Considerations For Municipal Enforcement of Executive Order 2020-42

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Today’s Presenter

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Authority To Promulgate Executive Order
Executive Power

- “. . . the executive power is vested in the governor.”
  - Constitution 1963, art 5, § 1
During times of ... a public emergency ... when public safety is imperiled ... the governor may proclaim a state of emergency. ... After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as ... she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation ...; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares
The violation of any such orders, rules and regulations made in conformity with this Act shall be punishable as a misdemeanor, where such order, rule or regulation states that the violation thereof shall constitute a misdemeanor.
The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this Act. Except as provided in section 7(2), an executive order, proclamation, or directive may be amended or rescinded by the governor.
MCL 30.403(4)

- The governor shall, by executive order or proclamation, declare a state of emergency if ... she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature.
MCL 30.405(3)

- A person who willfully disobeys or interferes with the implementation of a rule, order, or directive issued by the governor pursuant to this section is guilty of a misdemeanor.
Enforcement

- From an enforcement perspective Executive Order 2020-42 is a criminal statute.

- “The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act.” MCL 30.403(2)
Chief Enforcement Officer

- Dana Nessel, the Attorney General, is the chief enforcement officer in the state for violations of criminal law.
The attorney general shall prosecute and defend all actions in the Supreme Court, in which the state shall be interested, or a party; ... and may, when in [her] own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.
MCL 14.30

- The attorney general shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices ...
MCL 14.101

- The attorney general of the state is hereby authorized and empowered to intervene in any action heretofore or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state.
March 25, 2020 Letter From AG Nessel to POAM

With respect to the Covid-19 Executive Orders, the Attorney General has clearly stated enforcement will be the responsibility of local law enforcement agencies:

- “Our residents are counting on us, and the Department of Attorney General will respond to inquiries or requests for assistance that Michigan law enforcement may have. Based upon the sheer volume of calls from the public, we are looking to local law enforcement to be the first-line agencies to receive complaints of possible violations of an EEO [Emergency Executive Order]. If law enforcement agencies encounter clear violations that result in presenting a case for prosecution and the local prosecutor is unable to handle the matter, our office is prepared to receive those cases.”
Municipal Enforcement Authority
The Duties and Authority of Police Officers
MCL 92.4

- Under the direction of the mayor and chief of police, and in conformity with the ordinances of the city and laws of this state, the police shall suppress riots, disturbances, and breaches of the peace; pursue and arrest a person fleeing from justice in any part of the state; apprehend a person in the act of violating a law of this state, or an ordinance of the city, involving a breach of the peace, and, unless the violation constitutes a civil infraction, take the offender before the proper court or magistrate to be dealt with for the violation; make complaints to the proper officers and magistrates of any person known or believed by them to be guilty of the violation of the ordinances of the city or the penal laws of the state...
MCL 117.34

- When *any person* has committed or is suspected of having *committed any crime* or misdemeanor within a city, or has escaped from any city prison, *the police officers* of the city *shall* have the same right to pursue, *arrest and detain such person* without the city limits as the sheriff of the county.
“It is ... simply ‘common sense that all police officers must use some discretion in deciding when and where to enforce [laws].’ Ibid. (emphasis added).” Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 761 (2005), quoting Chicago v. Morales, 527 U.S. 41 (1999). See also, Howard ex rel. Estate of Howard v. Bayes, 457 F.3d 568, 574 (6th Cir. 2006) (Recognizing the “well established” tradition of police discretion in enforcing “apparently mandatory” arrest statutes.)
Third-Party Challenge

- The decision not to arrest – or prosecute – cannot be challenged by a third party.

Right to Compel

- Similarly, there is no right to compel arrest or prosecution under State law. *Gyarmati v. Bielfield*, 245 Mich. App. 602, 605, 629 N.W.2d 93 (2001)
Enforcement Actions

- There is no civil liability for failing to arrest or take other enforcement action, even if that inaction results in injury or death.
- “[N]othing in the language of the Due Process Clause itself,” the court has instructed, “requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.” *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 (1989); *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006)
Enforcing the Law

- Thus, while there is a “duty” on the part of law enforcement officers to enforce the law, that duty is not absolute. Law enforcement officers have broad discretion on when and how to enforce the law and decisions not to enforce the law are essentially not reviewable.
Specific Enforcement Issues Related to EO 2020-42
Potential Liability

- If a person is arrested for violating an Executive Order and the arrest is challenged in a lawsuit for damages, it is the enforcing officer and entity that are potentially liable, not the author of the order.
Executive Order 2020-42(1)

 “This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.”

