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“THE PEOPLE” GETTING SICK OF ORDERS: LEGISLATIVE VETOES AND CHECKS AND BALANCES

ABSTRACT

*During the COVID-19 pandemic, state legislators rushed to amend their public health emergency statutes or state’s constitution to alter the balance of power between the executive and legislative branches during public health emergencies. The power to exercise an unconditional and unilateral legislative veto of a governor’s declaration of public health emergency is among one of the most forceful of these pandemic-era amendments. The Pennsylvania legislature attempted to exercise this kind of power in June 2020 to prematurely terminate the governor’s declaration of public health emergency, which was challenged in *Wolf v. Scarnati*. While the Supreme Court of Pennsylvania held that this violated the Pennsylvania Constitution’s presentment clause, the Pennsylvania legislature lost the battle, but won the war; Pennsylvania voters approved a constitutional amendment to the state’s presentment clause in May 2021, creating an unrestrained exception for legislative vetoes of the governor’s declarations of public health emergency.*

*Kentucky, New York, Florida, and New Hampshire’s legislatures granted themselves similar statutory legislative vetoes in the wake of the pandemic. These self-grants of unfettered power to override a governor open the door for partisan politics to more easily derail future public health emergency responses. This Note argues that these legislative vetoes are facially unconstitutional and that, if used, will likely face the same fate as the legislative veto at issue in *Scarnati*. With that fate in mind, should states that want to enhance legislative oversight and executive branch accountability during a public health emergency follow Pennsylvania’s example and carve an exception into their constitutions, or work within the current constitutional system to achieve these objectives through other means?*

This Note endorses the latter approach. Rather than tinker with bedrock constitutional principles of separation of powers and checks and balances as Pennsylvania has, this Note endorses a legislative framework created by the Uniform Law Commission as a constitutional, albeit imperfect, legislative solution to address the need for improved oversight of executive branch declarations and orders and interbranch cooperation in order to best serve the public health needs of its people.

I. INTRODUCTION

When the COVID-19 pandemic (“the pandemic”) reached the United States in March 2020, governors in all fifty states and the mayor of the District of Columbia promptly issued declarations of public health emergency (“PHE”).¹ Thereafter, many states’ governors issued executive orders in accordance with each state’s PHE or other emergency statutes.² These executive orders included measures like mask mandates, vaccine mandates, and school and business closures, among many others.³ These executive orders, designed in part based on the expertise of epidemiologists and public health experts, were issued to combat the spread of COVID-19.⁴

State efforts to mitigate the pandemic began with encouraging communities to stay at home for two weeks to “flatten the curve.”⁵ But as infection and death rates rose, those two weeks became months as governors continued to extend these “temporary” stay at home orders and issue even more executive orders. These continuing restrictions were met with skepticism and frustration from many citizens,⁶ some of whom voiced concerns that these executive orders

1. *2020 COVID-19 State Restrictions, Re-openings, and Mask Requirements*, NAT’L ACAD. FOR STATE HEALTH POL’Y (Jan. 11, 2021), <https://nashp.org/2020-covid-19-state-restrictions-re-openings-and-mask-requirements/>.

2. *See, e.g.*, Mo. Exec. Order No. 20-03 (Mar. 18, 2020), <https://www.sos.mo.gov/library/reference/orders/2020/eo3>.

3. *See, e.g.*, Ill. Exec. Order No. 2020-32 (Apr. 30, 2020), <https://www.illinois.gov/government/executive-orders/executive-order-executive-order-number-32.2020.html>.

4. *See, e.g.*, Tex. Exec. Order No. GA-08 (Mar. 19, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_08_COVID-19_preparedness_and_mitigation_FINAL_03-19-2020_1.pdf.

5. Helen Branswell, *Why ‘flattening the curve’ May be the World’s Best Bet to Slow the Coronavirus*, STAT (Mar. 11, 2020), <https://www.statnews.com/2020/03/11/flattening-curve-coronavirus/>.

6. *See Most Americans Say State Governments Have Lifted COVID-19 Restrictions Too Quickly*, PEW RSCH. CTR. (Aug. 6, 2020), <https://www.pewresearch.org/politics/2020/08/06/public-assessments-of-the-u-s-coronavirus-outbreak/#what-is-the-most-effective-way-to-an-economic-recovery> (summarizing the results of an online survey of 11,001 U.S. adults during July and August of 2020; finding that only thirty percent of Americans were “more concern[ed] that these restrictions have not been lifted quickly enough.”).

violated their civil rights.⁷ In response to this outcry,⁸ state legislatures quickly amended PHE statutes to alter the balance of power between states' legislative and executive branches. As of November 2023, legislators in all fifty states have proposed some form of amendment to their state's PHE statutes; at least eight states have successfully amended their PHE statutes, expanding the legislature's oversight of governors' declarations of PHE ("declaration(s)") and executive orders.⁹ Pennsylvania has taken the most drastic action thus far, amending its constitution's presentment clause to permit a legislative veto of a governor's declaration or executive order.¹⁰

These amendments have significant implications for the future of public health preparedness. Most of these amendments appear to enable a legislative veto, which avoids the presentment clause of their respective states' constitutions and allows the legislature to unilaterally terminate a declaration or executive order.¹¹ Canons of statutory interpretation and bedrock principles of separation of powers mandate that these amendments be interpreted to require presentment to the governor for approval or veto.¹² Thus, these amendments create the risk that a legislature's exercise of unconstitutional power during a

7. See, e.g., Marc Levy, *Wolf's Mask Order Inflames Partisan Fight Over Virus*, AP (July 3, 2020, 5:09 PM), <https://apnews.com/article/149b46d2535d615b54b3d8fbb71d4de6> (collecting criticism regarding the governors' executive orders from state legislators). Some representatives felt that "we live in a free society, people can make decisions for themselves" whether to wear a mask during the pandemic. Others were more forceful in their language, invoking the sacrifices of members of the armed forces to make the argument that "they died so that one man would not get to dictate laws and tell us how we have to live our lives" during the pandemic. *Id.* See also Doug Mastriano, *Op-Ed: Religious Freedom in Pennsylvania & COVID-19*, SENATOR MASTRIANO (May 28, 2020), <https://senatormastriano.com/2020/05/28/op-ed-religious-freedom-in-pennsylvania-covid-19/>. State Senator Mastriano raised concerns regarding the First Amendment's right to free exercise of religion: "Neither Governor Wolf, the Health Secretary, nor any government official can 'in any case whatever, control or interfere' with this right. To infringe on this would be an unprecedented violation of people's basic constitutional rights." *Id.*

8. See, e.g., Dakin Andone, *Protests are Popping up Across the US Over Stay-At-Home Restrictions*, CNN (Apr. 17, 2020), <https://www.cnn.com/2020/04/16/us/protests-coronavirus-stay-at-home-orders/index.html>.

9. *50 State Survey: Summary of Enacted Laws and Pending Bills Limiting Public Health Authority: The Second Wave*, NETWORK FOR PUBLIC HEALTH LAW (June 1, 2022), <https://www.networkforphl.org/wp-content/uploads/2022/06/Summary-of-Enacted-Laws-and-Pending-Bills-Limiting-Public-Health-Authority-2.pdf>; Me. Leg. Doc. 2167, § H-1 (129th Legis. 2020); H.B. 6247, 2023 Reg. Leg. Sess. (CT 2023); S.B. 136, 82nd Reg. Sess. (Nev. 2023); H.B. 80, 56th First Sess. (N.M. 2023); H.B. 2399, 82nd Reg. Sess. (Or. 2023); Assemb. B. 272, 2021-22 Reg. Sess. (WI 2023)). Maine amended its PHE statute, preserving preexisting separation of powers between legislative and executive; Connecticut, Nevada, New Mexico, Oregon, and Wisconsin proposed legislative oversight mechanisms, but these bills have not become law.

