 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. (emphasis added).*

Here the Order does not define "assistance." In light of the existing emergency, one may reasonably infer that "assistance" includes spiritual assistance as well as sustenance. Again, when religious entities engage in the covered activities, this provision should apply.

Finally, under the pretense of protecting an individual's religious liberty, the Governor's Order states:

> *Consistent with prior guidance, a place of religious worship, when used for religious worship, is not subject to [the penalty provided]"*

It is reasonable to conclude that the language here necessarily implies that participants in ordinary worship services are likewise exempt from the penalty. We suggest that otherwise the phrase has no reasonable meaning, as it cannot reasonably be construed to refer to worship only by clergy. To be sure, the Executive Order creates unnecessary tension between freedom of religion and the Governor's existing statutory authority to act in a state of emergency. The Governor apparently did not consider the limits of constitutional liberty on the exercise of Executive power. The following constitutional analysis more fully explains these concerns.

## CONSTITUTIONAL ANALYSIS

Unconstitutional interference with a citizen's freedom of religion must not stand. Government must not use its power in ways hostile to religion or religious viewpoints.[4] Indeed, government ought to protect and not impede the free exercise of religious conscience.[5]

### *Limits on Governor's Power under the First Amendment to the United States Constitution*

The First Amendment to the United States Constitution protects individuals against government actions substantially interfering with the free exercise of religion.[6] Under this constitutional provision, government authorities hold no power to dictate acceptable verses unacceptable exercises of religious conscience.

[4] *See e.g., Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1731 (2018).
[5] *See e.g., Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2022 (2017) (holding government violates Free Exercise Clause if it conditions a generally available public benefit on an entity giving up its religious character); *Burwell* v. *Hobby Lobby Stores, Inc.,*134 S. Ct. 2751, 2775 (2014) (holding Religious Freedom Restoration Act applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 565 U.S. 171, 196 (2012) (barring employment discrimination suit brought against religious school). *See also,* E.O. 13831; E.O. 13798, 82 FR 21675 (May 9, 2017).
[6] U.S. Const. amend. I

The Supreme Court, for a time, viewed the free exercise of religious conscience as an unalienable right. Thus, in a number of cases, the Court strictly scrutinized government actions interfering with a person's free exercise of religion. As we shall see, though, this high standard of review does not necessarily mean a court will always protect the free exercise of religion.

In *Sherbert v Verner*, the Court struck down government action denying unemployment benefits to a person who lost her job when she did not work on her Sabbath.[7] Similarly, in *Wisconsin v. Yoder*, the Court overturned convictions for violations of state compulsory school attendance laws that conflicted with defendants' sincerely held religious beliefs.[8] Because the Court considered these unalienable rights fundamental, it required government to provide a compelling interest to justify interfering with an individual's free exercise of religion. The Court, while applying this strict scrutiny to government action, further required the government to show it used the least restrictive means available to accomplish its interest.

The Court, however, eventually drifted away from this constitutional absolute in connection with its treatment of the freedom of religion. In *Employment Division v. Smith,* the Supreme Court upheld as constitutional a law substantially infringing upon the free exercise of religious conscience.[9] In *Smith* the Court characterized the government action at issue as a neutral law of general applicability. Because the government action was neutral and generally applicable, the Court required no justification by the government for its action—even though the action substantially infringed upon the free exercise of religious liberty. Thus, the Court concluded that in such situations government action is constitutional if rationally related to a legitimate government interest—the lowest level of scrutiny an American court can apply when reviewing a law to determine whether it is constitutional.[10]

In response to the *Smith* decision, Congress, in a bi-partisan way, enacted the Religious Freedom Restoration Act (RFRA).[11] The act expressly provided that:

> *Government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, [unless] ... it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.*

In enacting the RFRA, Congress declared: "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." Congress stated the purpose of the legislation was:

[7] *Sherbert v Verner* (1963) 374 US 398
[8] *Wisconsin v Yoder* (1972) 406 US 205
[9] *Employment Division v Smith* (1990) 494 US 872
[10] Compare, *Church of Lukumi Babalu Aye v Hialeah* (1993) (holding that Court will apply strict scrutiny to a law substantially infringing upon religious liberty when the law is not a neutral law of general applicability).
[11] Title 42 United States Code § 2000bb.