 This appears to be in conflict with the Rule of Lenity which requires penal statutes “to be strictly construed and any ambiguity [] to be resolved in favor of lenity.” People v. Gilbert, 414 Mich. 191, 211, 324 N.W.2d 834 (1982)

 “No one should be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” People v. Willis, 504 Mich. 905, 931 N.W.2d 1, 8, n 14 (2019)
Vague or Ambiguous Provisions
Vague or Ambiguous Provisions

- There are “basic” due process protections that apply to vague or ambiguous language in criminal enactments.
Criminal statutes violate the Fifth Amendment’s due process clause if they are too vague “to give ordinary people fair notice” of the criminalized conduct or “so standardless” as to “invite[] arbitrary enforcement.” United States v. Parrish, 942 F.3d 289, 295 (6th Cir. 2019), quoting Johnson v. United States, 135 S. Ct. 2551, 2556 (2015). “The prohibition of vagueness in criminal statutes “is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,” and a statute that flouts it “violates the first essential of due process.” Id. at 2556 – 2557
Smith v. Goguen

“Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. The Legislature may not so abdicate their responsibilities for setting the standards of the criminal law.” Smith v. Goguen, 415 U.S. 566, 575, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)
Filling the Gaps

- If the Executive Order is ambiguous, does a municipality have the authority to create its own rules or standards to “fill in the gaps?”

Municipality’s Authority?

- If the Executive Order is ambiguous or does not address a specific issue, a municipality has no authority to regulate what is not clearly delineated and prohibited in the Order.
Example

- Section 9(f) of EO 2020-42 identifies as critical infrastructure workers: Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.
Section 11(c) of EO 2020-42

- For stores of less than 50,000 square feet of customer floor space, 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.
Closing Areas of Stores

- Section 11 (d)(2) states that stores of more than 50,000 square feet close areas of the store — by cordoning them off, placing signs in aisles, posting prominent signs, removing goods from shelves, or other appropriate means — that are dedicated to the following classes of goods:
  - Carpet or flooring
  - Furniture
  - Garden Centers and Plant Nurseries
  - Paint
Section 9(f)

- By negative implication, stores of less than 50,000 square feet that are identified in Section 9(f) are permitted to sell the goods larger stores are prohibited from selling.

- Does a municipality have the authority to ban stores of less than 50,000 square feet from selling the goods listed in Section 11(d)(2)?

- Does a municipality have the authority to establish a rule that unless a certain percentage of a store’s shelf space is devoted to groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences, the store does not qualify for inclusion in Section 9(f)?
Due Process Clause

- The due process clause strongly points to “no” as the answer to these questions. This type of ad hoc decision making is precisely what *Smith v. Goguen* warned against: “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.” *Smith v. Goguen*, 415 U.S. at 575, and “invites arbitrary enforcement.” *United States v. Parrish*, 942 F.3d 289, 295 (6th Cir. 2019)
General Enforcement Rules for Law Enforcement Officers
Investigative Stops

- A police officer may properly make an investigative stop of an automobile if the stop is based on specific, articulable facts which, when taken with rational inferences from those facts, would lead a reasonable police officer to believe that a crime had been committed or criminal activity is taking place. *People v. Estabrooks*, 175 Mich. App. 532 (1989); *People v Spencer*, 154 Mich. App. 6, 10 (1986)
U.S. Constitution Prohibitions

- In addition to state law, the U.S. Constitution also prohibits a traffic stop to make random inquiries about possible violations of the law. The U.S. Supreme Court held in *Delaware v. Prouse*, 440 U.S. 648, 661 (1979):
  - When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations ... we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver. ... This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.
Violation of Motor Vehicle Code