10. *Corman v. Acting Sec'y of Pa. Dep't of Health*, 266 A.3d 452, 457-58 (Pa. 2021).

11. See discussion *infra* Part IV.

12. See discussion *infra* Part IV.

PHE will disrupt the government's ability to rapidly cooperate and act to protect the people whom it represents.

This Note proceeds in four parts. Part II describes the developments prompting this recent wave of PHE legislation. Part III examines Pennsylvania's experience with defining and rebalancing its emergency powers during the pandemic.¹³ Using Pennsylvania as a guide, Part IV analyzes the constitutionality of amendments to PHE statutes in four states: Kentucky, New York, Florida, and New Hampshire.¹⁴ Finally, Part V proposes legislative solutions that align with what is necessary to respond effectively to a PHE using reason and science¹⁵ while reflecting upon the uncertainty these four amendments create.

II. STATE REACTIONS TO COVID-19

In March 2020, COVID-19¹⁶ was a novel virus spreading rapidly throughout the United States.¹⁷ Scientists did not fully understand how COVID-19 could be transmitted from person to person, how long it could live on surfaces, or how long it could linger in a given space after someone spoke, coughed, or sneezed, gleaned what little they *did* know from the virus' initial outbreak in China in December 2019.¹⁸

To combat the threat posed by this novel virus, states' public health authorities and governors implemented a variety of emergency responses throughout the pandemic,¹⁹ including stay-at-home orders, mask mandates, travel restrictions, and curfews.²⁰ Many of these measures, especially mask mandates, were effective in combatting the spread of COVID-19.²¹

13. See discussion *infra* Part III.

14. See discussion *infra* Part IV.

15. See discussion *infra* Part V.

16. For ease of discussion, this Note will refer to both the virus (SARS-CoV-2) and the disease it causes (COVID-19) using the colloquial shorthand "COVID-19."

17. Yi-Chi et al., *The Outbreak of COVID-19: An Overview*, 83 J. CHINESE MED. ASS'N 217, 218 (2020).

18. *Id.* at 217–18.

19. See Lawrence O. Gostin & Lindsay F. Wiley, *Governmental Public Health Powers During the COVID-19 Pandemic: Stay-at-Home Orders, Business Closures, and Travel Restrictions*, 323 JAMA 2137, 2137, 2138 (2020) (describing the various executive orders promulgated by governors and public health authorities).

20. *Id.*; see also NAT'L ACAD. FOR STATE HEALTH POL'Y, *supra* note 1.

21. See Bhuma Krishnamachari et al., *The Role of Mask Mandates, Stay at Home Orders and School Closure in Curbing the COVID-19 Pandemic Prior to Vaccination*, 49 AM. J. OF INFECTION CONTROL 1036, 1039–40 (2021) (study of COVID-19 data finding that states that implemented a mask mandate earlier in the pandemic had an overall lower cumulative number of COVID-19 cases).

Despite the effectiveness of these public health measures, some states saw a strong negative reaction to the orders.²² Throughout April 2020, anti-lockdown protests²³ occurred in nearly every state.²⁴ These protests seemed to be directly at odds with popular sentiment at the time; nearly two-thirds of all Americans surveyed by the Pew Research Center felt that "the worst [of the pandemic was] still to come," and worried that "state governments [would] lift restrictions on public activity too quickly."²⁵ Only about one-third of Americans felt that "the worst [was] behind us," and worried that "state governments [would] not lift restrictions on public activity quickly enough."²⁶ This minority was ultimately successful in pressuring state governments to ease or lift business closures by May 2020.²⁷ By the summer of 2021,²⁸ many states allowed declarations to expire,²⁹ while others had already repealed most emergency measures.³⁰

Some states went as far as introducing targeted legislation to prevent certain public health measures from being used to combat future pandemics, such as mask or vaccine mandates.³¹ Consider Idaho's House Bill 391, which expressly prohibits any governmental entity from imposing or enforcing "any additional restrictions on ... any rights guaranteed by the United States [C]onstitution or the constitution of the state of Idaho, including the right to peaceable assembly

22. Brenna Goth, *Pandemic Backlash Leaves Cities With Less Decision-Making Power*, BLOOMBERG LAW (Jul. 19, 2021), <https://news.bloomberglaw.com/coronavirus/pandemic-backlash-leaves-cities-with-less-decision-making-power-1>.

23. Michael Martina et al., *How Trump Allies Have Organized and Promoted Anti-Lockdown Protests*, REUTERS (Apr. 21, 2020), <https://www.reuters.com/article/us-health-coronavirus-trump-protests-idUSKCN2233ES>.

24. See, e.g., Andone, *supra* note 8 (noting that Michigan, Ohio, Kentucky, Minnesota, North Carolina, and Utah had experienced such "anti-lockdown" protests).

25. *Most Americans Say Trump Was Too Slow in Initial Response to Coronavirus Threat*, PEW RSCH. CTR. 3, 4 (2020), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/04/PP_2020.04.16_Trump-and-COVID-19_FINAL.pdf (describing the results of an online survey of 4,917 U.S. adults in April of 2020, recruited through national, random sampling of residential addresses, and weighted to be representative of the U.S. adult population by gender, race, ethnicity, partisan affiliation, education and other categories).

26. *Id.* at 4.

27. Alaa Elassar, *This is Where Each State is During its Phased Reopening*, CNN (May 27, 2020), <https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/> (state-by-state detailing of reopening plans).

28. *2021 COVID-19 State Restrictions, Re-openings, and Mask Requirements*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Jan. 11, 2022) (detailing duration of state-by-state mask mandates and showing that many mask mandates ended from late April 2021 to early June 2021).

29. See *Reopening Plans and Mask Mandates for All 50 States*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> (last updated July 1, 2021).

30. *Id.*

31. *State Laws Limiting Public Health Protections: Hazardous for Our Health*, NETWORK FOR PUBLIC HEALTH LAW 8 (Oct. 2022), file:///Users/nag924/Downloads/Analysis-of-State-Laws-Limiting-Public-Health-Protections-1.pdf.

or free exercise of religion.”³² Similarly, Iowa’s House File 847 prohibits any school from adopting, enforcing, or implementing “a policy that requires [anyone] to wear a facial covering for any purpose while on the ... school’s property unless the facial covering is necessary for” extracurricular, instructional, or safety purposes, or made necessary by another law.³³ Other state legislatures³⁴ rushed to enact legislation³⁵ to directly inhibit or expand a governor’s role in addressing public health emergencies.³⁶

States enacted this type of legislation despite many legislative statements of intent to curtail the “negative [economic] impacts” of a PHE.³⁷ Legislators focused on and responded to the short-term problem of decreased business revenues and economic activity,³⁸ but failed to seriously consider the long-term socioeconomic impacts of permitting a novel virus to spread throughout a population. Such impacts include increased health care costs from treating COVID-19 and delaying treatment of other conditions,³⁹ as well as the financial fallout of a workforce becoming infected with COVID-19 or “long COVID”—or even dying from COVID-19.⁴⁰

This wave of recently-enacted legislation leaves many public health experts deeply concerned. With unnecessarily restrictive public health laws appearing across the country, this legislation will undoubtedly “delay lifesaving information and interventions reaching the public, while advancing health-harming political calculations that override protective decisions and measures for the public’s health.”⁴¹

32. H.B. 391, 66th Leg., 1st Reg. Sess. (Idaho 2021) (alteration in original) (amending Idaho Code § 46-1008(7)).

33. H.F. 847, 89th Gen Assemb. (Iowa 2021) (adding section 280.31 to chapter 280 (Uniform School Requirements) of Title VII of the Iowa Code).

