

D R A F T
FOR DISCUSSION ONLY

Model Public-Health Emergency Authority Act

Uniform Law Commission

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Model Public-Health Emergency Authority Act

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Model Public-Health Emergency Authority Act

Prefatory Note

The *Model Public-Health Emergency Authority Act* (the Act) is designed to improve the preparedness of states for public-health emergencies. Specifically, the Act clarifies the powers of a Governor to declare a public-health emergency and to issue orders in response to that emergency. Simultaneously, the Act establishes measures to promote a Governor's accountability to the Legislature and to the public at large. The goal of the Act is to empower a Governor to act quickly and decisively while also clarifying substantive and procedural limitations to a Governor's authority.

This project emerged from the uncertainties in state law that the COVID-19 pandemic made acutely apparent. These legal uncertainties contributed to the decision of many individuals, businesses, and some legislatures to file lawsuits challenging the statutory and constitutional authority of Governors and other executive officials to respond to the risks posed by the pandemic. Moreover, these same legal uncertainties have resulted in state legislation clawing back core public health powers from Governors and executive branch officials. Consequently, Governors and health officials in many states may no longer have the legal authority needed to protect public health adequately during the next emergency.

By way of background, legal preparedness for public-health emergencies has evolved in fits and starts over the last twenty years largely in response to major public-health crises. Most notably, the 9/11 attacks prompted the federal government to fund a project at Georgetown University Law Center in 2001 to develop a model state law for public-health emergency powers. This resulted in the 2001 Model State Emergency Health Powers Act released in December 2001 (2001 Model Law), which a majority of states have adopted in substantial part. Yet, the 2001 Model Law addressed primarily executive branch authority to quarantine and isolate individuals during an emergency, and it did not address adequately or at all many of the actions that became necessary during the COVID-19 pandemic. In particular, the 2001 Model Law does not address the power of Governors to issue orders designed to mitigate the effects of a novel contagious disease that has taken root in a population. Thus, Governors and state officials often relied on old state statutes to respond to the COVID-19 pandemic. Those statutes authorized officials to take actions "necessary" to preserve public health. Such broad language, while valuable, provided little accountability or limitation, and it invited a wide variety of constitutional and administrative challenges to various orders issued during the pandemic.

The Act clarifies the kinds of orders that Governors are authorized to issue during a public-health emergency. It also imposes substantive and procedural guardrails as a check against arbitrary public-health action. It does so by requiring Governors to develop a record in support of any declaration of a public-health emergency and in support of any public health order issued during the term of such a declaration. Additionally, the Act creates a sunset provision on every public-health emergency declaration and public-health emergency order, and it requires a Governor to make a new record as a condition of renewing a declaration or an order.

The drafting committee believes that the Act strikes an appropriate balance between

1 empowering Governors to take swift emergency action and holding Governors accountable for
2 each such action. Yet, the Committee has faced some challenges. In particular, the Committee
3 found that differences in state constitutions prevented the Committee’s including provisions
4 authorizing state legislatures to terminate unilaterally a public-health emergency declaration or
5 any public-health emergency order issued by a Governor. For example, state constitutions
6 typically do not authorize legislatures to act with the force of law except by passing legislation in
7 both chambers, presenting that legislation to the Governor for signature or veto, and overriding
8 any gubernatorial veto. Under such a state constitution, a statutory provision authorizing a
9 legislature to terminate a public-health emergency declaration or public-health emergency order
10 by joint or concurrent resolution would amount to an unconstitutional legislative veto.
11

