

The Honorable Judge Benjamin A. Settle

**UNITED STATES DISTRICT COURT
WESTERN DIVISION OF WASHINGTON**

CLINT DIDIER, LISA THOMAS, TIM)	NO.3:20-cv-5408
EYMAN, LAWANDA JOY HATCH,)	
DEAN WELLSFRY, PATTY DETRO,)	DECLARATION OF
and JASON BERNICA, and OTHER)	MICHAEL COHEN
NONESSENTIAL WASHINGTONIANS)	
SIMILARLY SITUATED,)	
)	
)	
Plaintiffs,)	
)	
JAY INSLEE, in his capacity as Governor)	
of the state of Washington,)	
)	
Defendant,)	

DECLARATION OF MICHAEL COHEN

I, Michael Cohen, a practicing physician in the state of Washington, on oath and subject to the laws of perjury in the state of Washington, being over 18 years of age and competent to testify to the matters set forth herein, now declare as follows:

DECLARATION OF MICHAEL COHEN
CASE NO.: 3:20-cv-5408

STEPHEN PIDGEON
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On March 19, 2020, Inslee, under Proclamation 20-24, prohibited “all hospitals, ambulatory surgical facilities, dental, orthodontic and endodontic offices in Washington State from providing health care services, procedures, and surgeries that, if delayed, are not anticipated to cause harm to the patient within the next three months, with exceptions and as provided below. This does not include outpatient visits delivered in hospital-based clinics.

Examples of procedures to delay include, but are not limited to: most joint replacements, most cataract and lens surgeries, non-urgent cardiac procedures, cosmetic procedures, some endoscopy, and some interventional radiology services.

The above prohibition does not apply to the full suite of family planning services and procedures or to treatment for patients with emergency/urgent needs (examples of the latter include, but are not limited to, people with heart attacks, strokes, or motor vehicle accidents). Hospitals and ambulatory surgical facilities may perform any surgery that if delayed or canceled would result in the patient’s condition worsening (for example, removal of a serious cancerous tumor or dental care related to the relief of pain and management of infection.)

Ambulatory surgical facilities are encouraged to work with their local hospitals to assist with surge capacity needs.

This Proclamation shall remain in effect until May 18, 2020.”

On May 18, 2020, Inslee proclaimed under Proclamation 20-24.1, that the state of emergency, issued on February 29, 2020, pursuant to Proclamation 20-05, would remain in effect until “rescinded, or until this order is amended or rescinded, whichever occurs first.”

Violators of this order may be subject to penalties pursuant to RCW 43.06.220(5) which provides that “[a]ny person willfully violating any provision of an order issued by the governor under this section is guilty of a gross misdemeanor.”

Because of the ambiguity of 20-24, and because of the criminal threat to healthcare providers embedded in 20-24, physicians and hospitals began to err on the side of not scheduling procedures what were, in reality, quite essential – resulting in delaying mastectomies for women with newly diagnosed breast cancer, delaying hernia repairs which can get clinically worse if not addressed, and delaying spinal cord surgery that was not “emergent,” among many others. Thus, instead of protecting public health, Amendment 20-24, combined with the stay-at-home Proclamation 20-25, harmed a large number of patients in the state of Washington by depriving them of medical care that was in fact, quite essential (just not according to our governor).

On the patient side of the equation, the stay-at-home order (20-25) made matters even worse. People became so afraid to leave their homes and/or go to the hospitals that, even for emergent procedures such as appendectomies and ischemic bowel resections, cardiac catheterizations, etc. – procedure volumes at many hospitals

dropped to about 30% of normal. This reduction in volume makes sense for trauma cases during a lockdown (primarily due to decrease in motor vehicle collisions), but not for heart attacks or routine gastro-intestinal emergencies. The reduction in volume of non -trauma emergent procedures can only be explained by people's unfounded fear of leaving their homes and going to hospitals to seek care, leading to a yet-to-be-determined number of non-COVID related illness, suffering, and mortality in the state during the lockdown.

On the biostatistics side of the equation, the numbers used to justify the draconian measures have been presented in the most misleading of ways. COVID-19 new cases and deaths being reported are not being stratified by age groups or by other risk factors (such as comorbid conditions). Without such risk stratification, the data are meaningless. When counting "new cases" of COVID-19, what is being reported are not only new admissions with a respiratory illness plus a positive COVID test, but every asymptomatic positive COVID test as well. For a cold virus that appears to cause no illness in 95-99 percent of "positive" cases, a positive test in the absence of clinical symptoms should not be considered a "new case," and public health policy decisions should not be made based on that number. If we start treating coronaviruses and rhinoviruses this way during every cold season, then we can have a "pandemic" at least once a year for the rest of time – a pandemic consisting of 99% asymptomatic carriers.

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This is the way these viruses have always been, and this is the way these viruses will always be: present in most of us, and asymptomatic in most of us ; and this in no way should be used as a justification for measures such as the ones Governor Inslee implemented this year. And while we all agree that “one death is too many,” the fact remains that every year, pneumonias secondary to cold and flu viruses have always ended several hundred lives among the state’s vulnerable populations such as the elderly or the patients with serious multiple medical comorbidities. Spending resources on the elderly and on treating those comorbidities would be much more productive and lifesaving because our annual death toll from these comorbidities (heart disease, lung disease, smoking, diabetes, morbid obesity etc.) is astronomically higher than COVID-19. With no basis in science, reason, or good statistics, the prohibition of elective procedures cut off the largest source of hospital revenue, thereby financially devastating hospitals and healthcare workers within a matter of weeks. These are the very same hospitals and healthcare workers that this order was intended to “protect as they provide health care services.” By early to mid-April, it became clear that our healthcare facilities were not overwhelmed by COVID patients. On the contrary, many were not busy at all, resulting in numerous layoffs of nurses and other healthcare staff. Yet, despite the low numbers of COVID admissions, the hospitals were still being told that they could not do any elective procedures, even though there was no longer any reason to postpone them.

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I am leaving it to the attorneys to discuss the constitutional violations committed by the governor. However, as a physician, I do have the medical education, training, and clinical experience to make the claim that it is absolutely imperative that, in the face of any pandemic or epidemic, our healthcare system has to remain completely intact, undisrupted, and untampered with. Any draconian measures such as the governor's Amendment 20-24, may never again be allowed without the proper checks and balances, or without thoughtful input from healthcare experts. An individual with no medical training and no clinical experience should never again be allowed to decide— for the entire state – what constitutes an “essential” medical procedure.

Disabling our hospitals, the way Governor Inslee did on March 19th, can eventually lead to a scenario where there are no hospitals and no healthcare workers left to take care of our fellow citizens – a scenario that would be devastating to everyone.

Michael Cohen, M.D.
Diplomate of the American Board of Plastic Surgery
Bayview Plastic Surgery, PLLC
Gig Harbor, WA



Signed in Gig Harbor Washington, this 11th day of June 2020.

STATE OF WASHINGTON)
) ss
COUNTY OF _____)

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