34. See discussion *infra* Part IV.

35. NETWORK FOR PUBLIC HEALTH LAW, *supra* note 9, at 1.

36. Goth, *supra* note 22.

37. FLA. STAT. §252.311(4) (2021).

38. Jiangzhuo Chen et al., *Epidemiological and Economic Impact of COVID-19 in the US*, SCIENTIFIC REPORTS (Oct. 14, 2021), <https://www.nature.com/articles/s41598-021-99712-z> (finding that the net economic loss of an optimal mitigation scenario in the United States would result in an economic loss of approximately \$1.5 trillion).

39. See *Pandemic-Driven Deferred Care has led to Increased Patient Acuity in America’s Hospitals*, AM. HOSP. ASS’N 2 (Aug. 2022), <https://www.aha.org/system/files/media/file/2022/08/pandemic-driven-deferred-care-has-led-to-increased-patient-acuity-in-americas-hospitals.pdf> (noting that increases in patient acuity have contributed to rising patient care costs).

40. See David M. Cutler, *The Costs of Long COVID*, 3 JAMA 1, 2 (2022) (estimating that the economic impact of long covid alone could be up to \$2.6 trillion dollars).

41. NETWORK FOR PUBLIC HEALTH LAW, *supra* note 31, at 16.

III. THE PENNSYLVANIA EXPERIENCE

During the pandemic, the Pennsylvania legislature used an emergency statute with language that closely mirrors these recent amendments. Section 7301 of Pennsylvania's Emergency Management Services Code grants the governor the authority to exercise emergency powers and to declare, renew, or terminate a PHE by executive order or proclamation.⁴² Section 7301(c) further provides that "the General Assembly *by concurrent resolution* may terminate a state of disaster emergency at any time. Thereupon, the governor shall issue an executive order or proclamation ending the state of disaster emergency."⁴³

A concurrent resolution is a legislative statement approved by a majority of each of the legislative chambers.⁴⁴ Concurrent resolutions are not generally legally binding because they are not signed into law by the executive.⁴⁵ Thus, in most states, a concurrent resolution simply expresses an opinion of a majority of the legislature, but has no legislative effect.⁴⁶

On March 6, 2020, Pennsylvania Governor Tom Wolf issued an initial declaration,⁴⁷ which he renewed on June 3.⁴⁸ On June 9, the Pennsylvania legislature adopted a concurrent resolution, unilaterally ordering the governor to terminate the declaration.⁴⁹ This is a quintessential example of a legislative veto of an executive action, which became the central issue of *Wolf v. Scarnati*.⁵⁰

A. *Wolf v. Scarnati: Testing the Statute's Legislative Veto*

In *Scarnati*, the court analyzed whether the June 9, 2020 concurrent resolution was subject to the Pennsylvania Constitution's presentment clause.⁵¹

42. 35 PA. CONS. STAT. § 7301 (last amended in October of 2014 by P.L. 2899, No. 187, § 1, long before the pandemic).

43. 35 PA. CONS. STAT. § 7301(c) (emphasis added).

44. 1A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 29:3 (2022).

45. See, e.g., *Types of Legislation*, U.S. SENATE (last visited Mar. 10, 2023), https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm ("Concurrent resolutions . . . must be passed in the same form by both houses, but they do not require the signature of the president and do not have the force of law.").

46. SINGER & SINGER, *supra* note 44, at § 29:3.

47. *Proclamation of Disaster Emergency*, OFF. OF THE GOVERNOR (Mar. 6, 2020), <https://web.archive.org/web/20230117124302/https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>.

48. *Amendment to Proclamation of Disaster Emergency*, OFF. OF THE GOVERNOR (June 3, 2020), <https://www.pema.pa.gov/Governor-Proclamations/Documents/06.03.2020%20TWW%20amendment%20to%20COVID%20disaster%20emergency%20proclamation.pdf>.

49. *Wolf v. Scarnati*, 233 A.3d 679, 685 (Pa. 2020).

50. *Id.* at 684.

51. *Id.* at 687. The court also analyzed a second argument relating to the constitutionality of the legislature's unilateral action, which it ultimately rejected. *Id.*

The Supreme Court of Pennsylvania decided the case on July 1, 2020,⁵² leaving the question of whether the PHE would end looming over the state for more than three weeks.

Presentment clauses in many states, and certainly in the Federal Constitution,⁵³ are phrased such that any legislative action that appears to alter the legal rights or duties of those outside the legislative branch must be presented to the governor for approval or veto.⁵⁴ The presentment requirement is mandatory, as it allows the executive branch to check and balance legislative power by subjecting legislative actions to review.⁵⁵ Any legislative action taken without presentment violates the separation of powers and is not legally binding; thus, any attempt to enforce such an action would be unconstitutional on these procedural grounds.⁵⁶

At the time of *Scarnati*, Pennsylvania's presentment clause provided in full:

Every order, resolution or vote, to which the concurrence of both houses may be necessary, except on the order of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both houses according to the rules and limitations prescribed in case of a bill.⁵⁷

The court held that the concurrent resolution terminating the declaration did not fit any of the three recognized exceptions to presentment in Pennsylvania.⁵⁸ While analyzing the three exceptions, the court determined the concurrent resolution had legal effect because requiring the termination of a declaration would have "far-reaching consequences" and prohibit the governor from taking legal action, which is itself a legal effect.⁵⁹

The court then focused on the text of the statute to determine whether section 7301(c) of Pennsylvania's Emergency Management Services Code expressed

52. *Id.* at 679.

53. U.S. CONST. art. I, § 7, cls. 2, 3 (emphasis added) ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States. . . . Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States.").

54. 82 C.J.S. Statutes § 54 (2022). A governor's veto typically returns the bill to the legislature, where legislators can often override the veto by a two-thirds supermajority vote in both chambers of the legislature.

55. *Id.*

56. *Id.* at § 13.

57. *Wolf*, 233 A.3d at 687 (quoting PA. CONST. art. III, § 9 (1790)).

58. *See id.* at *passim* (analyzing the three recognized exceptions to the Presentment Clause of the Pennsylvania constitution for concurrent resolutions which are: (1) "on the question of adjournment," (2) proposing a constitutional amendment, or (3) not "relat[ing] to and are a part of the business of legislation;" holding that the concurrent resolution terminating the declaration of PHE did not meet any of the three exceptions).

59. *Id.* at 692, 694.

the legislature's intent that its concurrent resolution not be subject to presentment.⁶⁰ The legislature argued that because of the plain meaning of the words or phrases in section 7301(c) like "at any time," "thereupon," or "shall issue," the legislature did not intend for this concurrent resolution to be subject to presentment.⁶¹ The court was not persuaded by this reading for two significant reasons. First, the legislature's intended interpretation would violate the presentment clause.⁶² Second, the court observed that another reasonable interpretation, which required presentment, was available.⁶³

The *Scarnati* court focused on the structure of section 7301(c)'s grants of emergency power to the governor, such as the authorization to issue declarations, to continue renewing the PHE, and to terminate the PHE by executive order.⁶⁴ These several grants of power vested solely in the governor indicated that while the legislature may terminate the PHE at any time with a concurrent resolution, the governor alone has the authority to determine when a PHE has ended.⁶⁵ The court further emphasized that even if the governor were to veto the legislature's concurrent resolution, the legislature still has the power to override the governor's veto.⁶⁶ The court also relied on the canon of avoidance and the presumption of constitutionality to interpret section 7301(c) as requiring presentment to the governor for approval or veto of a concurrent resolution.⁶⁷ In the words of the court, "[a] legislative veto in the context of a statute delegating emergency powers might be a good idea. It might be a bad idea. But it is not a constitutional idea under our current Charter."⁶⁸

Based on this interpretation of section 7301(c), the court held that the statute's language created an unconstitutional legislative veto, and that the June 9, 2020 vote was a "legal nullity" because the legislature failed to present it to

60. *Id.* at 694 (quoting 35 PA. CONS. STAT. § 7301(c)) ("The General Assembly by *concurrent resolution* may terminate a state of disaster emergency at any time. Thereupon, the governor shall issue an executive order or proclamation ending the state of disaster emergency.").