12 This exact issue arose in Pennsylvania during the COVID-19 pandemic. In June 2020 the
13 Governor of Pennsylvania renewed an initial public-health emergency proclamation. A few days
14 later each chamber of Pennsylvania’s legislature, under an authorizing statute, approved a
15 concurrent resolution terminating the Governor’s proclamation. When leadership of the
16 Legislature filed suit to enforce the resolution, the Governor petitioned the Pennsylvania
17 Supreme Court to immediately review the matter, and the Court granted the Governor’s petition.
18 In *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020), the Court held that the Legislature’s resolution
19 violated the Pennsylvania Constitution’s requirement that every legislative “order, resolution, or
20 vote . . . be presented to the Governor” for approval or disapproval. Because the concurrent
21 resolution purporting to terminate the public-health emergency proclamation was not presented
22 to the Governor, the Court held that the resolution was void as unconstitutional. (The electorate
23 of Pennsylvania later approved a state constitutional amendment authorizing such a legislative
24 veto.)
25

26 Because state constitutions typically contain similar presentment requirements, the Act
27 does not authorize the Legislature to terminate the Governor’s declaration of a public-health
28 emergency unilaterally. Some states’ constitutions—like Pennsylvania’s now amended
29 Constitution—may permit such a legislative veto. Because this is a constitutional matter with
30 variation among the states, this Act does not create new legislative authority.
31

32 Instead, the Act promotes executive branch accountability in two ways. First, it requires
33 that a state legislature be in session or have an opportunity to be in session as a condition of a
34 Governor’s power to renew a declaration of public-health emergency. In states with full-time
35 legislatures and in states with part-time legislatures that are authorized to call themselves into
36 special session, this condition is always satisfied. Part-time legislatures in about a dozen states,
37 however, are not empowered to call themselves into special session. In those states, this Act
38 incentivizes a Governor to call a special legislative session so as to trigger the Governor’s
39 authority to renew a declaration of public-health emergency. A Governor in such a state may
40 choose not to call a special session, in which case, the declaration and all of its associated orders
41 will expire, and the Governor cannot reissue the same or similar declaration for 15 days. By
42 assuring that a state legislature is in session or will have an opportunity to be in session at the
43 time a declaration is renewed, the Act triggers the political process as a check on gubernatorial
44 authority. Once in session, state legislatures may pass bills terminating or amending an ongoing
45 declaration of public-health emergency and present those bills to the Governor who will be held
46 politically accountable for the decision to sign or veto such bills.

1 Second, this Act requires that a Governor make a written report that is submitted to the
2 Legislature and otherwise made publicly available. This creates a basis to challenge both a
3 declaration and each individual order on administrative grounds. For example, anyone with
4 standing may petition a state court to set aside a declaration of public-health emergency if the
5 circumstances do not meet the definition of a “public-health emergency” or if the Governor has
6 not met the procedural requirements for issuing or renewing such a declaration. Similarly,
7 anyone with standing may seek judicial review of a public-health emergency order, alleging that
8 it is arbitrary or capricious where the administrative record is insufficient or otherwise fails to
9 support such an order.

Model Public-Health Emergency Authority Act

Section 1. Title

This [act] may be cited as the Model Public-Health Emergency Authority Act.

Comment

The Act's title includes the word "model" and not the word "uniform" to signal that the Act accommodates key differences among jurisdictions with respect to their constitutions and legislative structure.

Section 2. Definitions

In this [act]:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(3) "Political subdivision" includes a city, [county,] district, and any other local or regional governmental authority.

(4) "Public-health emergency" means an imminent threat or actual appearance of an infectious, biologic, radiologic, or chemical agent or toxin, regardless of cause, that poses a high probability of:

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

(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; or

(D) a substantial adverse impact on the availability of medical, public

1 health, or other emergency resources.

2 (5) “Public-health emergency order” means an order issued or renewed under this
3 [act].

4 (6) “Record” means information:

5 (A) inscribed on a tangible medium; or

6 (B) stored in an electronic or other medium and retrievable in perceivable
7 form.

8 (7) “State” means a state of the United States, the District of Columbia, Puerto
9 Rico, the United States Virgin Islands, or any other territory or possession subject to the
10 jurisdiction of the United States.

