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The Model Public-Health Emergency Authority Act

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THE MODEL PUBLIC-HEALTH EMERGENCY AUTHORITY ACT

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ABSTRACT

The Uniform Law Commission recently approved the Model Public-Health Emergency Authority Act (MPHEAA or the Act or the Model Act). The MPHEAA grants governors specific and plenary powers to issue public health emergency orders while also ensuring executive branch transparency and accountability. The Act improves public health emergency preparedness by resecuring the legal foundation for states to respond effectively to future emergencies. However, more work is needed to enhance data collection and support vulnerable populations in emergencies.

This Article discusses the origins of the MPHEAA, key policy and drafting choices the Drafting Committee made in creating the MPHEAA, and the impact of the MPHEAA on public health preparedness. It begins with a history and overview of the MPHEAA and then dives deeply into two challenging choices the Drafting Committee made: (1) granting both specific and plenary powers to a governor to issue public health emergency orders; and (2) authorizing a governor to renew a declaration of public health emergency for as long as the emergency might last without requiring legislative approval. It concludes that

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I presented much of the contents of this Article at the 2023 ASLME Health Law Professors Conference and in presentations to the academic communities at Case Western Reserve University School of Law, UNLV William S. Boyd School of Law, and UCLA School of Law.

the MPHEAA adds to the nation's public health emergency preparedness by securing the powers governors and public health officials may need to respond to a variety of public health emergencies in the future and does so in ways that can withstand various forms of judicial scrutiny.

I. INTRODUCTION

On July 26, 2023, the Uniform Law Commission (ULC or the Commission)[1] approved the Model Public-Health Emergency Authority Act (MPHEAA or the Act or the Model Act).[2] The MPHEAA is model legislation that provides constitutionally-sound oversight of executive branch actions during a public health emergency.[3] Following this success, the Commission will work to have the Act introduced as a bill in each state's legislature.[4]

For the past two years, I was the Reporter to the ULC Committee that drafted the MPHEAA (the Drafting Committee).[5] This Article describes the Act, some of its background, and its value as the nation prepares for future public health emergencies.

This Article proceeds in four parts. Part II starts with a brief history of the Act and the "burn it all down" environment in which it was drafted before focusing on the Act's structure and primary provisions. Part III dives deeper into two particularly challenging choices the Drafting Committee made: (1) granting both specific and plenary powers to a governor to issue public health emergency orders; and (2) authorizing a governor to renew a declaration of public health emergency for as long as the emergency might last without requiring legislative approval. Part IV makes the case that the MPHEAA adds to the nation's public health emergency preparedness by securing the powers governors and public health officials may need to respond to a variety of public health emergencies in the future and does so in ways that can withstand the kinds of judicial scrutiny

1. The Uniform Law Commission "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." UNIF. L. COMM'N, *About Us* (last visited Jan. 22, 2024). The ULC does not have the power to make law; rather, it has the power to influence state legislators to consider, if not introduce, the uniform and model laws it drafts and adopts. *Id.*

2. *See* UNIF. L. COMM'N, MODEL PUBLIC-HEALTH EMERGENCY AUTHORITY ACT ("as approved" version, July 26, 2023), https://www.uniformlaws.org/committees/community-home?communitykey=7a88c160-5910-4e41-9dff-018a850ef3b2 (last visited July 30, 2023). The Act is drafted as a "model" law rather than a "uniform" law because the MPHEAA accommodates differences of law and policy among the states and thus does not pursue uniformity of state law as its primary objective. *See* UNIF. L. COMM'N, *"What is a Model Act?",* https://www.uniformlaws.org/acts/overview/modelacts (last visited July 30, 2023).

3. *See* UNIF. L. COMM'N, MODEL PUBLIC-HEALTH EMERGENCY AUTHORITY ACT 1 ("final" version, Oct. 3, 2023), https://www.uniformlaws.org/viewdocument/final-act-167?CommunityKey=7a88c160-5910-4e41-9dff-018a850ef3b2&tab=librarydocuments (last visited Mar. 14, 2024).

4. *See* UNIF. L. COMM'N, *FAQs*, https://www.uniformlaws.org/aboutulc/faq (last visited July 30, 2023) ("Upon final approval, ULC uniform acts are then submitted for consideration by the state legislatures for enactment.").

5. The Reporter for a Uniform Law Commission drafting committee is usually an expert in the relevant field of law, and the Reporter is responsible for drafting the legislation based on the Committee's policy choices. *See* UNIF. L. COMM'N, *supra* note 3; *see also Drafting Committees*, ULC (last visited Mar. 14, 2024), https://www.uniformlaws.org/projects/committees/drafting.

experienced during the COVID-19 pandemic. The Article concludes that, while there is more work to be done to restore public health emergency powers, the Act can make necessary improvements to public health emergency preparedness in the states that enact it.

II. HISTORY AND OVERVIEW OF THE MODEL PUBLIC-HEALTH EMERGENCY AUTHORITY ACT

In April 2020, ULC leadership formed a committee to study the value of drafting a model or uniform law related to public health emergency powers.[6] This was just three months after the Centers for Disease Control and Prevention (CDC) had confirmed the first case of COVID-19 in the United States and about one month after several states issued stay-at-home orders and other orders designed to prevent the spread of the virus.[7] In July 2021, following the recommendations of the ULC Study Committee, the Commission formed the Drafting Committee and charged it "to draft a model law addressing the distribution of public health emergency powers between state executive and legislative branches and addressing state preemption of local public health emergency powers."[8]

6. *See* FINAL REPORT FROM THE STUDY COMMITTEE ON PUBLIC HEALTH EMERGENCY AUTHORITIES, UNIF. L. COMM'N 1 (May 12, 2021) (on file with the author) [hereinafter STUDY COMMITTEE FINAL REPORT].

7. *See CDC Museum COVID-19 Timeline*, CDC, https://www.cdc.gov/museum/timeline/covid19.html (last visited July 24, 2023).

8. *See* MEMORANDUM FROM THE MODEL PUBLIC-HEALTH EMERGENCY AUTHORITY ACT DRAFTING COMMITTEE TO THE UNIF. L. COMM'N (June 28, 2022), file:///Users/nag924/Downloads/Public-Health-Emerg.%20Authority_Issues%20Memo_2022AM.pdf. This charge was derived from a much broader set of topics considered by the Study Committee. These included:

> 1) the authority of state governments to order individual and area quarantines, isolation, social distancing, and other restrictions on travel and gatherings and the enforcement of such powers;
>
> 2) the authority of states to order the closure of non-essential business, and the criteria for determining which businesses are essential;
>
> 3) state government acquisition of critical resources through collective purchasing mechanisms (including the need to comply with federal antitrust law) or through commandeering private property; and
>
> 4) rules for medical practice, including crisis standards of care, licensure reciprocity, and information sharing.

STUDY COMMITTEE FINAL REPORT, *supra* note 6, at 1. Over the course of its work, the Study Committee narrowed and reframed the drafting topics to the following three:

> 1) the allocation of authority between the state executive branch officials and the legislature with respect to the full array of public health interventions, as well as control over the distribution of necessary supplies (PPE, pharmaceuticals, vaccinations etc.);

The Drafting Committee met several times between September 2021 and July 2022 to develop an initial iteration of the MPHEAA, which received its first reading and hearing at the ULC's annual meeting in July 2022.[9] The Drafting Committee then used feedback from that meeting to rework parts of the Act.[10] The Drafting Committee also met several times in 2022 and 2023 in preparation for the Act's second reading and final vote for approval at the ULC's 2023 annual meeting.

A. Drafting the MPHEAA During a "Burn It All Down" Backlash

Throughout the process, the Drafting Committee sought to draft an Act that would serve two goals: (1) provide state executive branch officials with the express legal powers needed to respond effectively to future public health emergencies;[11] and (2) protect against the abuse of such powers by promoting executive branch transparency and accountability through external checks, substantive standards, and procedural safeguards.[12] The Drafting Committee's formulation of these goals, and all of its work drafting the MPHEAA, were animated and informed by a "burn it all down" backlash[13] occurring in many states. As described next, this led to lawsuits and legislation that—in some states—eliminated executive branch authority necessary to protect public health during the COVID-19 pandemic and future emergencies.

When the Drafting Committee first met in December 2021, the supreme courts of several states had already ruled on lawsuits seeking to set aside

2) the allocation of authority between state and local governments with respect to the full array of public health interventions, as well as control over the distribution of necessary supplies (PPE, pharmaceuticals, vaccinations etc.); and

3) the collection of data regarding the impact of state public health emergency laws on socially vulnerable populations, and measures to ensure that states consider the impact of public health emergency orders on vulnerable populations.