> *(1) to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and*
>
> *(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.*

The Supreme Court reviewed Congress' exercise of its power after the passage of RFRA. The Court upheld the RFRA as applied to federal government actions, but said Congress acted outside the scope of its constitutional authority as applied to the states. [12] Thus, state government actions interfering with religious conscience do not face the higher standard of review in a First Amendment analysis *under the U.S. Constitution.*

While we disagree with, (and someday hope to overturn) the U.S. Supreme Court's holding in *Smith*, we must acknowledge how a court today will likely apply it. If a court applies *Smith* in a First Amendment challenge to the Governor's Order, it will most likely uphold the Governor's action. Applying *Smith*, a court would likely conclude that the Order is a generally applicable neutral law, thus triggering the lower level of scrutiny. Applying this lower level of scrutiny, a court would likely find the Governor's Order rationally related (i.e., it is reasonable and not arbitrary) to a legitimate government purpose (e.g., suppressing the spread of COVID-19).

### *Limits on the Governor's Power under the Michigan Constitution*

Michigan's Constitution likewise protects our unalienable freedom of religion. [13] Article 1, section 4 of the Michigan Constitution provides:

> *Every person shall be at liberty to worship God according to the dictates of his own conscience. ... The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.*

Michigan's Supreme Court has held that the U.S. Supreme Court's application of a lower level of scrutiny under the U.S. Constitution, does not apply to the religious liberty protections in the Michigan's Constitution:

> *... we apply the compelling state interest test (strict scrutiny) to challenges under the free exercise language in Const. 1963, art. 1, § 4, regardless of whether the statute at issue is generally applicable and religion-neutral, which is the case here.* [14]

The Great Lakes Justice Center believes the free exercise of religious freedom is an unalienable liberty. We daily fight on the

[12] In *Gonzales v O Centro Espirita A Beneficente Uniao Do* (2006), (upholding RFRA requirements as applied to federal government actions; *City of Boerne v Flores* (2007) (striking down RFRA requirements as applied to states)

[14] *Champion v. Secretary of State*, 281 Mich.App. 307, 314; 761 N.W.2d 747 (2008) citing *McCready v. Hoffius*, 459 Mich. 131, 143, 586 N.W.2d 723 (1998), vacated in part 459 Mich. 1235, 593 N.W.2d 545 (1999), and *Reid v. Kenowa Hills Pub. Schools*, 261 Mich.App. 17, 27, 680 N.W.2d 62 (2004)

front lines at great cost to defend this inviolable freedom. For our purposes here though, we must explain how a court today will likely apply Michigan's Constitution to the Governor's Order. If a court today applied the *compelling interest test* in a challenge to the Order under the Michigan Constitution, the court would most likely uphold the Governor's action.

The court, applying *Strict Scrutiny*, would likely conclude that the Governor had a compelling interest in issuing her order (i.e., suppressing the spread of COVID-19; preventing an overwhelmed state health care system; allowing time for the production of critical medical equipment; and avoiding needless deaths). A court would also likely conclude that the Governor's three week "stay at home" mandate is the least restrictive means to accomplish the above state compelling government interest.

While we may personally disagree with this legal conclusion, we are convinced that it is the likely conclusion a court would reach. Indeed, even when a high standard of review is applied, nothing stands in the way of an activist judge enacting a preferred political preference.[15] The Justice Center will continue to fight for a more correct understanding and application of our constitutional freedom of religion. In the meantime though, we want the reader to understand the practical judicial realities, thus empowering the reader to make informed decisions concerning these important issues.[16]

In the end, each Church must decide its own course. We hope this memo helps you to make the decision a more informed one.

**GREAT LAKES JUSTICE CENTER**
PROFESSOR WILLIAM WAGNER, J.D.



[15] *See McCready v. Hoffius,* 459 Mich. 131, 143, 586 N.W.2d 723 (1998)*, vacated in part* 459 Mich. 1235, 593 N.W.2d 545 (1999) (finding a compelling interest and least restrictive means existed to justify interfering with an individual's freedom of religion)*,* and see, *EEOC v. Harris Funeral Homes, Inc.,* No. 16-2424, slip op. at 35-45 (6th Cir. March 7, 2018) (deeming, in another constitutional context, that a compelling government interest existed, and that government enforcement was the least restrictive means of accomplishing this interest).

[16] Given statements by the Governor and the language of her Order, it is clear what she plans to do if a case goes to court. No question exists that she plans to argue a sufficient government interest exists to justify her interfering with a citizen's freedom of religious conscience.