61. *Id.*

62. *Wolf*, 233 A.3d at 697.

63. *Id.*

64. *Id.* at 698.

65. *Id.*

66. *Id.*

67. *Wolf*, 233 A.3d at 698–99. The canon of avoidance prefers a constitutional interpretation and asks a reviewing court to interpret the statute in a way that avoids an unconstitutional result. The presumption of constitutionality presumes that the legislature did not intend an unconstitutional or absurd result when drafting the statute. Both will be discussed in further detail *infra* Part IV.C.

68. *Id.* at 694.

the governor.⁶⁹ The governor's declaration withstood the constitutional challenge, and would go on to be renewed four more times.⁷⁰

B. Enshrining the Legislative Veto for Declarations in the Pennsylvania Constitution

Constitutional amendments in Pennsylvania are first proposed in a joint resolution of the legislature, publicized at least three months before the next general election, then voted on by the people.⁷¹ If the amendment receives a majority vote, it becomes part of the state's constitution.⁷²

Senate Bill ("SB") 1166 was introduced on June 5, 2020, just two days after the governor had renewed the declaration.⁷³ SB 1166 bill was a joint resolution containing a single amendment⁷⁴ to the state's constitution, which limits a governor's ability to extend the duration of an existing declaration and prevents the governor from issuing a new declaration based on the same emergency without legislative approval.⁷⁵ SB 1166 was later amended on July 7, 2020, not even a week after the *Scarnati* decision, to include an amendment to the presentment clause, providing for an exception for concurrent resolutions in the context of declarations.⁷⁶ The proposed amendments were approved by the legislature on July 15, 2020.⁷⁷

Despite the Pennsylvania legislature's intent to terminate the declaration, the pandemic was far from over; Moderna was entering phase three of clinical trials

69. *Id.* at 707.

70. *Amendment to Proclamation of Disaster Emergency*, OFF. OF THE GOVERNOR (May 20, 2021), <https://www.pema.pa.gov/Governor-Proclamations/Documents/Proclamation-Amending-Disaster-Emergency-COVID19-052021.pdf>.

71. PA. CONST. art. XI, § 1.

72. *Id.*

73. S.B. 1166, 204th Gen. Assemb., 2019-2020 Reg. Sess. (Pa. 2020). As originally introduced on June 5, this bill contained a single amendment to the state's constitution, which would limit a governor's ability to extend the duration of an existing declaration of PHE and prevent the governor from issuing a new declaration based on the same emergency without legislative approval.

74. S.B. 1166, 204th Gen. Assemb., 2019-2020 Reg. Sess. (Pa. 2020).

75. PA. CONST. art. IV, §§ 20(c), (d) ("(c) A disaster emergency declaration under subsection (a) shall be in effect for no more than twenty-one (21) days, unless otherwise extended in whole or part by concurrent resolution of the General Assembly. (d) Upon the expiration of a disaster emergency declaration under subsection (a), the Governor may not issue a new disaster emergency declaration based upon the same or substantially similar facts and circumstances without the passage of a concurrent resolution of the General Assembly expressly approving the new disaster emergency declaration.").

76. S.B. 1166, 204th Gen. Assemb., 2019-2020 Reg. Sess. (Pa. 2020).

77. *Bill Information (History) - Senate Bill 1166*, PA. GEN. ASSEMB. (last visited Mar. 18, 2024) https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2019&sind=0&body=S&type=B&bn=1166.

for its COVID-19 vaccine at the time.⁷⁸ In the coming fall and winter months, Pennsylvania would go on to experience both a seemingly exponential rise in both COVID-19 case counts⁷⁹ and peak deaths attributable to COVID-19 on a single day⁸⁰ throughout the course of the pandemic.⁸¹

In the next general election following the legislature's approval of these proposed amendments,⁸² a narrow majority (roughly 52%) of Pennsylvania voters approved two ballot measures amending the constitution that remain in effect today.⁸³ Article III, section 9 of the Pennsylvania constitution, its presentment clause, now reads:

Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the questions of adjournment *or termination or extension of a disaster emergency declaration as declared by an executive order or proclamation, or portion of a disaster emergency declaration as declared by an executive order or proclamation*, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.⁸⁴

Just two days after the general election, the governor issued his final renewal of the declaration.⁸⁵ Four days later, the Pennsylvania house introduced a concurrent resolution to terminate the declaration, which was later signed in the senate on June 10.⁸⁶ Under the newly approved amendment to Pennsylvania's presentment clause, this termination was now constitutional. The governor has

78. *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

79. *COVID-19 Data for Pennsylvania*, PA. DEP'T OF HEALTH (last updated Mar. 7, 2023), <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (jumping from an average of 1,000 new cases per day from July to October, to a peak of 12,760 new cases on December 9, 2020 alone).

80. *COVID-19 Aggregate Death Data Current Weekly County Health*, OPENDATA.PA, <https://data.pa.gov/Covid-19/COVID-19-Aggregate-Death-Data-Current-Weekly-Count/fbgu-sqgp> (last visited Mar. 18, 2024) (242 people died on December 22, 2020, in Pennsylvania due to COVID-19).

81. *Id.* (showing that no day since December 22, 2020 has had as many deaths).

82. *2021 Municipal Primary Summary Results*, PA. ELECTIONS (last updated Mar. 10, 2023), <https://www.electionreturns.pa.gov/Home/SummaryResults?ElectionID=84&ElectionType=P&IsActive=0>.

83. *Id.*

84. PA. CONST. art. III, § 9 (emphasis added).

85. *Amendment to Proclamation of Disaster Emergency*, COMMONWEALTH OF PA. OFF. OF THE GOVERNOR (May 20, 2021), <https://www.pema.pa.gov/Governor-Proclamations/Documents/Proclamation-Amending-Disaster-Emergency-COVID19-052021.pdf>.

86. *Bill Information (History) - House Resolution 106*, PA. GEN. ASSEMB., <https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2021&sInd=0&body=H&type=R&bn=0106>, (last visited Mar. 18, 2024).

not issued another declaration to date.⁸⁷ The Supreme Court of Pennsylvania acknowledged this series of events in *Corman v. Acting Secretary of Pennsylvania Department of Health*, where the court noted that the recent amendment to the presentment clause “thereby abrogate[ed its] decision in *Scarnati*.”⁸⁸

The Pennsylvania legislature took Pennsylvanians on a nearly yearlong legal odyssey during the PHE. This odyssey began with the legislature attempting to exercise a then-unconstitutional legislative veto power⁸⁹ and ended with the legislature giving itself that very power anyway, with the help of less than thirty percent of Pennsylvania’s registered voters.⁹⁰ This is a significant step into historically uncharted territory, as the text of the Pennsylvania Constitution’s presentment clause had been “virtually unchanged since 1790.”⁹¹ Amending the presentment clause—which has historically been critical to the structure of checks and balances between the executive and legislative branches⁹²—to provide for an unconditional, unchecked, unilateral legislative veto for declarations may one day be detrimental to Pennsylvanians. Imagine what could have happened if the legislature had been able to unilaterally terminate the declaration in June 2020, before the surge in COVID-19 cases and the accompanying rise in COVID-19 deaths.⁹³

IV. CONSTITUTIONALITY OF LEGISLATION WITH LEGISLATIVE VETO MECHANISMS

Despite having seen what may lie ahead, states like Kentucky, New York, Florida, and New Hampshire have enacted amendments to emergency powers statutes that attempt to allow the states’ legislatures to override executive actions with a legislative veto similar to the one in Pennsylvania’s statute.⁹⁴ Part IV compares and assesses these states’ amendments through the *Scarnati* framework by reviewing the text of each piece of legislation, states’ presentment

87. *Corman v. Acting Sec’y of Pa. Dep’t of Health*, 266 A.3d 452, 458 (Pa. 2021).