See id. at 2. In the end, a majority of the Study Committee recommended that the ULC for a committee to draft "a model act focused on the allocation of authority between state executive branch officials and the legislature (including with respect to preemption of local governments) and the processes that should apply to the use of such authorities." *Id*. (emphasis in original).

9. *See* DRAFT: PUBLIC-HEALTH EMERGENCY AUTHORITY ACT (UNIF. L. COMM'N, July 2022), https://www.uniformlaws.org/viewdocument/2022-annual-meeting-9?CommunityKey=be7c4af5-73e0-4307-8d5a-ca281b8216cd&tab=librarydocuments (last visited July 24, 2023).

10. *See* DRAFT: PUBLIC-HEALTH EMERGENCY AUTHORITY ACT (UNIF. L. COMM., JULY 2023), https://www.uniformlaws.org/viewdocument/2023-annual-meeting-draft-and-iss?CommunityKey=be7c4af5-73e0-4307-8d5a-ca281b8216cd&tab=librarydocuments (last visited July 24, 2023).

11. *See* UNIF. L. COMM'N, *supra* note 3, at 1.

12. *See id*.

13. Jill Krueger of the Network for Public Health Law coined this phrase. The author first heard it attending a presentation by Ms. Krueger at the ASLME Health Law Professors Conference held at Arizona State University, Sandra Day O'Connor College of Law in June 2022.

masking orders, gathering restrictions, and shelter-at-home orders issued by governors or public health officials in response to the mounting pandemic.[14] Plaintiffs in those lawsuits claimed that the targeted orders were void because the authorizing statutes on which they were based were unconstitutional, citing the non-delegation and major questions doctrines.[15] Alternatively, they claimed that even if the authorizing statutes were constitutional, the orders at issue exceeded the scope of authority delegated to governors or public health officials.[16] Some plaintiffs also argued that the orders were void because they were not orders at all, but rather "rules" subject to administrative rulemaking procedures that were not followed.[17]

While many courts rejected these challenges,[18] several ruled in favor of plaintiffs, invalidating their states' authorizing statutes and, consequently, the targeted COVID-19 orders.[19] For example, the Wisconsin Supreme Court held that statewide pandemic orders were void because they were "rules" that failed to follow the state's administrative rulemaking procedures.[20] Additionally, the court held that the statute—which granted the state's chief health officer authority to implement "all emergency measures necessary to control communicable diseases"—was so broadly worded as to violate the non-delegation doctrine.[21] Thus, the court ruled that the orders were also void because they exceeded the statutory authority on which they relied.[22]

Likewise, the Michigan Supreme Court declared unconstitutional a statute authorizing the Governor, during an emergency, to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and

14. *See, e.g.,* Munza v. Ivey, 334 So. 3d 211 (Ala. 2021); Gateway City Church v. Newsom, 516 F. Supp. 3d 1004 (N.D. Cal. 2021); Bailey v. Pritzker, No. 3:20-cv-474-GCS, 2020 WL 3498428 (S.D. Ill. June 29, 2020).

15. *See, e.g., In re* Certified Questions, 958 N.W.2d 1, 5 (Mich. 2020).

16. *Id.*

17. *See* Wisconsin Legis. v. Palm, 942 N.W.2d 900, 908 (Wis. 2020).

18. *See, e.g.*, Casey v. Lamont, 258 A.3d 647, 660, 664–65 (Conn. 2021) (statute authorizing Governor, during declared emergency, to take such steps as "are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state" does not violate the nondelegation doctrine because the Governor's authority is constrained by an intelligible principle to which he must conform); Beshear v. Acree, 615 S.W.3d 780, 813 (Ky. 2020) (statute authorizing Governor to protect public health and safety during an emergency does not violate the nondelegation doctrine, and Governor's statewide orders are not subject to administrative rulemaking procedures).

19. Abbott v. Jenkins, 665 S.W.3d 675, 695 (Tex. App. 2021), *vacated*, 671 S.W.3d 960 (Tex. 2023).

20. *Palm*, 942 N.W.2d at 918.

21. *Id.* at 915. *See also* Wendy Parmet & Dorit Reiss, *Major Questions about Vaccine Mandates, the Supreme Court, and the Major Questions Doctrine*, BILL OF HEALTH (Jan. 5, 2022), https://blog.petrieflom.law.harvard.edu/2022/01/05/major-questions-vaccine-mandates-supreme-court/.

22. *Palm*, 942 N.W.2d at 915.

property or to bring the emergency situation within the affected area under control."[23] The court held that the statute violated the separation of powers because it delegated legislative authority to the executive branch without any meaningful guidance for how the Governor must exercise that authority.[24]

State legislatures also got in on the action, passing bills that both eliminated executive branch public health emergency response powers and attempted to empower legislatures to terminate public health emergency declarations or orders unilaterally. For example, in March 2021, Ohio enacted legislation (over a gubernatorial veto)[25] that undermines the executive branch's ability to respond to public health emergencies in several ways. First, it authorizes the Legislature to rescind any "order or rule for preventing the spread of contagious or infectious disease" and to do so unilaterally by concurrent resolution.[26] Second, it empowers the Legislature to terminate the Governor's declaration of a public health emergency, also by concurrent resolution, once the declaration has been in effect for thirty days.[27] Third, the statute prohibits the Governor from redeclaring the same or a similar public health emergency for sixty days if and when the Legislature terminates the Governor's initial declaration of emergency.[28]

Similarly, Arizona amended its emergency management statute to limit the power of the Governor to declare a public health emergency.[29] It now empowers the Legislature to terminate the Governor's declaration at any time by concurrent resolution.[30] The statute also prohibits the Governor from extending a declared emergency for more than a total of 120 days.[31] At that point, any declaration terminates automatically, and the Governor may not redeclare a similar state of public health emergency.[32] Only the Legislature has the power to extend or redeclare a public health emergency declaration after 120 days, and it may do so unilaterally through a concurrent resolution.[33]

The legislative rollback of emergency public health authority was widespread and ongoing throughout the Drafting Committee's work. Data gathered and analyzed through May 2022 by the Policy Surveillance Program at Temple University's Center for Public Health Law Research indicates that at least twenty-three states had enacted legislation limiting the power of governors,

23. *In re* Certified Questions, 958 N.W.2d 1, 12, 31 (Mich. 2020).
24. *See id.* at 21–24.
25. Sub. S.B. 22, 134th Gen. Assemb. (Ohio 2021).
26. OHIO REV. CODE ANN. § 101.36(A) (West 2021).
27. OHIO REV. CODE ANN. § 107.42(D)(1).
28. *Id.* at § 107.42(D)(2).
29. *See* ARIZ. REV. STAT. ANN. § 26–303.
30. *See id.* at § 26–303(F).
31. *See id.* at § 26-303(G).
32. *See id.*
33. *See id.*

state public health agencies, or public health officials to respond to public health emergencies; similar bills had been introduced in the legislatures of twenty-two states.[34] Similarly, an earlier analysis conducted by the Network for Public Health Law and the National Association of County and City Health Officials found that "[a]t least 15 states have passed or have considered measures to drastically undermine the authority of public health agencies to save lives."[35]

On top of these judicial and legislative actions, anti-government commentators and organizations also blamed allegedly "tyrannical" governors and public health officials for the public's frustration with the disruption the COVID-19 pandemic caused.[36] One such organization, the American Legislative Exchange Council (ALEC),[37] drafted model state legislation to limit

34. *See* Center for Public Health Law Research, *Public Health Authority Limits*, POL'Y SURVEILLANCE PROGRAM, https://lawatlas.org/datasets/public-health-authority-limits (last visited May 20, 2022). The program provides a dataset of state bills and enacted laws on this and other public health law topics. The dataset can be filtered based on coded attributes of the bills and enactments in the dataset. The author filtered the dataset in two different ways: (1) for "enacted" laws that limited a governor's or a state health official's authority in any one or more of the following ways—"Issuance of emergency order is restricted," "Duration of emergency order is limited," "Scope of emergency order is restricted," "Termination by legislature," or "Termination by another entity;" and (2) for bills "introduced" that, if enacted, would limit a governor's or state health official's authority similarly. The first filters resulted in the following list of twenty-three states in which legislation has been exacted limiting executive branch public health emergency powers: Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, and West Virginia. The second filter resulted in the following list of twenty-two states in which legislation has been introduced that would limit executive branch public health emergency powers: Alabama, Alaska, Arizona, California, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Washington.

35. NETWORK FOR PUB. HEALTH L. & NACCHO, PROPOSED LIMITS ON PUBLIC HEALTH AUTHORITY: DANGEROUS FOR PUBLIC HEALTH 1, 5 (May 2021), https://www.networkforphl.org/resources/proposed-limits-on-public-health-authority-dangerous-for-public-health-3/.