11 **Legislative Note:** *A state that uses a different term for “county” should insert that term in the*
12 *brackets in paragraph (3). If a state does not have a governmental unit corresponding to a*
13 *county, it should delete the bracketed term.*

14
15 **Comment**

16
17 1. The definition of “electronic” is based on language currently used in uniform and
18 model laws drafted and approved by the Uniform Law Commission.

19
20 2. The definition of “person” is based on language currently used in uniform and model
21 laws drafted and approved by the Uniform Law Commission.

22
23 3. The definition of “political subdivision” is based on language currently used in
24 uniform and model laws drafted and approved by the Uniform Law Commission.

25
26 4. The definition of “public-health emergency” is central to the operation of this Act. It
27 identifies the circumstances under which a Governor may issue a declaration of public-health
28 emergency, which then triggers the authority of the Governor to issue orders designed to protect
29 public health. The definition is designed to account for various agents and toxins that threaten or
30 harm public health. These include, without limitation, infectious agents that are communicable
31 among humans (e.g., COVID-19, measles, Ebola) infectious agents transmitted through insects
32 or other vectors (e.g., malaria). These also include, without limitation, toxins released into the
33 environment (e.g., chemical spill or nuclear accident). Additionally, these include, without
34 limitation, threats to public health associated with disasters or other emergencies, including,
35 without limitation, mold, vermin, or bacteria. The definition also requires that the agent or toxin
36 pose a high probability of one or more types of significant, population-level harm, meaning that

1 a single case of an infectious disease that is well-controlled and thus does not pose a high
2 probability of significant population-level harm would not meet the definition.

3
4 5. The definition of “public-health emergency” in this Act shares some of the elements of
5 the definition of “public health emergency” in the 2001 Model Law, parts of which have been
6 adopted by a majority of states. Yet, the definition here accounts for public-health preparedness
7 lessons learned since 2001. For example, the definition above recognizes that a public-health
8 emergency can exist when an agent or toxin poses a high probability of significantly straining
9 medical, public health, or other emergency resources.

10
11 6. The definition of “public-health emergency” in this Act also includes the phrases
12 “affected population” and “high probability.” In this Act, “affected population” refers to the set
13 of individuals who are likely or actually at risk of harm from the threatened or actual infectious,
14 biologic, radiologic, or chemical agent or toxin that may justify the declaration of a public-health
15 emergency. In this way, the size of the “affected population” is determined by the nature and
16 scope of a particular threat. While the nature and scope of a threat may result in the
17 determination that the “affected population” is the population of the state or of one or more
18 political subdivisions of a state, the “affected population” need not correspond to the boundaries
19 of one or more political subdivisions of a state. In this Act, the phrase “high probability” is
20 intended to mean higher than would reasonably be expected in the absence of the agent or toxin,
21 the threat or presence of which may justify declaring a public-health emergency.

22
23 7. The phrase “other emergency resources,” as used in subsection 4(D), refers to
24 resources other than medical personnel, facilities, services, or supplies and other than public
25 health personnel, facilities, services, or supplies and that are or may become appropriate for an
26 adequate response to the risks posed by the toxin or agent that may justify declaring a public-
27 health emergency. The scope of what constitutes “other emergency resources that could be
28 affected by the public-health emergency” will be determined by the nature of the relevant
29 emergency. For example, safe drinking and bathing water could constitute “other emergency
30 resources that could be affected by the public-health emergency” in the case of water
31 contamination that meets the definition of a “public-health emergency.”

32
33 8. Circumstances meet the definition of a “public-health emergency” regardless of the
34 cause of the emergency.

35
36 9. While the definition of “public-health emergency” as used in this Act does not refer
37 expressly to “disaster” or “natural disaster,” it encompasses a public-health emergency arising
38 out of any disaster. The definition in this Act refers to “infectious, biologic, radiologic, or
39 chemical agent or toxin, regardless of cause.” This necessarily includes the threat of such toxins
40 or agents when they arise as part of a natural or non-natural disaster. For example, an “infectious,
41 biologic, radiologic, or chemical agent or toxin” would include a chemical leak resulting from a
42 train derailment or truck crash, and it would include bacteria, mold or vermin associated with a
43 flood. In this way, the Act addresses circumstances in which a threat to public health results from
44 a natural or non-natural disaster.