88. *Id.* at 457.

89. *Wolf v. Scarnati*, 233 A.3d 679, 706 (Pa. 2020).

90. Steve Ulrich, *The PA Constitution as a Political Tool*, POLITICS PA (July 25, 2022, 12:22 PM) <https://www.politicspa.com/the-pa-constitution-as-a-political-tool/110280/> (“Both [amendments] passed with just over 1.16 out of 2.25 million votes. . . . Pennsylvania has 8.7 million registered voters. That’s less than 30 percent of the people making a decision on amending the state’s Constitution.”). The 2020 Census shows that in 2020, Pennsylvania had a total voting age population of approximately 10.35 million people. *See* U.S. CENSUS BUREAU, DECENNIAL CENSUS (2020), <https://data.census.gov/table/DECENNIALDP2020.DP1?q=2020+census+population+pennsylvania>.

91. *Wolf*, 233 A.3d at 687.

92. 82 C.J.S., *supra* note 54.

93. PA. DEP’T OF HEALTH, *supra* note 79. NETWORK FOR PUBLIC HEALTH LAW, *supra* note 9.

94. NETWORK FOR PUBLIC HEALTH LAW, *supra* note 9.

clauses, and canons of statutory interpretation to demonstrate how the new legislative vetoes are subject to constitutional challenges.⁹⁵

A. Amendments to Public Health Emergency Statutes

As Pennsylvania contemplated a constitutional amendment to its presentment clause, the Kentucky, New York, Florida, and New Hampshire legislatures were also proposing, debating, and ultimately amending their own PHE statutes, though their amendments ultimately took different forms. Some amendments replace the preexisting legislative veto mechanism, while others aim to expand the scope of the legislature's power to terminate PHE declarations or executive orders.

In February 2021, the Kentucky legislature constitutionally overrode the governor's veto⁹⁶ of SB 1,⁹⁷ which amended several provisions of Kentucky's PHE statute.⁹⁸ SB 1's amendments allow the legislature to terminate a declaration of emergency by joint resolution. Section 4 of the amendment reads: "The General Assembly, *by joint resolution*, may terminate a declaration of emergency at any time."⁹⁹ In states that consider a joint resolution to have binding legal effect, like Kentucky, joint resolutions are also subject to presentment requirements.¹⁰⁰

In March 2021, New York enacted SB 5357,¹⁰¹ which amended the section of New York's PHE statute authorizing the governor to issue a declaration.¹⁰² That section now provides in full: "The legislature may terminate at any time a state disaster emergency issued under this section *by concurrent resolution*."¹⁰³ Similarly, in May 2021, Florida enacted SB 2006,¹⁰⁴ which amended the section of Florida's PHE statute that grants the governor emergency management powers.¹⁰⁵ That section now reads: "At any time, the Legislature, *by concurrent resolution*, may terminate a state of emergency or any specific order, proclamation, or rule thereunder. Upon such concurrent resolution, the Governor

95. See discussion *supra* Part III.

96. KY. CONST. § 88 (explaining the procedure for how a governor's veto of a bill can be overridden by a successful majority vote in both houses of the legislature).

97. S.B. 1, 2021 Reg. Sess. (Ky. 2021).

98. *Id.*

99. *Id.* (emphasis added).

100. *Id.*

101. S.B. 5357, 244th Leg. Reg. Sess. (N.Y. 2021) (amending section 28 of New York's Executive Law by adding subparagraph (5)).

102. N.Y. EXEC. LAW § 28 (authorizing the governor to declare a "disaster emergency" by executive order).

103. N.Y. EXEC. LAW § 28(5).

104. S.B. 2006, 27th Leg. 1st Reg. Sess. (Fla. 2021) (amending section 252.36 of Florida's State Emergency Management Act by adding subparagraph (3)(a)).

105. FLA. STAT. § 252.36 (2021).

shall issue an executive order or proclamation consistent with the concurrent resolution.”¹⁰⁶

In August 2021, the New Hampshire legislature enacted HB 187,¹⁰⁷ which amended the section of New Hampshire’s PHE statute granting the state commissioner of health and human services the authority to issue orders.¹⁰⁸ This section reads in full:

The legislature may terminate an emergency order issued under this chapter *by a majority vote of both the senate and the house of representatives*. A majority vote shall consist of a majority of members present and voting in each chamber acting separately. The commissioner’s power to renew an emergency order under this chapter shall terminate upon a majority vote of both chambers under this section; provided, however, that such vote shall not preclude the commissioner from issuing a new emergency order during the state of emergency for different circumstances.¹⁰⁹

These amendments either replaced the preexisting legislative veto or appear to grant the legislature a legislative veto in their emergency statutes. Kentucky added a joint resolution, New York and Florida added a concurrent resolution, and New Hampshire replaced its concurrent resolution to require a majority vote of both chambers of the legislature.

However, none of these amendments make clear whether legislatures intended for their legislative vetoes to avoid presentment requirements. Much of legislators and governors’ commentary on the purpose or intent behind these amendments has been either understated,¹¹⁰ entirely unaddressed,¹¹¹ or described as striking a balance between protecting one’s safety and personal liberty¹¹² and protecting public health and guarding the economy from

106. FLA. STAT. § 252.36(3)(a) (2021).

107. H.B. 187, 2021 Reg. Sess. (N.H. 2021) (amending section 21-P:53 of New Hampshire’s Public Health Emergency Management Powers statute by adding paragraph IX).

108. N.H. REV. STAT. ANN. §21-P:53 (2021) (granting the commissioner of health and human services, under “the direction and control of the governor,” the authority to issue orders).

109. N.H. REV. STAT. ANN. §21-P:53(IX) (2021) (emphasis added).

110. See Introducer’s Memorandum in Support of S.B. 5357, Sen. Andrea Stewart-Cousins, N.Y. State S. (Mar. 8, 2021) (stating in the justification section of the memorandum that the legislature “feels that it is necessary to begin the process of recovering from this pandemic with a new vision for the way the disaster response will be handled by the government of this state.”).

111. See Press Release, Florida Governor’s Office (May 3, 2021), <https://www.flgov.com/2021/05/03/governor-ron-desantis-signs-landmark-legislation-to-ban-vaccine-passports-and-stem-government-overreach/> (failing to mention ability of legislature to terminate declaration of PHE as a result of Fla. S.B. 2006).

112. Press Release, Comments from Tom Leek, H. Rep., Florida Governor’s Office (May 3, 2021) <https://www.flgov.com/2021/05/03/governor-ron-desantis-signs-landmark-legislation-to-ban-vaccine-passports-and-stem-government-overreach/>.

government overreach.¹¹³ Part of the Florida legislature's stated intent for this broad self-grant of power was "to minimize the negative effects of an extended emergency," while making "all aspects of emergency preparedness, response, and recovery" transparent to the public to the greatest extent possible.¹¹⁴

Yet, in its amendment, the Florida legislature did nothing to ensure that its intent would be realized for one of the most critical aspects of emergency response: the decision to terminate a declaration. The language of Florida's amendment, and of the aforementioned states' amendments, do not impose any guardrails to ensure this power is only used to protect public health. In fact, none of these amendments provide *any* checks or balances on the legislature's legislative veto—no requirement that the legislature explain its rationale for the veto, no requirement to review requisite research before acting, nothing at all to constrain this unilateral exercise of power over another branch of government.

B. Presentment Clauses

Presentment clauses require that a legislative action, like legislative vetoes, must be presented to the governor for approval or veto.¹¹⁵ Kentucky,¹¹⁶ New York,¹¹⁷ and New Hampshire¹¹⁸ all have language that is fairly similar to that of Pennsylvania's original presentment clause.¹¹⁹ After *Scarnati*, it stands to reason that these states' new legislative vetoes very likely require presentment, if they are to have binding legal effect.