36. *See e.g.* Dinesh D'Souza (@DineshDSouza), X (June 15, 2023, 8:35 AM), https://twitter.com/DineshDSouza/status/1669337713244250113; South Dakota Freedom Caucus, *SD Freedom Caucus Stages Opposition to Emergency Laws*, (June 20, 2023), https://sdfreedomcaucus.com/sd-freedom-caucus-stages-national-opposition-to-emergency-laws/#close.

37. *See* Emergency Power Limitation Act, ALEC, https://alec.org/model-policy/emergency-power-limitation-act/#:~:text=Summary,judicial%20review%20of%20these%20requirements.
ALEC operates "almost a dating service between politicians at the state level, local elected politicians, and many of America's biggest companies." Ed Pilkington, *How ALEC Serves As A 'Dating Service' For Politicians And Corporations*, NPR (Dec. 10, 2013), https://www.npr.org/2013/12/10/249956329/how-alec-serves-as-a-dating-service-for-politicians-and-corporations.
The organization describes itself as "America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism." ALEC, *About ALEC*, https://alec.org/about/ (last visited Oct. 16, 2023). ALEC operates privately and does not allow public participation or observation. Through a variety of task

public health emergency powers, which it published and promoted to its network of ultra-conservative state legislators in January 2021—months before the Drafting Committee had even formed. Under ALEC's Emergency Power Limitation Act, any public health emergency order issued by a governor automatically expires after seven days if the legislature is not in session; otherwise, the order expires after thirty days.[38] Moreover, the legislature is authorized to terminate unilaterally a governor's emergency orders by a vote of each chamber, and a governor may not reissue any order the legislature has terminated.[39] Additionally, ALEC's Act imposes strict scrutiny on all public health emergency orders, stating: "emergency orders, decrees, regulations, or other mandates . . . issued by state or local officials that bind, curtail or infringe the rights of private parties *must be narrowly tailored to serve a compelling public health or safety purpose*."[40] Florida has already adopted a statute with these dangerous features, which applies to emergency orders issued by political subdivisions in the state.[41]

This is the political and legal context in which the Drafting Committee began its work in the last quarter of 2021, and that continues today. It is an environment in which many believe that a temporary—and necessary—loss of liberty during the pandemic was a far greater tragedy than the loss of lives from COVID-19—1.2 million Americans and counting.[42]

B. Structure of MPHEAA

The Model Act mimics the basic structure of many emergency management statutes. It authorizes a governor to declare a "public-health emergency."[43] This, in turn, triggers the governor's authority to issue orders in response to the declared emergency.[44]

forces chaired by legislators and businesses or business lobbyists, all of whom are ALEC members, these task forces write model legislation that serves the interests of those at the table. The organization then promotes the ready-made legislation with ALEC's members who are legislators with the expectation that member-legislators will introduce and support the legislation. *See* ALEC Exposed, *What is ALEC*, CTR. FOR MEDIA DEMOCRACY, https://www.alecexposed.org/wiki/What_is_ALEC (last visited Oct. 16, 2023).

38. *See* ALEC, *supra* note 37, at § 3.

39. *See id*. at §§ 4–5.

40. *Id*. at § 3 (emphasis added).

41. *See* FLA. STAT. ANN. § 252.36(3) (West 2023).

42. *See* e.g., Ben Carson, *Americans Must Say 'Never Again' to COVID-19 Tyranny*, WASH. EXAMINER (Sept. 18, 2023), https://www.washingtonexaminer.com/restoring-america/patriotism-unity/americans-must-say-never-again-to-covid-19-tyranny; D'Souza, *supra* note 36.

43. *See* UNIF. L. COMM'N, *supra* note 3, at § 4.

44. *See generally id.* at § 6.

A governor may declare a "public-health emergency" when circumstances meet the statutory definition of that term.[45] First, there must be "an imminent threat or actual appearance of an infectious, biologic, radiologic, or chemical agent or toxin, regardless of cause."[46] As noted, the source or cause of the agent or toxin is not relevant. So, for example, a dangerous virus threatening all or part of a state may constitute a "public-health emergency" whether it was caused by a natural disaster, an act of God, or a deliberate act of bioterrorism. Second, the imminent threat or actual appearance of the agent or toxin must also "pose[] a high probability of"[47] one or more of the following harms:

45. *Id.* at § 4. Additionally, the Act permits a governor to declare a public-health emergency only "if *immediate action is appropriate*…to eliminate, reduce, contain, or mitigate a risk of harm or an adverse effect posed by the public-health emergency." *Id.* at § 4(a) (emphasis added). The phrase "immediate action is appropriate" represents a compromise among Commissioners. Some preferred that the Act require a governor to prove that immediate action is necessary so that the public can be sure that an "emergency" truly exists. Others opposed such a requirement given the harm to public health that would occur while a governor attempted to satisfy the burden of proving that some definitive action is necessary now rather than later, a burden that could be impossible in the face of a novel pandemic virus—like COVID-19—about which very little is known at the time most appropriate for declaring a public health emergency. The language is a compromise in the sense that it includes the "immediacy" element but avoids using the word "necessary" and instead uses "appropriate" to set a less demanding standard. Commentary under Section 4 clarifies this standard. Comment 3 states:

> The Governor satisfies this condition [that "immediate action is appropriate"] by determining that a wait-and-see approach is too risky or otherwise is ill-suited to the circumstances. This does not require that the Governor establish that one or more actions are necessary. Rather, it is sufficient for the Governor to determine that, given the risks and uncertainties of an evolving emergency, it is prudent for the Governor to make an initial declaration or renew a previous declaration so as to take or continue even precautionary action to protect public health.

Id. at § 4 cmt. 3.

46. *See* UNIF. L. COMM'N, *supra* note 3, at § 2(4). Comment 4 under Section 2 offers additional clarification of this element:

> The definition is designed to account for various agents and toxins that threaten or harm public health. These include, without limitation, infectious agents that are communicable among humans (e.g., COVID-19, measles, Ebola) and infectious agents transmitted through insects or other vectors (e.g., malaria). These also include, without limitation, toxins released into the environment (e.g., chemical spill or nuclear accident). Additionally, these include, without limitation, threats to public health associated with disasters or other emergencies, including, without limitation, mold, vermin, or bacteria.

Id. at § 2 cmt. 4.

47. *Id.* at § 2(4). Comment 6 under Section 2 offers additional clarification of the meaning of this phrase:

> The phrase "high probability" is intended to mean significantly higher than a baseline that would reasonably be expected either in the absence of or given the already endemic prevalence of the agent or toxin, the threat or presence of which may justify declaring a public-health emergency. So, for example, deaths or disabilities caused by common tobacco use could not constitute a public-health emergency when the number of deaths or disabilities that occur are about what would be expected given the baseline incidence of

(A) a large number of deaths of individuals in the affected population;[48]

(B) a large number of serious or long-term disabilities of individuals in the affected population;

(C) widespread exposure to the agent or toxin that poses a significant risk of substantial harm to a large number of individuals in the affected population;[49] or

(D) a substantial adverse impact on the availability of medical, public health, or other emergency resources.[50]

If a governor declares a "public-health emergency," the Act requires a governor to write a report that must be publicly released and filed with the legislature within seven days of issuing the declaration.[51] This requirement promotes executive branch accountability and transparency. The report must explain the circumstances and evidence in support of the governor's action.[52] This same reporting requirement applies each time a governor issues a public health emergency order during a declared public health emergency.[53] The Drafting Committee imagined that a governor would likely declare an

deaths and disabilities that happen year-to-year from tobacco use. Meanwhile, when, as a result of opioid use, a significant spike in deaths occurred above the baseline of what would be expected, this would have constituted a public-health emergency if all other elements of the definition of public-health emergency were also satisfied.

Id. at § 2 cmt. 6.

48. *Id.* at § 2(4)(A). Comment 6 under Section 2 clarifies the meaning of this phrase:

"Affected population" refers to the set of individuals who are likely or actually at risk of harm from the threatened or actual infectious, biologic, radiologic, or chemical agent or toxin that may justify the declaration of a public-health emergency. In this way, the size of the "affected population" is determined by the nature and scope of a particular threat. While the nature and scope of a threat may result in the determination that the "affected population" is the population of the state or of one or more political subdivisions of a state, the "affected population" need not correspond to the boundaries of one or more political subdivisions of a state.

See UNIF. L. COMM'N, *supra* note 3, at § 2 cmt. 6.

49. *Id.* at § 2(4)(C). Comment 7 clarifies what is meant by "a significant risk of substantial harm:

The phrase "significant risk of substantial harm" in subsection 4(C) of the definition of "public-health emergency" is intended to capture a broader set of harms than a large number of deaths (subsection 4(A)) and a large number of serious or long-term disabilities (subsection 4(B)), which could occur as a result of exposure to the agent or toxin giving rise to the emergency. This includes, without limitation, illness that is unlikely to result in either death or disability. For example, a highly transmissible, novel flu might not pose a significant risk of either death or disability, but it might pose a significant risk of causing thousands of individuals in the affected population to miss weeks of work or school.