45
46 10. The definition of “public-health emergency order” is an order issued by the Governor

1 under Section 6 of this Act and that complies with the requirements of Section 7 of this Act. The
2 Governor has the authority to issue a public-health emergency order during the term of a
3 declaration of public-health emergency.

4
5 11. The definition of “record” is based on language currently used in uniform and model
6 laws drafted and approved by the Uniform Law Commission.

7
8 12. The definition of “State” is based on language currently used in uniform and model
9 laws drafted and approved by the Uniform Law Commission.

10 11 **Section 3. Relationship to Other State Law**

12 (a) If a public-health emergency exists, this [act] creates the exclusive authority for the
13 [Governor] to respond to the emergency.

14 (b) If an emergency exists other than a public-health emergency, the [Governor] may
15 respond as authorized by other law of this state.

16 (c) If a public-health emergency and an emergency other than a public-health emergency
17 arise out of the same circumstances:

18 (1) this [act] authorizes the [Governor] to respond to the part of the circumstances
19 that is a public-health emergency; and

20 (2) other law of this state authorizes the [Governor] to respond to the part that is
21 an emergency other than a public-health emergency.

22 (d) Except as provided in Section 9, state and local agencies and officials retain during a
23 public-health emergency their authority under other law of this state.

24 **Legislative Note:** Change “Governor” to the appropriate title if the individual heading the state
25 is not the Governor, such as in the District of Columbia.

26 27 **Comment**

28 This section declares that, when circumstances meet the definition of a public-health
29 emergency, this Act controls over other state laws for the sole purpose of responding to the
30 public-health emergency. Circumstances may exist in which a public-health emergency arises in
31 connection with a different kind of emergency. For example, a flood might result in bacteria,
32 mold or vermin that pose a threat to public health and that otherwise meets the definition of a

1 “public-health emergency.” In such circumstances, the Governor’s authority to respond to the
2 part of the broader emergency that constitutes a “public-health emergency” derives exclusively
3 from this Act; meanwhile, the Governor’s authority to respond to all aspects of the broader
4 emergency other than the portion that is a “public-health emergency” derives from other state
5 law. This section also clarifies that, except as provided in Section 9, this Act does not suspend
6 any authority granted to state and local agencies or officials by other state law even during a
7 declared public-health emergency. Instead, public-health officials retain any non-emergency
8 authority granted to them under other state law to protect public health unless preempted under
9 Section 9.

10 11 **Section 4. Declaration of Public-Health Emergency; Renewal**

12 (a) The [Governor] may, by [executive order], issue a declaration of a public-health
13 emergency. An initial declaration of a public-health emergency may not have a term longer than
14 [90] days.

15 (b) Before a declaration of a public-health emergency issued under subsection (a) or
16 renewed under this subsection expires, and subject to subsection (c), the [Governor] may, by
17 [executive order], renew a declaration of a public-health emergency. A renewed declaration of a
18 public-health emergency may not have a new term longer than [90] days.

19 (c) The [Governor] may renew an initial or previously renewed declaration of a public-
20 health emergency only if:

21 (1) the [Governor] provides notice in a record to the [Legislature] before the
22 renewal; and

23 (2) the [Legislature] is or will be in session, or the [Legislature] will have an
24 opportunity to be in session, not later than [five] days after commencement of the renewal.

25 (d) If the [Governor] determines that a public-health emergency continues to exist and
26 subsection (c) is satisfied, there is no limit on the number of times the [Governor] may renew an
27 initial or previously renewed declaration of a public-health emergency that has not expired.

28 (e) An initial or renewed declaration of a public-health emergency expires at the end of

1 its term unless renewed or further renewed or unless the [Governor], under Section 5, terminates
2 the declaration of a public-health emergency before the term expires.