Much like Pennsylvania's constitution, Kentucky¹²⁰ and New Hampshire's¹²¹ constitutions treat resolutions like bills and extend the presentment requirement to resolutions, such as the ones in their respective PHE statutes. If these states' legislative vetoes are faced with a constitutional challenge, Kentucky and New Hampshire's presentment clauses would ultimately necessitate the same result seen in *Scarnati*: the statutes would be read

113. Press Release, Comments from Chris Sprowls, Speaker, H.R., Florida Governor's Office (May 3, 2021), <https://www.flgov.com/2021/05/03/governor-ron-desantis-signs-landmark-legislation-to-ban-vaccine-passports-and-stem-government-overreach/>.

114. S.B. 2006, 27th Leg. 1st Reg. Sess. (Fla. 2021) (amending section 252.311 of Florida's State Emergency Management Act by adding paragraphs (4) and (5)).

115. 82 C.J.S., *supra* note 54.

116. KY. CONST. § 89 ("Every order, resolution or vote, in which the concurrence of both Houses may be necessary, except on a question of adjournment, or as otherwise provided in this Constitution, shall be presented to the Governor...").

117. N.Y. CONST. art. IV, § 7 (amended 2001).

118. N.H. CONST. pt. 2, art. 44 ("Every bill which shall have passed both houses of the general court, shall, before it becomes a law, be presented to the governor...").

119. *Wolf v. Scarnati*, 233 A.3d 679, 687 (Pa. 2020) (quoting PA. CONST. art. III, § 9 (1790)) ("Every order, resolution or vote, to which the concurrence of both houses may be necessary, except on the order of adjournment, shall be presented to the Governor...").

120. KY. CONST. § 89.

121. N.H. CONST. pt. 2, art. 45 ("Every resolve shall be presented to the governor...").

to implicitly require presentment because their presentment clauses plainly state that resolutions are subject to presentment.

The New York¹²² and Florida¹²³ constitutions, however, differ in their language, given that each presentment clause consistently uses the word “bill.” New York cases like *Doyle v. Hofstader*¹²⁴ and *Koenig v. Flynn*¹²⁵ establish a general rule that if a resolution has is to have the effect of law, it must be presented to the governor as though it were a bill for it to have legal effect. Moreover, in *Koenig*, the New York Court of Appeals stated in passing that a concurrent resolution was not a law, and thus would not need to be presented to the governor for approval.¹²⁶ This emerging principle encompasses the conclusion reached in *Scarnati*; both Pennsylvania and New York have placed great emphasis on intended legal effect in determining whether presentment is required for a concurrent resolution.¹²⁷

Florida’s constitution imposes a second procedural rule requiring an enacting clause in every “law”¹²⁸ in addition to the presentment requirement. Florida’s presentment clause makes use of the specific word “bill,”¹²⁹ which does not encompass concurrent “resolutions.” This creates a clear distinction between a “bill” and a “resolution.” “Bills” become “law” and have legal effect if the text contains the proper enacting clause and the bill is presented to the governor; “resolutions” are not passed with an enacting clause¹³⁰ and thus are not “law” in Florida.¹³¹ Moreover, in *State ex rel. Schwartz v. Bledsoe*, the Florida Supreme Court reaffirmed that the legislature cannot use “resolutions”

122. N.Y. CONST. art. IV, § 7 (amended 2001) (“Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor...”).

123. FLA. CONST. art. III, § 8 (revised 1998) (“Every bill passed by the legislature shall be presented to the governor...”).

124. *Doyle v. Hofstader*, 177 N.E. 489, 494 (N.Y. 1931) (holding in part that a joint resolution which purported to have the effect of law was invalid because it was not presented to the governor).

125. *Koenig v. Flynn*, 179 N.E. 705, 707-08 (N.Y. 1932) (holding in part that a joint resolution which constituted an exercise of the lawmaking power was invalid because it was not presented to the governor).

126. *Id.* at 706.

127. *Wolf v. Scarnati*, 233 A.3d 679, 692, 694 (Pa. 2020).

128. *Id.* at § 6 (“The enacting clause of every law shall read: “Be It Enacted by the Legislature of the State of Florida:”).

129. FLA. CONST. art. III, § 8 (revised 1998).

130. Resolutions in Florida instead contain a distinct prefatory clause as a formality: “Be It Resolved by the Legislature of the State of Florida:” *see, e.g.*, H.R.J. Res. 239, 28th Leg. 1st Reg. Sess. (Fla. 2022).

131. *See In re Advisory Opinion*, 31 So. 348, 307-09 (Fla. 1901) (analyzing a joint resolution attempting to draw money from the treasury; the relevant constitutional provision read “no money shall be drawn from the treasury except in pursuance of appropriations made by law.” The court held that the clause “by law” required a bill with an enacting clause. The joint resolution at issue was held “not effectual as a law” because it lacked the requisite enacting clause for enacting bills into laws, as distinguished from resolutions.)

to recall a "bill" once it has been presented to the governor.¹³² Thus, the underlying logic is clear. In Florida, as is the case in other states, a concurrent "resolution" would not have legal effect in the way a "bill" does.

C. *The Canon of Avoidance and the Presumption of Constitutionality*

Canons of statutory interpretation are principles that guide the interpretation of statutory text.¹³³ A foundational canon of statutory interpretation is the canon of avoidance.¹³⁴ States articulate the canon of avoidance differently, but the general trend (as seen in Pennsylvania,¹³⁵ Florida,¹³⁶ and New Hampshire)¹³⁷ is for a reviewing court to interpret the statute in a way that avoids an unconstitutional result or prefers a constitutional interpretation.

Another key canon of statutory interpretation is the presumption of constitutionality of legislative acts. As with the canon of avoidance, states articulate the presumption differently. As Kentucky¹³⁸ and New York¹³⁹ demonstrate, the general rule is for a reviewing court to presume that the legislature did not intend an unconstitutional or absurd result when drafting and presenting the statute for enactment.

In tandem with the respective state's presentment clause, these two canons of statutory interpretation support the reading that the legislative vetoes in Kentucky, New York, and New Hampshire's amendments require presentment

132. *State ex rel. Schwartz v. Bledsoe*, 31 So. 2d 457, 461, 461–62 (Fla. 1947) (quoting *State ex rel. Florida Portland Cement Co. v. Hale*, 176 So. 577, 598 (Fla. 1937) ("We hold that neither the House of Representatives nor the Senate of the Legislature of Florida could by its independent resolution recall from the hands of the Governor a bill which had been duly passed by the Legislature, had been authenticated and transmitted to the Governor for his consideration.")).

133. *See Canons of Construction*, BLACK'S LAW DICTIONARY (2d ed. 1910).

134. 1 WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW* § 1:6, 3rd ed. (2022).

135. *Wolf v. Scarnati*, 233 A.3d 679, 698 ("If a statute is ambiguous, a court should interpret that statute in such a manner as to avoid a finding of unconstitutionality.").

136. *State v. Giorgetti*, 868 So.2d 512, 518 (Fla. 2004) (quoting *Gray v. Central Florida Lumber Co.*, 140 So. 320, 323 (Fla. 1932)) ("(1) On its face every act of the Legislature is presumed to be constitutional; (2) every doubt as to its constitutionality must be resolved in its favor; (3) if the act admits of two interpretations, one of which would lead to its constitutionality and the other to its unconstitutionality, the former rather than the latter must be adopted.").

137. *Polonsky v. Town of Bedford*, 190 A.3d 400, 406 (N.H. 2018) (quoting *DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988)) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to [legislative] intent").

138. *Ballinger v. Commonwealth*, 459 S.W.3d 349, 354 (Ky. 2015) ("We presume, of course, that the General Assembly did not intend an absurd or an unconstitutional statute or one at odds with other statutory provisions.").