Id. at § 2(4)(C) cmt. 7.

50. *Id.* at § 2(4)(D).

51. *Id*. at § 4(i).

52. *See* UNIF. L. COMM'N, *supra* note 3, at at §§ 4(i)(1), 4(j).

53. *See id.* at §§ 7(c)–(d).

emergency and issue several orders all at once, in which case the governor could satisfy the reporting requirement for each of these actions in one report.

A declaration of a public health emergency triggers a governor's authority to issue public health emergency orders.[54] The Act empowers a governor to issue public health emergency orders in two different ways. First, it specifies seventeen specific purposes an emergency order might serve and authorizes a governor to issue orders that serve one or more of those purposes.[55] These include purposes important for preventing or eliminating the risks or effects of a public health emergency and for mitigating those risks and effects.[56] For example, the Model Act authorizes a governor to issue not only conventional orders addressing testing, quarantine, and isolation, but also orders addressing the "movement, gathering, evacuation, or relocation of individuals"[57] as well as "zoning, operation, commandeering, use, or management of buildings, shelters, facilities, parks, outdoor space, or other physical space, and the management of activities in those places."[58] Second, the Act separately authorizes a governor to issue "any order to eliminate or reduce any of the risks of harm posed by the public-health emergency or to eliminate, reduce, contain, or mitigate any of the effects of the public-health emergency."[59] This catchall provision is designed to authorize emergency orders that are appropriate responses to a public health emergency but do not fall into any of the seventeen specific categories of orders.

Every public health emergency order a governor issues must meet certain procedural and substantive standards under the Model Act. These standards are designed to guide a governor's decision-making and to promote both transparency and accountability.

An order may be issued only while a public health emergency declaration is in effect.[60] The order also must be based on "evidence then available to the Governor about the nature of and risk posed by the public-health emergency" and be "rationally designed"[61] to either "eliminate or reduce the risk of harm

54. *Id.* at § 6(a).

55. *See id.* at § 6(b).

56. *Id.* at § 6(b).

57. *See* UNIF. L. COMM'N, *supra* note 3, at at § 6(b)(4).

58. *Id.* at § 6(b)(3).

59. *Id.* at § 6(c).

60. *See id.* at § 7(a)(1).

61. *Id*. at § 7(a)(2). The phrase "rationally designed" embedded in this substantive standard each order must meet is worth highlighting. State public health and emergency management statutes conventionally describe the power they delegate to executive branch officials as the authority to take any and all actions that are "necessary" to prevent the introduction or spread of a communicable disease or to otherwise protect the health and safety of the state's population. *See e.g.*, CONN. GEN. STAT. ANN. § 28-9(b)(7) (during a declared emergency, "Governor may take such other steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state. . . "). While courts traditionally have interpreted "necessary" in that context to mean rational and non-arbitrary, there is a risk that they could read it literally in

giving rise to the public-health emergency" or "eliminate, reduce, contain, or mitigate the effect of the public-health emergency."[62] Additionally, any order must identify its goal, the date on which it will expire (which must be on or before the expiration date of the declaration of a public health emergency under which the order was issued), and the agencies or officials assigned to administer the order.[63] Moreover, as noted above, a governor must write and file a report describing the evidence in support of the order.[64] Finally, in issuing an order, the governor must consider the following factors:

> (1) the scope and degree of each risk of and effect from the public-health emergency that the order is designed to eliminate, reduce, contain, or mitigate;
>
> (2) the likelihood that the order will result in the outcome it is designed to achieve;
>
> (3) the proportion of the affected population that likely will benefit from the outcome the order is designed to achieve;
>
> (4) the likelihood that the order will meet the needs of, or disproportionately burden, individuals in the affected population who are particularly vulnerable to the risks of or harm from the public-health emergency because of unique characteristics, including age, gender, disability, income and other financial resources, education, employment, location, and race; and
>
> (5) the burdens likely to result from issuing the order, including deaths, illnesses, injuries, financial losses, job losses, business closures, depletion of available financial resources, and other relevant health and economic burdens.[65]

Recognizing that public health emergencies and our understanding of their nature, risks, and effects evolve over time, the Model Act sets a range of forty-five to ninety days for the term of a public health emergency declaration;[66] an adopting state must establish a term for a declaration that falls within this range.[67] A governor may renew an initial declaration for as long as a public

the future so long as the word "necessary" remains a key statutory term. If applied literally, a requirement that emergency orders be "necessary" to prevent the introduction or spread of a communicable disease would place an enormous burden on executive branch officials. It would require the government to introduce evidence proving that the order is absolutely essential to safeguard public health. In the early stages of the pandemic, we had very little understanding of COVID-19. It would have been all but impossible for state officials to satisfy the burden of proof, and the orders that nearly all states issued would have set aside. By avoiding the word "necessary" and using "rational," the Act codifies the conventional interpretation of traditional public health and emergency statutes that empower executive branch agencies and officials to respond to emergencies and threats in any manner that is not arbitrary or capricious.

62. UNIF. L. COMM'N, *supra* note 3, at § 7(a)(2).
63. *Id*. at § 7(a)(4)–(6).
64. *Id.* at § 7(c)(1).
65. *Id.* at §§ 6(e), 7(a)(3).
66. *See id.* at §§ 4(a), 4(b).
67. *See* UNIF. L. COMM'N, *supra* note 3, at § 4 Legislative Note.

health emergency actually lasts, but renewals may not last longer than the term of the initial declaration.[68] Additionally, each renewal triggers the obligation of the governor to write a new report that is released publicly and filed with the legislature in which the governor shares the reasons and then-current evidence for the renewal.[69]

This iterative process is intended to achieve two ends. First, it provides the authority executive branch officials need to maintain their emergency powers for as long as the emergency lasts. Additionally, the process forces the governor to reevaluate the evidence and reasons that warrant extending the declaration of emergency, as well evidence supporting the particular emergency strategy being pursued. Thus, as the facts of the emergency change and develop, the Act compels the governor to assess periodically how these changes and discoveries affect policy.

A governor's authority to renew an initial or previously renewed declaration of public health emergency also turns on whether or not the legislature will have an opportunity to be in session five or more days prior to the start of any renewed declaration.[70] Only ten states have full-time legislatures,[71] and in the remaining forty states, many part-time legislatures do not have the power to call themselves into session.[72] As a result, some states' legislatures did not have the opportunity to exercise their law-making powers for months during the height of the COVID-19 pandemic because their governors did not call them into session.[73] This undercuts a vital check on executive branch authority during a prolonged emergency. By conditioning a governor's authority to renew a declaration on the state's legislature having an opportunity to be in session, the MPHEAA incentivizes a governor either to call a special legislative session or to offer to call a special legislative session if the legislative leadership would like the governor to do so.[74]

68. *Id.* at § 4(b).

69. *Id.* at § 4(i).

70. *See id.* at § 4(c)(2).

71. *See States with a Full-Time Legislature*, BALLOTPEDIA, https://ballotpedia.org/States_with_a_full-time_legislature (last visited July 30, 2023) (listing Alaska, California, Hawaii, Illinois, Massachusetts, Michigan, New York, Ohio, Pennsylvania, and Wisconsin) available at https://ballotpedia.org/States_with_a_full-time_legislature (last visited July 30, 2023).

72. Betsy Z. Russell, *Should Legislature Be Able to Call Itself Into Special Session?*, ID. PRESS (Nov. 1 2022), https://www.idahopress.com/emmett/news/should-legislature-be-able-to-call-itself-into-special-session/article_562b29ce-5853-11ed-b6e4-5387cfbb0e11.html (last visited July 30, 2023).

73. *See id.*

74. The constitutional authority of a governor to call a special legislative session is a discretionary power that state statutes cannot make mandatory. Therefore, the MPHEAA gives a governor a choice either to exercise the governor's discretion to call or offer to call a special session thereby triggering the statutory authority to renew a declaration before it expires, or a governor

If the governor does not renew a declaration before its term expires, then the declaration terminates automatically, and all orders issued under that declaration become void.[75] A governor is prohibited from redeclaring the same or similar public health emergency for fifteen days after the previous declaration expires.[76] This waiting period functions as an incentive for a governor to consider carefully whether to allow the legislature an opportunity to be in session so as to trigger the governor's power to renew a declaration before it expires.

