



**JUSTICE CENTER UPDATE FOR CHURCHES ON GOVERNOR’S  
NEW DECREES**

Can we legally open? Do I have to wear a mask when I preach? What about members of the congregation? The Governor recently issued new decrees that impact churches and religious organizations. Here is our analysis.

**BACKGROUND**

When the Governor of Michigan previously decreed it to be a crime for any number of individuals to gather for any purpose, she expressly made it a crime for individuals to travel to and attend church worship services – (or even to, for example, meet with a pastor to live stream a sermon). To be sure, a misleading exemption at the time said a “place” of worship was not subject to the penalty. This language expressly excluded, however, individuals like a pastor and congregants.

After we received notice of law enforcement approaching clergy, and were contacted by numerous pastors for representation... and upon also learning that the governor had refused in negotiations to protect individuals or recognize the constitutional limitations of the First Amendment in her orders, we filed suit.

A copy of the Federal Complaint can be found here. After we filed suit the Governor changed the language to protect individuals seeking to worship God. The most recent version states:

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*... nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution [e.g., the freedom of religion] ...Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 15 of this order*

*for allowing religious worship at such place. No individual is subject to penalty under section 15 of this order for engaging in religious worship at a place of religious worship, or for violating the face covering requirement of section 6(b) of this order.<sup>1</sup>*

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Additionally, the Governor just issued a new decree mandating everyone wear masks. According to the Governor, her decree requires individuals

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*to wear a face covering whenever they are in an indoor public space. It also requires the use of face coverings in crowded outdoor spaces. Most significantly, the order requires any business that is open to the public to refuse entry or service to people who refuse to wear a face covering.*

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The requirement to wear a face covering “does not apply” to various individuals. The exceptions most applicable to churches include individuals who:

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*Are officiating at a religious service;*

*Cannot medically tolerate a face covering*

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Moreover, the edict reaffirms:

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*Nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution [e.g.,*

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<sup>1</sup> See Executive Order 2020-115

*freedom of religion] ... and no individual is subject to penalty ... for removing a mask while engaging in religious worship at the house of religious worship. Consistent with guidance from the CDC, congregants are strongly encouraged to wear face coverings during religious services.*

Circumstances require two layers of examination to properly analyze the Governor's latest actions:

1. What are the legal implications for pastors and churches if the Governor's actions are legally authorized, and
2. Whether the Governor's actions illegally exceed her authority under Michigan Law

#### **I. IMPLICATIONS FOR PASTORS AND CHURCHES.**

This part of the analysis reviews the implications for pastors and churches. The analysis here assumes the Governor's actions are legally authorized (which, as we will see later, is highly questionable as a matter of law).

##### Opening a Church for Worship Services is Legal under the Governor's Executive Orders.

First, it is now clear that no legal prohibition on opening a church for worship service any longer exists. Reaffirming recent Executive Orders, the current orders reaffirm that nothing in the edicts shall abridge the freedom of religion protected under both the Michigan and Federal Constitutions. This acknowledgment of constitutional protection, combined with the express exemptions from punishment for

1. individuals while "engaging in religious worship at a place of religious worship" and
2. "a place of religious worship ... for allowing religious worship"

strongly suggests that the edicts, while poorly drafted, do not impose any legal prohibition on opening a church for worship service, subject of course to other edicts concerning, for example,

social distancing. Moreover, the newest exception that exempts a pastor from wearing a face mask while "officiating at a worship service" by its very terms presupposes the lawful existence of a worship service.

While the Governor acquiesced to the fact that churches have a First Amendment right to freely assemble and freely exercise their religious beliefs, pastors and churches must still decide whether and when to safely open.

##### Face Coverings at Church Worship Services and Other Church Activities

The edict's acknowledgment of the relevance of constitutional protection, combined with the express exemption from punishment for removing a mask "while engaging in religious worship" at church, strongly suggests the lawfulness of doing so. Moreover, because the order by its very terms only "strongly encourage[s]" congregants "to wear face coverings during religious services," it is difficult to envision a situation where a congregant might be prosecuted for not wearing a mask.

Again, even though the Governor now acknowledges that individuals have a First Amendment right to the free exercise of religion, each church must now decide how to safely operate. Moreover, the church mask exemptions in the Governor's edict do not cover any church activity beyond a worship service. The exemptions do not include, for example, Bible studies or Elder Board meetings held at the church.

Just because the Governor's current edicts are now less hostile to religious people than previous ones, does not mean we believe her orders are valid, legal or binding. All the constitutional and statutory violations stated in the court cases filed by us and others still exist.

#### **II. QUESTIONABLE 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:

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*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.*

*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.*

*Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.*

*Section 8 of article 5 of the Michigan Constitution of 1963 obligates the governor to take care that the laws be faithfully executed.*

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Additionally, the Governor previously relied upon two statutes. She stated:

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*The Emergency Management Act [of 1976] 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).*

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After the expiration of 28 days of a declared state of disaster, the EMA requires that:

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*... the governor shall issue an executive order or proclamation declaring the state of disaster terminated.... unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature.*

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Michigan's legislatively approved 28-days expired on April 30, 2020 without the legislature approving an extension. The Governor issued Executive Order 2020-66 terminating the state of disaster / emergency declared under the EMA.

Immediately after the Governor ended the state of emergency, however, she issued another Executive Order declaring a State of Emergency, and continues to do so. See, e.g., Executive Order 2020-127

Ignoring the legal requirements of the 1976 EMA, the Governor claims she holds absolute authority to unilateral rule under the 1945 act (even though this act by its very terms expressly does not cover pandemics or health emergencies). This assertion of absolute power propelled the Michigan government into a Constitutional crisis. Both the House and Senate authorized their leaders to take legal action in order to restore constitutional governance to the state. The question is now before State and Federal Courts.

**The bottom line:** Serious questions now exist as to whether the Governor's Executive Orders are any longer based on proper legal authority. Nonetheless the Governor contends her actions are authorized; the State and other government authorities actively continue to enforce her orders by bringing criminal prosecutions, revoking professional licenses, imposing fines, etc.... Hopefully the courts will resolve the matter sooner than later.

**GREAT LAKES JUSTICE CENTER**