139. *People v. Epton*, 19 N.Y.2d 496, 505 (N.Y. 1967) ("It must be assumed that the Legislature intended to enact a statute which was in harmony with the United States Constitution and the Constitution of the State of New York.").

to have binding legal effect because a reading that authorizes the unilateral action of the legislature would create an unconstitutional result.

However, it is uncertain whether Florida would consider the concurrent resolution in its recent constitutional amendment to be a “bill” under its presentment clause. Case law in this area is dated, and many of those opinions¹⁴⁰ predate the 1968 revision to the Florida Constitution.¹⁴¹ Thus, a constitutional question of this nature is likely an issue of first impression for the Florida Supreme Court.

When interpreting constitutional provisions that are ambiguous or do not directly address a particular issue, Florida courts “must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers and the voters.”¹⁴² The Florida Supreme Court has applied the separation of powers doctrine strictly, describing it as “the cornerstone of American democracy.”¹⁴³ Thus, to preserve the framers’ intent, preserving the separation of powers is of the utmost importance.

Traditionally, concurrent resolutions are not subject to presentment requirements because they are an expression of legislative opinion, and thus do not have legal effect.¹⁴⁴ However, permitting the Florida legislature to use a concurrent resolution as articulated in its recent amendment would have significant economic, social, and legal consequences during a PHE¹⁴⁵—exactly as the concurrent resolution from *Scarnati* would have had.¹⁴⁶ Thus, if the concurrent resolution appears to have the effect of terminating a governor’s declaration, the legislative veto in Florida’s PHE statute must be interpreted to implicitly require presentment to the governor.

V. THE MODEL PUBLIC HEALTH EMERGENCY AUTHORITY ACT

It is clear that state legislators are intent on altering their state’s powers to combat future PHEs, given the enormous volume and sweeping nature of bills

140. See, e.g., *In re Advisory Opinion*, 31 So. 348, 349 (Fla. 1901) (holding that a joint resolution lacking the constitutionally required enacting clause for a law had no legal effect to appropriate funds as attempted).

141. See FLA. CONST. (the last major revision of the Florida constitution occurred during a special legislative session from June 24 to July 3, and was ultimately ratified on November 5, 1968).

142. *Edwards v. Thomas*, 229 So.3d 277, 283 (Fla. 2017) (quoting *Ford v. Browning*, 992 So.2d 132, 136 (Fla. 2008)).

143. *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

144. See discussion *supra* Part III.

145. During the pandemic, the USDA granted waivers allowing for the issuance of emergency allotment of SNAP benefits, conditioned on PHE declarations being active at both the state and federal level. See, e.g., *SNAP COVID-19 Emergency Allotments Guidance*, U.S. DEP’T AGRIC. (2021), <https://www.fns.usda.gov/snap/covid-19-emergency-allotments-guidance>.

146. *Wolf v. Scarnati*, 233 A.3d 679, 692 (Pa. 2020).

and laws in this recent wave of legislation.¹⁴⁷ Based on the language in the amendments discussed above, some of the driving forces behind these bills appear to be based in a desire to preserve the separation of powers and implement more checks and balances between states' legislative and executive branches during a PHE.¹⁴⁸

Since 2021, a drafting committee at the Uniform Law Commission (ULC) has been developing the Model Public-Health Emergency Authority Act (MPHEAA).¹⁴⁹ The MPHEAA provides a legislative framework for allocating PHE powers to a state's executive branch that gives the legislative branch greater oversight of those powers.¹⁵⁰ In many ways, the MPHEAA's statutory framework appears readily able "to minimize the negative effects of an extended emergency," while making "all aspects of emergency preparedness, response, and recovery" transparent to the public to the greatest extent possible through the use of constitutional checks and balances.¹⁵¹

A. *Substantive Checks on Executive Branch Emergency Powers*

The MPHEAA creates a number of substantive checks on a governor's power to issue, renew, or actively terminate a declaration. Declarations and renewals under the MPHEAA must specify the nature and duration of the PHE, as well as the geographic area affected by the declaration.¹⁵² A declaration or renewal must also articulate a governor's rational basis for declaring or renewing a PHE, which must be based on then available evidence about the nature of the pathogen causing the PHE and the risks posed to the public.¹⁵³ After issuing the declaration or renewal of a PHE, a governor must then provide a report to the legislative branch with additional evidence considered after issuing or renewing the declaration.¹⁵⁴ The MPHEAA imposes the same standard to serve as a similar check on a governor's power to terminate a declaration.¹⁵⁵

147. See generally NETWORK FOR PUBLIC HEALTH LAW, *supra* note 9 (summarizing COVID-19-related laws at the state level from January 2021 through mid-May 2022 for enacted laws and September 2021 through mid-May 2022 for pending legislation).

148. *Supra* Part IV.A.

149. ISSUES MEMORANDUM FROM THE MODEL PUBLIC-HEALTH EMERGENCY AUTH. ACT DRAFTING COMM. TO THE UNIF. L. COMM'N (May 22, 2023), <https://www.uniformlaws.org/HighLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=46a74bd5-10c3-695d-3887-5d317b3e7bec&forceDialog=0>.

150. *Id.*

151. S.B. 2006, 27th Leg. 1st Reg. Sess. (Fla. 2021) (amending section 252.311 of Florida's State Emergency Management Act by adding paragraphs (4) and (5)).

152. See UNIF. L. COMM'N, MODEL PUBLIC-HEALTH EMERGENCY AUTHORITY ACT § 4(g) (Oct. 3, 2023), <https://www.uniformlaws.org/viewdocument/final-act-167?CommunityKey=7a88c160-5910-4e41-9dff-018a850ef3b2&tab=librarydocuments>.

153. *Id.* at § 4(h).

154. *Id.* at § 4(j).

155. *Id.* at § 5(b).

The MPHEAA also creates substantive checks on the executive branch's power to issue or renew emergency orders. As drafted, the MPHEAA sets forth a list of seventeen aspects of a PHE that the executive branch may address via emergency order, creating ascertainable standards for judicial review.¹⁵⁶ The MPHEAA further limits these emergency orders by requiring that they be rationally designed to eliminate, or otherwise mitigate, the risks or effects of a PHE.¹⁵⁷ The framework also imposes a five factor balancing test on each emergency order, requiring the executive branch to consider factors like the severity of the PHE and the potential impact of the order on the PHE and socioeconomic conditions.¹⁵⁸

B. Procedural Checks and Balances

The MPHEAA's framework creates a number of procedural checks and balances on the executive branch's emergency powers, including mandatory public reporting requirements. These reports must describe the substantive basis for the declaration or emergency order and must be submitted to the legislative branch within certain timeframes, depending on the emergency power exercised.¹⁵⁹ The governor must deliver this report shortly after a declaration¹⁶⁰ or emergency order¹⁶¹ has been issued or renewed. If the governor is actively terminating a declaration with an executive order, this report must be delivered when the order is issued.¹⁶²

The MPHEAA also imposes durational limits on issuing a declaration,¹⁶³ renewing a PHE,¹⁶⁴ and issuing emergency orders.¹⁶⁵ Failure to renew a declaration¹⁶⁶ or emergency order¹⁶⁷ before its expiration date will result in its expiration; the framework has no provisions to exempt or otherwise avoid the conditions for renewal.

The MPHEAA conditions the renewal of a declaration on both the governor providing notice to the legislature of the upcoming renewal and the legislature having the opportunity to be in session close to the commencement of the renewal.¹⁶⁸ In all fifty states, the governor has the power to call the legislature

156. *Id.* at § 6(b).

157. UNIF. L. COMM'N, *supra* note 152, at § 6(d).

158. *Id.* at § 6(e).

159. *Id.* at §§ 4(i), 7(c).

160. *Id.* at § 4(i).

161. *Id.* at § 7(c).