As a further check on executive branch authority, the Act acknowledges the right of any person with standing to seek judicial review of a declaration of public health emergency, or all or part of a public health emergency order, under existing state law.[77] A person allegedly harmed by a governor's emergency order would likely file a petition for a writ of *quo warranto*, claiming that the governor issued the order without sufficient statutory authority or did so without meeting the procedural requirements of the MPHEAA.[78] Where the order was issued by an executive branch official or agency, a person with standing might also proceed under a state's administrative procedure act.[79]

Violations of a public health emergency order are subject to a $250 civil fine under the MPHEAA.[80] Additionally, the executive branch official or agency authorized to enforce a public health emergency order may pursue injunctive relief against any person violating an order.[81] The Act does not provide for criminal enforcement of a public health emergency order, nor does it create a private right of action for one who was allegedly harmed as a result of another person's violation of a public health emergency order.[82]

The Act is designed to avoid interfering with other state law that authorizes state or local agencies or officials to protect public health. It provides that "during a public-health emergency, state and local agencies and officials retain their authority under other law of this state."[83] However, there are two exceptions. First, a local agency or official may not exercise its authority during a declared public health emergency in such a way as to directly conflict with a public health emergency order issued under the Act.[84] If a local agency or official were to do so, that administrative action would be preempted.[85] Second,

may choose not to exercise that option at the expense of not triggering the statutory power to renew a declaration before it expires. *See* UNIF. L. COMM'N, *supra* note 3, at § 4 cmt. 5.

75. *See id.* at §§ 4(e), 8.
76. *See id.* at § 4(f).
77. *See id.* at § 10(a).
78. *See e.g.,* Snell v. Walz, 985 N.W.2d 277, 282 (Minn. 2023).
79. *See e.g.,* 640 Tenth, LP v. Newsom, 294 Cal. Rptr. 3d 123, 127 (Cal. Ct. App. 2022).
80. *See* UNIF. L. COMM'N, *supra* note 3, at § 12(a).
81. *See id.* at § 11.
82. *See id.* at § 13.
83. *See id.* at § 3(d).
84. *See id.* at § 9.
85. *See* UNIF. L. COMM'N, *supra* note 3, at § 9.

if a governor delegates some of the Act's emergency authority to a state or local agency or official, then the agency or official's actions are controlled by the Act and not by any other legal authority the agency or official might have.[86]

Similarly, only when a public health emergency exists does the Act displace the power a governor may have under other state law to declare a state of emergency or disaster. "The Governor may respond to an emergency other than a public-health emergency as authorized by other law of this state."[87] Of course, one emergency or disaster can include both public health and non-public health threats. "For example, a flood might result in bacteria, mold, or poisonous or disease-carrying vermin that pose a threat to public health and that otherwise meets the definition of a 'public-health emergency.'"[88] A flood can certainly constitute an emergency or disaster, and some effects of the flood may be a threat or concrete harm to public health. "In such circumstances, the Governor's authority to respond to the part of the broader emergency that constitutes a *public-health emergency* derives exclusively from this Act; meanwhile, the Governor's authority to respond to all aspects of the *broader* emergency…derives from other law of [the] state."[89]

In a state that adopts the MPHEAA and has another statute authorizing the governor to declare a state of disaster, two declarations and two sets of orders may result: a general declaration of disaster with its associated orders, and a declaration of public health emergency under the Act with orders addressing the public health aspects of the disaster.

Finally, the Act protects political subdivisions against field preemption by state law during a public health emergency, thereby preserving local governments' authority to respond to a public health emergency as each sees fit. "A public-health emergency order does not preempt an order, regulation, or ordinance of a political subdivision, except to the extent the order, regulation, or ordinance conflicts with the public-health emergency order."[90] A comment under this provision clarifies that it is designed "to permit conflict preemption and not field preemption of local law."[91] In other words, a governor cannot claim the entire field of public health emergency management simply by issuing an order during a declared public health emergency. Political subdivisions would retain whatever legal authority they had under other state law to issue other public health orders so long as those orders do not directly conflict with the state's order. For example, imagine that a governor declares a public health emergency related to the appearance of a novel, dangerous influenza virus and

86. *See id.* at § 3(d).
87. *Id*. at § 3(b).
88. *Id*. at § 3 cmt. 2.
89. *Id.* (emphasis added).
90. *See* UNIF. L. COMM'N, *supra* note 3, at § 9.
91. *Id.* at cmt.

subsequently issues a statewide indoor masking order. Further, imagine that a public school district in the same state, during the declared public health emergency, issued an order—acting under its statutory authority under state law—temporarily excluding a student or staff member exposed to the novel influenza from school. While the school district would be obligated to enforce the state's masking order, neither the state's declaration of a public health emergency nor the indoor masking order would preempt the school district's order temporarily excluding the student or staff member from school.

III. TWO KEY POLICY AND DRAFTING CHOICES

The Drafting Committee made several difficult policy choices while developing the Act. These included: (1) granting both specific and plenary powers to a governor to issue public health emergency orders; and (2) authorizing a governor to renew a declaration of public health emergency for as long as the emergency might last without requiring legislative approval. This section explains each of these choices.

A. Including Both Specific and Plenary Power to Issue Orders

As described above, the Act includes two independent provisions authorizing a governor to issue public health emergency orders during a declared emergency. Under section 6(b), a governor may issue any order that serves one or more of seventeen specified purposes.[92] As exhaustive as this list of specific purposes might seem, it is also prudent to include a broad, catchall power to account for the possibility that the idiosyncrasies of a particular public health emergency call for orders that do not fall into one of these categories. Consequently, the very next provision, section 6(c), states that the "Governor also may issue any order to eliminate or reduce a risk of harm posed by the public-health emergency or to eliminate, reduce, contain, or mitigate an effect of the public-health emergency. . . ."[93]

It is fair to ask why the Drafting Committee authorized governors to issue any public health emergency orders which fall into one or more of the seventeen purposes listed in section 6(b). After all, any order issued under the Act must be rationally designed to meet the standard under the catchall authority "to eliminate or reduce a risk of harm posed by the public-health emergency or to eliminate, reduce, contain, or mitigate an effect of the public-health emergency."[94] So, as a matter of logic, any order a governor is authorized to issue under section 6(b) can necessarily be issued under the plenary authority granted under section 6(c), making the more specific grant of authority appear superfluous.

92. *Id.* at § 6(b).
93. *Id.* at § 6(c).
94. *Id.*

As highlighted in Section II.A of this Article, recent court rulings reveal that statutory grants of plenary public health or emergency management powers are at risk of being declared unconstitutional under separation of powers theories, including the non-delegation doctrine. Under the non-delegation doctrine, statutory authority for an executive branch agency or official to promulgate rules or issue orders is a presumptively unconstitutional delegation of legislative power because the typical state constitution—like the federal Constitution—vests legislative powers exclusively in the legislative branch.[95] An exception to the doctrine exists where the statutory grant of power includes an "intelligible principle" that guides and constrains any use of that power by executive branch agencies or officials.[96] By including such a principle, the statutory grant of authority to the executive branch becomes the power to "administer" the legislation rather than the power to legislate.[97] A few state courts ruled that statutes granting plenary power to executive branch officials to take any actions "necessary" to protect public health or respond to an emergency were unconstitutional grants of legislative authority because they lacked a constraining intelligible principle.[98]

For example, the Michigan Supreme Court declared the state's Emergency Powers of the Governor Act (EPGA) unconstitutional, holding that it violated the non-delegation doctrine.[99] The EPGA authorized Michigan's Governor to "'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.'"[100] The court held that "the emergency powers conferred by the EPGA, . . . [were] remarkably broad,"[101] and illustrated the breadth of this plenary power by describing the variety of executive orders the Governor had issued under the EPGA during the pandemic.[102] These included orders requiring individuals to shelter at home, to not travel for any reason other than essential purposes, to wear masks when indoors, to stay at least six feet from others when outside of one's residence, and to not visit family or friends in hospitals or nursing homes.[103] Additional orders closed non-essential

95. *See* Hampton v. United States, 276 U.S. 394, 405–410 (1928).

96. *See id.* at 409.

97. *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 693–694 (1892).

98. In addition to *In re* Certified Questions, 958 N.W.2d 1, 24 (Mich. 2020), which is summarized in the text of this Article, *see also* Wis. Legislature v. Palm, 942 N.W.2d 900, 912–913 (Wis. 2020) (declining to interpret statutory power of public health official to "implement all emergency measures necessary to control communicable diseases" as exempting those actions from administrative rulemaking procedures because such an interpretation would result in the statute's violating the non-delegation doctrine).

99. *In re* Certified Questions, 958 N.W.2d at 31.

100. *Id.* at 12 (quoting MCL Sec. 10.31(1)).

101. *Id.* at 20.

102. *Id*. at 20–21.