- If a traffic stop is made for violation of the motor vehicle code (or for some other reason supported by probable cause), it is permissible for the police to ask questions unrelated to the traffic stop as long as it does not unnecessarily prolong the stop. *People v. Williams*, 472 Mich. 315 – 316 (2005); *Arizona v. Johnson*, 555 U.S. 323 (2009). This extends to passengers in the vehicle. *Id.*, *United States v. Everett*, 601 F.3d 484, 490 (6th Cir. 2010)
Right to Ask Questions

- However, although police have the right to ask questions about travel plans, destination, purpose for the trip, etc., the occupants have a constitutional right not to answer any questions, and the refusal to answer cannot be used as a basis to arrest the occupants. *United States v. Herbin*, 343 F.3d 807, 811 (6th Cir. 2003); *Terry v. Ohio*, 392 U.S. 1 (1968)
Without Probable Cause

- The same rules apply to a person walking on a public street. Even without probable cause, police are allowed to approach a person and ask questions. “[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen ...” *Florida v. Royer*, 460 U.S. 491, 498 (1983). At the same time, a person “may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.” *Id.* Simply put, while the police have the right to ask questions, a person has the right to ignore the questions and walk away. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)
Constitutional Concerns With Specific Provisions
Right of Familial Association
Section 2 of EO 2020-42

- States in part: 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.
Fourteenth Amendment

- Fourteenth Amendment protects certain fundamental rights not expressly identified in the Bill of Rights, including “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” Lawrence v. Texas, 539 U.S. 558, 574 (2003); Flaskamp v. Dearborn Public Schools, 385 F.3d 935, 941 (6th Cir. 2004)
Prohibitions Against Gatherings

- Does a prohibition against gatherings of family members who are not residents of the same household implicate the fundamental right of familial association?

- Probably. Does it violate that right? That is much less clear, but it is doubtful. The Sixth Circuit has not presented a uniform approach to what the elements of such a claim are or what level scrutiny applies. See, Schulkers v. Kammer, ____ F.3d ____ (6th Cir. Mar. 30, 2020) (“It is possible that one could interpret our case law to be somewhat unclear ...”) However, under the current circumstances there is nothing in the case law that would suggest the courts would find the prohibition constitutionally infirm.
Right of Intrastate Travel
In 2002, the Sixth Circuit held that the right of intrastate travel is a fundamental right under the Constitution. *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002)
Paragraph 7(b)(3) of EO 2020-42

- Residents of Michigan may travel: “Between two residences in this state, through April 10, 2020. After that date, travel between two residences is not permitted.”
Analyzing Paragraph 7(b)(3) of EO 2020-42

- Under the *Johnson* decision, Paragraph 7(b)(3) of EO 2020-42 leads to liability concerns for an officer enforcing that portion of the Order. While preventing the spread of the virus is unquestionably a compelling governmental interest, laws subject to strict scrutiny rarely survive, even when a compelling governmental interest is identified.
First Amendment – Free Speech
Section 11(d)(3) of EO 2020-42

- By April 13, 2020, stores of more than 50,000 square feet must “refrain from the advertising or promotion of goods that are not groceries, medical supplies, or items that are necessary to maintain the safety, sanitation, and basic operation of residences.”
Commercial Speech

While commercial speech is analyzed under a different and less rigorous standard than “regular” speech, it is still entitled to constitutional protection. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 522 (6th Cir. 2012)
Within the First Amendment

- For commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Next, the court asks whether the asserted governmental interest is substantial. If both inquiries yield positive answers, the court then determines whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.
Advertising Prohibitions

- The potential constitutional concern with enforcing the advertising prohibition is that stores of greater than 50,000 square feet can still sell the prohibited items online and for curbside pick-up. Thus, the goods are only “illegal” if sold within the stores. However, the prohibition is not limited to advertising the goods for in-store sales. It prohibits advertising the goods regardless of how they are sold. That prohibition is problematic under the *Central Hudson* test.
Qualified Immunity
Travel Portion of EO 2020-42

- Even if a court were to find the travel portion of the Order unconstitutional, the officer would typically be entitled to rely on the defense of qualified immunity. Generally, the police are entitled to qualified immunity for enforcing a law that is later declared unconstitutional. *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979). However, that is not the case when the law is “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” *Id.*

- It is rare for a court to find a law “grossly and flagrantly unconstitutional.”
Questions?

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