162. UNIF. L. COMM'N, *supra* note 152, at § 5(c).

163. *Id.* at § 4(a).

164. *Id.* at § 4(b).

165. *Id.* at § 7(a)(5).

166. *Id.* at § 4(e).

167. UNIF. L. COMM'N, *supra* note 152, at § 8(2).

168. *Id.* at § 4(c).

into a special session to address a specific agenda.¹⁶⁹ This provides one of the critical balances in the MPHEAA framework: the governor must decide whether to call the special session or to permit the declaration to expire. The MPHEAA is slightly more permissive of issuing and renewing emergency orders, but still requires a standing declaration to be in effect at the time of the order, along with similar post-order reporting requirements to declarations.¹⁷⁰

Upon termination of a declaration, the MPHEAA framework imposes a temporary restriction on a governor's ability to issue a declaration that is identical or substantially similar to a recently-expired declaration.¹⁷¹

C. *In Practice*

Consider this hypothetical scenario. During an ongoing PHE, the governor of a state with a part-time legislature wants to renew a declaration. The legislature is not in session at this time. Additionally, after speaking with constituents, the legislature determined that the conditions giving rise to the PHE are no longer "emergent," but rather are part of a "new normal." Thus, the legislature wants to terminate the PHE and address the conditions with ordinary legislation moving forward.

Because the legislature is not in session, the governor will need to provide advance notice to the legislature and call a special session to consider or pass legislation related to the PHE to renew the declaration; otherwise, the declaration will expire. Thus, the MPHEAA's framework strongly incentivizes (but does not require) the governor to exercise the power to call a special session when the governor has determined the renewal is necessary.

This special session would then allow the legislature to discuss enacting legislation to address the condition with the governor, as opposed to the governor unilaterally renewing the declaration. Ideally, the governor and the legislature can reach an agreement on how to best manage the PHE. However, even if negotiations are unsuccessful, both the governor and the legislature are free to continue using their other constitutional powers.

By the terms of the MPHEAA, the governor does not need the express approval of the legislature to renew the declaration.¹⁷² Rather, the governor need only provide the legislature with advance notice before the renewal and an opportunity to be in session shortly after the renewal.¹⁷³ By publishing notice and calling a special session, the MPHEAA allows the governor to renew the declaration and continue issuing executive orders in the meantime. This

169. *Special Sessions*, NAT'L CONF. OF STATE LEGISLATURES (last updated Apr. 7, 2021), <https://www.ncsl.org/research/about-state-legislatures/special-sessions472.aspx>.

170. UNIF. L. COMM'N, *supra* note 152, §§ 7(a), (c).

171. *Id.* at § 4(f).

172. *Id.* at § 4(c).

173. *Id.*

mechanism allows for continuity in a state's emergency response to a PHE while the executive and legislative branches debate the merits of further renewals or termination of the PHE. It also puts the entire state on notice that this renewed declaration could be the last one if the executive and legislative branches cannot reach an agreement.

A governor renewing a declaration without support from the legislature may introduce a natural political incentive for the legislative branch to act in opposition to the executive branch, especially if the governor is acting against the will of the people. Facing this political pressure, the legislature would then likely enact legislation to address or terminate the PHE. This legislation would then go on to either be signed and approved by the governor or vetoed, leaving the legislature to raise the votes needed to overrule the veto. This omnipresent possibility of ordinary lawmaking diminishes the likelihood that a governor could renew a declaration more than once without legislative support. This further preserves the state's emergency response in the event of dysfunction, as the governor is able to continue renewing the declaration if the legislature is unable to act in coordinated opposition with a supermajority.

Taken together, the MPHEAA's checks and balances serve to force the government into action to confront the PHE, one way or another. At nearly all times, the government is able to provide a coordinated response to a PHE while ensuring that the executive branch's emergency powers cannot be easily abused. Moreover, these statutory checks and balances serve to simultaneously constrain the scope of the executive branch's emergency powers and ensure transparency by requiring that the rationale behind each declaration or order is made available to the people. This framework is carefully balanced such that it does not stifle the government's ability to implement a response to a PHE, but instead works in concert to encourage an emergency response that best reflects the will of the people. However, some drawbacks remain.¹⁷⁴

VI. CONCLUSION

It is evident that when the Kentucky, New York, Florida, or New Hampshire legislatures try to use their legislative vetoes for the first time, those actions may face significant judicial challenges on these constitutional grounds. Their respective presentment clauses and canons of statutory interpretation will guide each state's courts to conclude that our current separation of powers must be maintained, and these legislative vetoes are still subject to presentment to the governor. But what may follow these challenges threatens to jeopardize public health preparedness for the next PHE.

174. For an extensive discussion of the function and design of the MPHEAA, see Robert Gatter, *The Model Public Health Emergency Authority Act*, 17 SAINT LOUIS J. HEALTH L. & POL'Y (forthcoming May 2023) (describing the MPHEAA drafting committee's rationale for its structural, policy, and drafting choices, including its overly deferential standard of review).

Other states like Kansas have attempted (but failed) to pass a constitutional amendment similar to Pennsylvania's.¹⁷⁵ This could go on to become a model for states where constitutional amendments are first proposed in the legislature, like Pennsylvania.¹⁷⁶ However, these kinds of efforts to strip away public health powers from the governor of a state will cause unforeseen problems—and likely foreseeable ones.¹⁷⁷ States that permit this kind of unchecked, unilateral legislative veto will diminish their executive branch's ability to promote the health and general welfare of the state's residents if emergent conditions continue beyond the initial statutorily permitted period of time, like the pandemic or any of the nation's previous PHEs.¹⁷⁸

There are better ways to achieve stronger legislative oversight and interbranch cooperation. The ULC's MPHEAA incorporates various layers of interbranch accountability and creates opportunities for the legislature and governor to collaborate and enact legislation to address the PHE at hand. The accountability is evident in provisions that would require the governor to create a publicly available, evidence-based record for every declaration, renewal, or termination of PHE,¹⁷⁹ or issuance or renewal of a related executive order.¹⁸⁰ The MPHEAA framework imposes more exacting conditions on the governor's power to renew a declaration, one of the core drivers of Pennsylvania's legal odyssey.¹⁸¹ Though the MPHEAA is not a perfect statute, it provides much, if not all, of the framework for a state to constitutionally amend its public health emergency statute. By enacting this statutory framework rather than hastily amending PHE statutes or bedrock provisions of state constitutions, state governments will be better equipped to cooperatively handle the next PHE by

175. Katie Bernard, *Kansas Voters Narrowly Reject Amendment to Enhance Legislative Power in Win for Kelly*, KANSAS CITY STAR (Nov. 14, 2022, 11:41 AM), <https://www.kansascity.com/news/politics-government/article268730892.html>.

176. PA. CONST. art. XI, § 1.

177. *SNAP COVID-19 Emergency Allotments Guidance*, *supra* note 145 (during the pandemic, the USDA granted waivers allowing for the issuance of emergency allotment of SNAP benefits, conditioned on PHE declarations being active at both the state and federal level).

178. See Margaret Barnhorst, *Primer: Public Health Emergencies in the United States*, AM. ACTION F. (Mar. 31, 2022), <https://www.americanactionforum.org/insight/primer-public-health-emergencies-in-the-united-states/> ("Two of the national PHEs—for the H1N1 Flu Outbreak (April 2009–June 2010) and the Zika Virus Outbreak (August 2016–July 2017)—lasted roughly one year each, while the other two—for the opioid crisis (first declared in October 2017) and the COVID-19 pandemic (first declared in January 2020)—are ongoing.").

179. *Id.* at §§ 4, 5.

180. *Id.* at § 7.

181. See discussion *supra* Part III.

giving the legislative branch more oversight of the executive branch's emergency powers, while maintaining foundational checks and balances and separation of powers principles.

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