103. *Id.*

businesses, instituted workplace safety measures at businesses that remained open, and prohibited advertising for non-essential goods and services.[104] The court concluded that:

> [e]ach of these policies was putatively ordered "to protect life and property" and/or to "bring the emergency situation within the affected area under control." What is more, these policies exhibit a sweeping scope, both with regard to the subjects covered and the power exercised over those subjects. Indeed, they rest on an assertion of power to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state and throughout wide-ranging industries.[105]

Next, the court considered whether the words "reasonable" and "necessary" in the EPGA's grant of authority to the Governor provide an intelligible principle sufficient to remove the statute from the non-delegation prohibition. According to the court, the word "reasonable" added nothing to guide or constrain the Governor's actions during an emergency beyond what principles of statutory construction and the due process clause of the state constitution already require; each assumes that the Legislature has not, and may not, authorize the executive branch to take unreasonable actions.[106] As for the word "necessary," the court held that given the scope of threats that an emergency can pose to people and property, virtually any reasonable action by the Governor to protect against those threats would qualify as necessary.[107] Consequently, the court concluded that:

> such illusory "non-standard" standards . . . [give] the Governor . . . free rein to exercise a substantial part of our state and local legislative authority . . . [, and] nothing within either the "necessary" or "reasonable" standards . . . serves in any realistic way to transform an otherwise impermissible delegation of legislative power into a permissible delegation of executive power.[108]

The MPHEAA includes substantive and procedural standards sufficient to protect against a non-delegation challenge to the plenary power granted in section 6(c). Nonetheless, the Drafting Committee included the more specific grants of authority in section 6(b) for a governor to issue public health emergency orders to guard against the risk that a court might invalidate the catchall power. For the same reason, the Drafting Committee also separated the grant of plenary authority into its own section and included in the provision that "[the plenary] authority under this subsection is not limited by the Governor's [more specific] authority to issue a public-health emergency order under subsection [6](b)."[109] If a court found the plenary authority so broad as to violate

104. *In re* Certified Questions, 958 N.W.2d at 20–21.
105. *Id.* at 21.
106. *Id.* at 22.
107. *Id.* at 22–23.
108. *Id.* at 24.
109. *See* UNIF. L. COMM'N, *supra* note 3, at § 6(c).

the separation of powers, then it is more likely to strike down *only* the separate plenary power provision. This is also because the language of the Act clarifies that it intended for the plenary power be independent from the more specific grant of authority. Thus, even if a court negated the plenary power, a governor's authority to issue public health emergency orders would remain intact to the extent those orders served one or more of the specific purposes listed in section 6(b). Moreover, the more specific grant of authority to issue orders is very likely to survive a separation of powers challenge precisely because it lists discrete purposes an order may serve, and each purpose, alone and collectively, creates intelligible principles that guide and constrain the governor's use of that authority.

The second reason the Drafting Committee separated the more specific and plenary grants of power also explains why the specific grant of authority appears before the plenary grant of authority in the Act. When general and specific grants of emergency power appear in the same statutory provision, some courts will treat them as inseverable.[110] As a result, a specific grant of power could be nullified if a general grant of authority in the same provision is held unconstitutional. Similarly, courts are more likely to construe a plenary power as limited by specific powers granted in the same provision, which undercuts the purpose of granting a plenary power.[111] By separating the specific and plenary grants of authority into two different sections and including language that the plenary power is not limited by the purposes listed in the specific grant of power, the Drafting Committee reduced each of these risks. Additionally, the Drafting Committee decided against using a common statutory structure when granting both broad and specific powers, which is to describe the broad power first followed by the statement that this power "includes but is not limited to" the more specific powers listed second. Even with the "not limited to" phrase, this

110. *See e.g.*, *In re* Certified Questions, 958 N.W.2d at 25 (holding that specific authority for Governor to issue emergency orders about traffic, building occupancy, and liquor sales, are not severable from general authority appearing in same statutory provision, and, as a result, entire statute is unconstitutional because the general grant of authority violates the non-delegation doctrine).

111. *See e.g.*, Corman v. Acting Sec'y of Pa. Dep't of Health, 266 A.3d 452, 483 (Pa. 2021) (the terms "isolation" and "quarantine" in a statute empowering an executive branch official to respond to a public health emergency narrow what constitutes "any other disease control measure" under the same provision so as to preclude any authority to issue masking orders); James v. Heinrich, 960 N.W.2d 350, 359 (Wis. 2021) (statute authorizing public health official to "take all measures necessary to prevent, suppress and control communicable diseases" does not empower official to close schools because Legislature must have meant to exclude that power when, in same provision, legislature authorized official to "inspect schools" but remained silent about closing schools); Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1157 (M.D. Fla. 2022), *vacated as moot sub nom.* Health Freedom Def. Fund v. Pres. of U.S., 71 F.4th 888 (11th Cir. 2023) (statutory authority for CDC to institute "other measures" as "necessary" to prevent the spread of disease is limited by the specific words "sanitation" and "disinfection").

structure suggests that the specific powers listed second are illustrative examples of the plenary power, a suggestion that the Drafting Committee preferred to avoid. Consequently, the MPHEAA grants the more specific set of powers first followed by the plenary power in the following section: a structure that more accurately communicates that the plenary power supplements the specific powers.

B. No Legislative Approval Required to Renew a Declaration

Public frustration with the prolonged public health emergency and shifting executive branch responses to pandemic-related uncertainty has coalesced around a political strategy of clawing back governors' emergency powers. A popular tactic is to empower state legislatures to terminate public health emergency declarations and orders unilaterally. For example, Kentucky amended its emergency management statute, authorizing the "General Assembly, by joint resolution, [to] terminate a declaration of emergency at any time."[112] Likewise, ALEC's model law provides that either the governor "or Legislature" may terminate a public health emergency order before its term expires.[113] The effect is to shift public health emergency authority from the executive to the legislative branch. Twenty-two states introduced bills shifting public health emergency authority from the states' governors to their legislatures during the period from January 2021 to May 2022.[114]

Although some members of the Drafting Committee initially supported a provision authorizing a legislature to terminate a governor's declaration of public health emergency or public health emergency order, the Drafting Committee ultimately rejected the idea because such a provision would likely be unconstitutional. Under most states' constitutions, legislation is binding as law only if it receives bicameral approval and is presented to the governor for signature or, if vetoed, through legislative override.[115] Statutes authorizing a legislature to terminate a governor's public health emergency declaration or order unilaterally based on a joint resolution violate the constitutional requirement that legislation must be presented to the governor for signature or veto. Without this constitutional step, legislative action does not have the force of law.

112. KY. REV. STAT. ANN. § 39A.090(4).

113. *See* ALEC, *supra* note 37, at § 3 ("All such [public health emergency] orders shall expire in [30] days unless . . . [t]he Governor or Legislature [by law] terminates them earlier").

114. POL'Y SURVEILLANCE PROGRAM, *Reallocation of Public Health Authority* (last visited Mar. 15, 2024), https://lawatlas.org/datasets/public-health-authority-shiftss (filtered by first selecting "yes" to two questions: 1. Is there a bill in the state shifting public health authority? 2. Is there a bill that shifts public health authority from the governor?; and by answering "to the state legislature" to question 2.1: Where does the public health authority shift?).

115. *See Indivisible States: How State Legislatures Work*, INDIVISIBLE, https://indivisible.org/resource/indivisible-states-how-state-legislatures-work.

The Pennsylvania Supreme Court addressed this issue during the pandemic, holding that a joint resolution purporting to terminate the Governor's emergency declaration was unenforceable because it violated the presentment clause of the Pennsylvania Constitution. In *Wolf v. Scarnati*, the court reviewed a complaint in *mandamus* filed by Pennsylvania's Legislature seeking to enjoin Governor Tom Wolf from responding the COVID-19 pandemic under his June 2020 proclamation renewing an initial public health emergency declaration.[116] The Legislature claimed that it had terminated the Governor's proclamation by passing a concurrent resolution, which it was authorized to do under a provision of Pennsylvania's Emergency Management Services Code.[117] The concurrent resolution had not been presented to the Governor for signature or veto, and the question before the Pennsylvania Supreme Court was whether the resolution was null and void as a result.[118] The court held that the Legislature's resolution violated the Pennsylvania Constitution's requirement that every legislative "order, resolution, or vote . . . be presented to the Governor" for approval or disapproval and, therefore, it was a legal nullity.[119]

The Drafting Committee refused to include an unconstitutional provision in the Model Act. Doing so would not only undermine the credibility of the Uniform Law Commission, but would also undermine the goal of supplying legislatures with an Act to help prepare their states for a public health emergency. A state that unknowingly relies on an unconstitutional statutory check on executive branch authority during an emergency will surely discover this foundational flaw in its authorizing statute at the most dangerous and chaotic moments during the next emergency. Unfortunately, several state emergency

116. *See* Wolf v. Scarnati, 233 A.3d 679, 686 (Pa. 2020).