3 (f) The [Governor] under subsection (a) may issue a declaration of a public-health
4 emergency identical or substantially similar to an expired declaration of a public-health
5 emergency if at least [15] days have elapsed since the expiration of the declaration.

6 (g) A declaration of a public-health emergency issued or renewed under this section must
7 specify:

8 (1) the nature of the public-health emergency;

9 (2) the political subdivision or geographic area subject to the declaration, which
10 may include the entire state; and

11 (3) the duration of the declaration, which is [90] days if a shorter term is not
12 specified.

13 (h) A declaration of a public-health emergency issued or renewed under this section and
14 each specification required by subsection (g) must be rationally based on evidence then available
15 to the [Governor] about the nature of the agent or toxin giving rise to the public-health
16 emergency and the risk posed by the agent or toxin.

17 (i) Not later than [seven] days after issuing or renewing a declaration of a public-health
18 emergency under this section, the [Governor] shall:

19 (1) prepare a report in a record describing the evidence on which the [Governor]
20 based the initial or renewed declaration and each specification required by subsection (g); [and]

21 (2) make the report publicly available[; and

22 (3) submit the report to the [Legislature] at or before the time the report is made
23 publicly available].

1 (j) The report under subsection (i) must include additional evidence the [Governor]
2 considered after making or renewing the declaration. The [Governor] shall exclude from the
3 report information protected by law as confidential, privileged, or otherwise exempt from
4 disclosure. The report must describe how the initial declaration or renewal and each specification
5 required under subsection (g) is rationally based on the evidence.

6 (k) A declaration of a public-health emergency issued or renewed under this section is not
7 subject to the rule-making procedures of [cite to state administrative procedure act].

8 **Legislative Note:** *In subsection (a), in a state that does not use executive orders, insert the*
9 *appropriate term describing the mechanism used to issue an executive-branch directive.*

10
11 *In subsections (c)(1) and (i)(3) in a state where the state-level legislative body is not called*
12 *“Legislature”, a state should insert the appropriate word.*

13
14 *In subsection (c)(1), a state may want to insert the procedures, if any, for how a Governor will*
15 *provide notice of renewal.*

16
17 *In subsection (i)(3), a state may also want to insert existing procedures, if any, for how a*
18 *Governor will submit the report to the Legislature or alternatively, a state may decide to*
19 *eliminate subsection (i)(3) because the Governor also is required to make the report publicly*
20 *available.*

21 22 **Comment**

23
24 1. This section addresses the declaration of a public-health emergency by the Governor.
25 Such a declaration is central to the operation of this Act because the declaration triggers the
26 Governor’s power to issue public-health emergency orders under Section 6 of this Act.

27
28 2. This section sets the process for the Governor’s declaring a public-health emergency,
29 which process is intended to promote accountability for the facts relied upon about the relevant
30 agent or toxin and the risks they pose to all or part of the state’s population as those facts are
31 known at the time the Governor declares a public-health emergency. Additionally, the process is
32 intended to promote transparency for and accountability to both the public and the Legislature
33 through the reporting requirement established in subsections(i) and (j).

34
35 3. Subsection (a) authorizes the Governor to issue an initial declaration of public-health
36 emergency and sets a maximum duration of its term.

37
38 4. Subsection (b) authorizes the Governor to renew an unexpired declaration of public-
39 health emergency and sets a maximum duration of its term. The Governor’s authority to renew a

1 declaration of public-health emergency applies not only to an initial declaration of public-health
2 emergency, but also to a previously renewed declaration of public-health emergency. This
3 subsection establishes that, unlike the Governor's authority to issue an initial declaration of
4 public-health emergency, the Governor's authority to renew a declaration of public-health
5 emergency is subject to one or more additional conditions set forth in subsection (c).
6