117. *Id*. at 684–85 (citing to 35 PA. CONS. STAT. § 7301(c)).

118. *Id*. at 686–87.

119. *See id*. at 687, 707. The court's reasoning relied primarily on the canon of constitutional avoidance, which requires a court to construe a statute in such a way as to avoid placing the constitutionality of the statute in doubt. *See id*. at 696–98. The statutory provision at issue in the case left some ambiguity as to whether it was authorizing the Legislature to terminate a Governor's declaration of a public health emergency unilaterally and without presentment or approval of the Governor. *See* 35 PA. CONS. STAT. § 7301(c). Had the provision unambiguously authorized the Legislature to terminate the Governor's proclamation without presentment, then the court likely would have declared that provision unconstitutional because it would permit a legislative veto.

> To allow a concurrent resolution that does not fit into one of the exceptions to take effect without presentment would be to authorize a legislative veto. In *Commonwealth v. Sessoms*, 516 Pa. 365, 532 A.2d 775 (1987), we adopted the reasoning of the Supreme Court of the United States in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983), and found that the provisions of Article III, Section 9 'are integral parts of the constitutional design for the separation of powers.' *Sessoms*, 532 A.2d at 778 (quoting *Chadha*, 462 U.S. at 946). '[U]nder our Constitution[,] the legislative power, even when exercised by concurrent resolution, must be subject to gubernatorial review.' *Id.* at 782.

Wolf, 233 A.3d at 687–88.

statutes contain this constitutional poisoned pill and should amend their laws to avoid the kind of mid-emergency surprise experienced in Pennsylvania.[120]

The Drafting Committee also considered and rejected another option that would shift public health emergency authority from the executive to the legislative branch. The provision would have placed a hard stop on all authority of a governor to declare a public health emergency or to issue public health emergency orders after ninety days. Under such a provision, the governor would not have been granted the power to renew an initial declaration or set of orders—at least not without seeking and receiving additional authority from the legislature. If a public health emergency were to last longer than ninety days, then the governor—anticipating the automatic termination of an emergency declaration—would need to petition the legislature to authorize a renewal, which the legislature could approve by joint resolution. If the legislature either failed to act or rejected the governor's petition, then the declaration would expire, and the governor would lose the power to declare the same or similar public health emergency permanently. At that point, only the legislature would have the power to redeclare an emergency.

Michigan has an emergency management statute with this structure, which was the subject of litigation during the COVID-19 pandemic. The statute provides:

> The governor shall, by executive order or proclamation, declare a state of emergency if he or 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*.[121]

Michigan's Governor declared a state of emergency under this statute in early March 2020.[122] The following month, the Governor filed a request with Michigan's Legislature to approve an extension of the emergency proclamation for another seventy days.[123] The Legislature approved a much shorter extension through the end of April.[124] At the end of the month, the Governor issued an executive order terminating the state of emergency as required under the

120. *See* Jose Sandoval, *"The People" Getting Sick of Orders: Legislative Vetoes & Public Health*, 17 SAINT LOUIS J. HEALTH L. & POL'Y (forthcoming June 2024) (manuscript at 7–14) (on file with authors).

121. MICH. COMP. LAWS § 30.403(4) (1976).

122. *See In re* Certified Questions, 958 N.W.2d 1, 6 (Mich. 2020).

123. *Id.* at 6–7.

124. *Id.*

statute.[125] She then immediately issued another executive order redeclaring the same state of emergency.[126] Several health care providers, who were prohibited from performing certain surgical procedures under one of the Governor's public health emergency orders, sued the Governor in federal court, claiming, among other things, that the Governor's order and the underlying state of emergency should be set aside as *ultra vires*.[127] The federal district court certified questions to the Michigan Supreme Court, including "whether, under the [statutory provision quoted above], the Governor had the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic."[128]

The Michigan Supreme Court held that, based on the plain language of the statute, the Governor did not have the legal authority to extend or redeclare the same state of emergency or to issue any emergency orders once the approved extension of the state of emergency expired at the end of April 2020.[129] In so holding, the court rejected the Governor's argument that the first sentence of the provision quoted above, which requires the Governor to declare a state of emergency whenever circumstances warrant, mandated that the Governor immediately declare a state of emergency again because of the ongoing COVID-19 pandemic.[130] The court construed the statutory language differently:

> [W]hen the cited language is read in reasonable conjunction with the language imposing the 28-day limitation, it is clear that the Governor only possesses the authority or obligation to declare a state of emergency or state of disaster once and then must terminate that declaration after 28 days if the Legislature has not authorized an extension. The Governor possesses no authority—much less obligation—to redeclare the same state of emergency or state of disaster and thereby avoid the Legislature's limitation on her authority under the [statute].[131]

The court rejected the Governor's reading of the statute because it "would effectively render the 28-day limitation a nullity."[132] Thus, the Governor's emergency powers came to a strict and permanent end unless and until the Legislature initiated further action.

This statutory structure is likely constitutional in most states. Unlike the statute in Pennsylvania, the Michigan statute does not attempt to authorize its Legislature to unilaterally end an ongoing state of emergency or ongoing emergency orders. Rather, the statute sets a term during which the Governor has the power to declare an emergency and issue emergency orders, after which the Governor loses all statutory power unless the Legislature acts to approve an

125. *Id.* at 7.
126. *Id.*
127. *See In re* Certified Questions, 958 N.W.2d at 7.
128. *Id.*
129. *Id*. at 11.
130. *Id.* at 10.
131. *Id.* (emphasis omitted).
132. *In re* Certified Questions, 958 N.W.2d at 9–10.

extension of emergency power beyond the twenty-eight-day statutory term.[133] Thus, in Michigan, the very statute that authorized the Governor to act also terminated that authority. There was not any unilateral intervention by the Michigan Legislature as there was in Pennsylvania. As a result, the Michigan Legislature did not violate the constitutional requirement of presentment, and the Michigan statute did not authorize a legislative veto.

Indeed, the Michigan Supreme Court addressed this very issue and came to the same conclusion. It reasoned:

> These provisions impose nothing more than a durational limitation on the Governor's authority. The Governor's declaration of a state of emergency or state of disaster may only endure for 28 days absent legislative approval of an extension. So, if the Legislature does nothing, as it did here, the Governor is obligated to terminate the state of emergency or state of disaster after 28 days. *A durational limitation is not the equivalent of a veto*.[134]

The Drafting Committee rejected the Michigan statutory structure for shifting public health emergency powers from the executive to legislative branch for policy, rather than constitutionality, reasons. First and foremost, the executive branch is better positioned than the legislative branch to declare, extend, and otherwise manage an emergency. Public health expertise and other resources are generally embedded in a state's executive branch in the form of appointed public health officers and existing public health agencies. Those executive branch officials and agencies are best informed both because they routinely monitor for the presence of infectious diseases and other health hazards and because they have direct, established lines of communication with federal authorities like the CDC. Moreover, they have the "gathered wisdom" that comes from public health experience. This is critical when, during a time of "radical uncertainty," judgments must be made on behalf of the state as to whether and when to declare an emergency, which strategies to deploy, and when to deploy them for the sake of protecting public health.[135] A state's public health emergency statute must enable the branch of government best positioned for such consequential decision-making to have the authority to act immediately, to continue to act for as long as an emergency lasts, and to do so without seeking permission from another branch of government. In the Drafting Committee's view, this meant authorizing a governor, as the head of the executive branch, to

133. *See* MICH. COMP. LAWS § 30.403(4) (1976).

134. *In re* Certified Questions, 958 N.W.2d at 11 (emphasis added).

135. "Radical uncertainty" is a term of art among those who study emergency preparedness. It refers to circumstances in which decision-makers must act even though "they may reasonably be able to imagine some of the different outcomes of their actions but can neither know nor specify the full range of possibilities nor calculate the likelihood that the one they desire will eventuate." David Tuckett, David Good & Leonard Smith, *Confronting Radical Uncertainty: Overview*, THE ROYAL SOCIETY, https://royalsociety.org/science-events-and-lectures/2022/10/radical-uncertainty/ (last visited Oct. 12, 2023).

not only declare an initial public health emergency, but also to renew the state of emergency as circumstances warrant.

A second and related reason for the Drafting Committee's choice is that legislatures can become mired in divisive politics. Any statute that shifts public health emergency management authority to the legislative branch runs the risk that political polarization will further hinder a timely and effective response. Michigan, again, provides an instructive example. At the end of April 2020, just as Michigan's extended state of emergency was due to expire, the Governor—a Democrat—asked the state's Republican-controlled Legislature to extend the emergency declaration for another twenty-eight days.[136] The Legislature declined to extend the emergency in a party-line vote,[137] despite the fact that, at the time, Michigan's most populous county had the nation's fourth largest number of COVID-19 deaths.[138] But the state of public health was likely not at the forefront of legislators' minds during this vote. Between 400 and 700 "anti-lockdown protesters"[139] not only assembled at Michigan's capitol building; they entered the capitol, crowded its halls, and yelled in the faces of capitol security who blocked them from entering the hearing chamber.[140] Most alarmingly, many of the protesters were armed.[141] At the same time, President Trump inserted himself into the mix by tweeting that Michigan's Governor should give in to the protesters' demands to end the state's COVID-19 orders.[142] Even if Michigan's Legislature somehow had the public health information and know-how that was at the Governor's fingertips, it is absurd to conclude that any legislation passed in such a toxic political environment would serve the interests of Michigan better than the ongoing authority of the Governor to manage the public health emergency.

Michigan's experience, while perhaps extreme, is nonetheless relevant. As Professor Wendy Parmet notes in this same journal issue, public health legal preparedness has been most critically undermined in states with divided, partisan governments; in particular, in states with a Democratic governor and a Republican-controlled legislature.[143] She writes that "the partisan divide around

136. *See* Ivan Pereira, *Michigan Governor Extends State Emergency Order Despite Trump Tweet Backing Protesters*, ABC NEWS (May 1, 2020), https://abcnews.go.com/US/michigan-governor-extends-state-emergency-order-protest-trump/story?id=70452444.

137. *See id*.

138. *See id*.

139. Ivan Pereira, *Protestors, some armed, spill into Michigan Capitol building demanding end to stay-at-home order*, ABC News (Apr. 30, 2020), https://abcnews.go.com/US/michigan-rally-shelter-place-order-spills-capitol-building/story?id=70432928.

140. *Id.*

141. *Id.*

142. *See* Pereira, *supra* note 136.

143. *See* Wendy E. Parmet, *From Deference to Indifference: Judicial Review of the Scope of Public Health Authority During the COVID-19 Pandemic*, 17 SAINT LOUIS J. HEALTH L. & POL'Y (forthcoming June 2024) (manuscript at 23) (on file with authors).

the pandemic is another likely reason" for the decline of judicial deference to the judgments of public health officials.[144] "The fact that each of the state supreme court decisions striking down public health authorities came from states where Republican officials challenged the actions of Democratic executive officials points to partisanship's strong role in the COVID-19 cases."[145]

The Drafting Committee chose to account for the ugly, modern truth that good public health governance means anticipating times "when partisan divisions grow so rancorous that 'owning' the other side becomes more important than protecting the common good and different political communities become entrenched in their epistemological echo chambers (many of which spew clear falsehoods)."[146] The Drafting Committee accounted for such politics by including a provision in the MPHEAA that provides a governor with the conditional power to renew a declaration of public health emergency for as long as circumstances warrant.[147] If a governor satisfies the conditions for renewing a declaration at the end of its term, then there is no limitation on the number of times a governor is empowered to renew the declaration.[148]

Yet, to assure that a state legislature could play its constitutional role during a prolonged public health emergency, the Drafting Committee included a condition on a governor's power to renew a declaration of public health emergency. The power to renew a declaration is only triggered if the legislature will be in session or will have "an opportunity to be in session" at least five days prior to the commencement of the term of a renewed declaration of public health emergency.[149] As explained above, the governor of a state with a part-time legislature that is not empowered to call itself into a special session can satisfy this condition by calling a special legislative session or by at least offering to the legislature's leadership to do so.[150] Once in session, the political process will take control. The legislature may pass bills related to the declaration or any of its associated emergency orders and force the governor to account for the will of the people through its elected legislators by either signing or vetoing such bills, each of which have political consequences for a governor. A gubernatorial veto will trigger the power of the legislature to vote to override the veto and enact the law. These are the conventional checks and balances that the MPHEAA's "opportunity to be in session" will bring to bear.

One might argue that a statutory structure like the one in Michigan that terms out the emergency powers of a governor unless and until the legislature extends those powers is valuable because it creates an incentive for a governor to

144. *Id.* at 42.
145. *Id.*
146. *Id.*
147. UNIF. L. COMM'N, *supra* note 3, at § 4(c), (h).
148. *Id.* at § 4(d).
149. *Id.* at § 4(c)(2).
150. *See* discussion *supra* Part II.B.

negotiate with legislative leadership. Such negotiations can result in ongoing authority for the governor to manage a prolonged public health emergency, albeit with limitations or conditions imposed by the legislature.

Setting aside the reality demonstrated in Michigan that negotiations can also fail, the answer to this argument is that an opportunity to negotiate is also created when a governor offers to call a special legislative session to trigger the governor's power to renew a declaration under the Act. Additionally, bills related to an ongoing public health emergency that are introduced in or are passed by the legislature present an opportunity for the governor to negotiate when they reach his or her desk for approval. Thus, it is not a choice between a statutory structure that incentivizes executive and legislative branch negotiations and one that does not. Rather, the question is whether it is good public health governance to make termination of a governor's emergency powers the default result of a failed negotiation. The Drafting Committee decided this made the stakes of negotiation much too high, and chose to ensure that governors retained the authority to deploy the executive branch's public health expertise and resources for as long as an emergency lasts.

IV. MPHEAA'S VALUE

Critically, the MPHEAA rebuilds the legal foundation for states to mount an appropriate and effective response to a public health emergency given the damage done to those state powers in the "burn it all down" political environment of the COVID-19 pandemic. It does so by securing not only executive branch power to end a public health emergency quickly through conventional measures, but also the power to take appropriate steps to mitigate the effects of a prolonged emergency.

The Model Act further secures public health emergency powers for governors by accounting for the risk of constitutional challenges that undercut vital authorizing statutes in states like Michigan and Wisconsin. The Act provides a variety of substantive standards that guide and constrain any use of the executive branch powers it grants. Additionally, the Act's procedural requirements ensure that executive branch action during a public health emergency is accountable to the legislative branch. Finally, the Act creates a ready-made avenue for individuals and business entities to seek judicial review of any public health emergency order, which the Drafting Committee believes will provide an outlet for grievances other than constitutional challenges that threaten to dismantle foundational statutory powers essential to managing an emergency.

That said, the MPHEAA cannot by itself ensure that a state's response to a public health emergency is sufficient, especially not during a prolonged emergency. As we learned during the peak of the COVID-19 pandemic, inequities abound when public health emergencies interrupt important aspects

of life, including work, school, transportation, community, and family.[151] The Model Act empowers a governor to issue orders that distribute any funds appropriated by the legislature,[152] which could include funds designed to replace lost income among a community's most vulnerable populations. That power, however, is meaningless if the legislature does not authorize any funding for that purpose. Additionally, the Act requires that a governor at least consider the benefits and burdens that an emergency order will have on particularly vulnerable segments of the population. However, the Act does not go so far as to require that a state collect data necessary to assess whether its response to an emergency is effective and equitable, meaning that there is no mechanism by which governors can learn from past responses to emergencies and determine how to best support vulnerable populations in future emergencies.

V. CONCLUSION

Ultimately, the MPHEAA is necessary to sound public health emergency preparedness, but it is not sufficient. There is still more work to be done.

Our legal preparedness for threats to public health seems to be a "two steps forward, one step back" project. The terror of 9/11 focused policymaking attention on public health emergency preparedness for the first time in a long time. Yet, with each successive public health crisis—SARS, Hurricane Katrina, H1N1, Ebola—we rediscover that the law is not as prepared as we had thought. Our experience with COVID-19 is no different. The pandemic revealed many weaknesses in our public health infrastructure, our political willingness to act as a community rather than a collection of individuals, and—of course—our laws. The MPHEAA is two steps forward.

151. *See* Rebecca Wolf et al., *Inequalities at Work and The Toll of COVID-19*, HEALTH AFFAIRS (June 4, 2021), https://www.healthaffairs.org/do/10.1377/hpb20210428.863621/#:~:text=The%20COVID%2D19%20pandemic%20has,equitable%20opportunities%20in%20the%20future; *see also* Clea Simon, *How COVID Taught America About Inequity in Education*, HARVARD GAZETTE (July 9, 2021), https://news.harvard.edu/gazette/story/2021/07/how-covid-taught-america-about-inequity-in-education/; Katherine L. Chen et al., *How is the COVID-19 Pandemic Shaping Transportation Access to Health Care?*, TRANSP. RSCH. INTERDISC. PERSPS. (June 10, 2021); Mieke Thomeer et al., *How Families Matter for Health Inequality during the COVID-19 Pandemic*, 12 J. FAM. THEORY REV. (2020); F. Marjin Stok et al., *Social Inequality and Solidarity in Times of COVID-19*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH (2021).

152. UNIF. L. COMM'N, *supra* note 3, at § 6(b)(2).