7 5. Subsection (c) creates two conditions on the authority of the Governor to renew a
8 declaration of public-health emergency. Subsection (c)(1) requires that the Governor notify the
9 Legislature prior to renewing a declaration of public-health emergency. This is intended to assure
10 that the Legislature is aware that the Governor intends to renew a declaration of public-health
11 emergency. Subsection (c)(2) additionally requires that the Legislature is in session at the time of
12 the Governor's renewal or that the Legislature will be in session or will have the opportunity to
13 be in session within five days of the day on which the renewed declaration takes effect. This
14 condition is intended to assure that the legislative branch has an opportunity to consider and pass
15 legislation related to the public-health emergency at the start of the term of the renewed
16 declaration of public-health emergency. This condition is particularly important for States with
17 part-time legislatures that lack the legal authority to call themselves into session. In such a State,
18 the Governor may exercise the Governor's discretion to call a special legislative session if the
19 Governor wishes to trigger the authority to renew a declaration of public-health emergency under
20 subsection (c) prior to its expiration if the Legislature is not scheduled to be in session within the
21 first 5 days of the term of the renewed declaration. Alternatively, the Governor of such a State
22 may choose to allow the declaration of public-health emergency to expire, in which case the
23 Governor would be prohibited under subsection (f) from issuing the same or substantially similar
24 declaration of public-health emergency for 15 days.
25

26 6. Subsection (c) does not create any power in the Legislature that does not otherwise
27 exist under other state law. For example, it does not authorize any legislature to call itself into
28 session. Nor does subsection (c) authorize the Legislature to amend or terminate a renewed
29 declaration of public-health emergency. Additionally, subsection (c) does not obligate the
30 Governor to sign any bills passed by the Legislature with respect to a renewed declaration of
31 public-health emergency whether passed during a regular or special legislative session.
32

33 7. Subsection (d) establishes that there is not a limitation on the total number of times a
34 Governor is authorized to renew a declaration of public-health emergency so long as the
35 underlying circumstances continue to meet the definition of a "public-health emergency" under
36 the Act and the Governor meets the requirements of and satisfies the conditions for each renewal.
37 The purpose of this provision is to assure that the Governor has the authority necessary to
38 address an ongoing public-health emergency and to assure that the Governor reassesses whether
39 a public-health emergency continues to exist.
40

41 8. Subsection (e) recognizes that a declaration of public-health emergency expires if not
42 renewed prior to the end of its term.
43

44 9. Subsection (f) establishes that the Governor's authority to issue an initial declaration of
45 public-health emergency that is identical or substantially similar to an expired declaration of
46 public-health emergency is triggered a certain number of days after the expired declaration of

1 public-health emergency reached the end of its term. This provision stands in contrast to
2 subsections (b) and (c) that, together, create the authority of the Governor to renew a declaration
3 of public-health emergency without any lapse in time if the Governor satisfies the conditions in
4 subsection (c). Subsection (f) applies when the Governor does not meet the conditions for
5 renewing a declaration of public-health emergency and therefore cannot renew such a declaration
6 before it expires. Subsection (f) imposes a waiting period on the Governor before the Governor
7 can issue another declaration of public-health emergency identical or substantially similar to the
8 expired declaration. This waiting period is intended to incentivize the Governor to choose the
9 renewal option under subsections (b) and (c), to specify the consequence of a Governor's failure
10 to meet the conditions of renewal, and to specify when the Governor's authority is reset so that
11 the Governor can protect the public health in the face of an ongoing public-health emergency.
12

13 10. Subsection (g) requires that a declaration of public-health emergency contain certain
14 information. This includes a statement specifying the nature of the public-health emergency
15 under subsection (g)(1). The Governor satisfies this standard by stating the nature of the public-
16 health emergency to the extent the nature of the emergency can be ascertained based upon the
17 information available to the Governor at the time the Governor makes the initial declaration or at
18 the time the Governor renews a previous declaration. Subsection (g)(2) requires that the
19 declaration of public-health emergency specify the geographic scope of the public-health
20 emergency, which may encompass all or part of the state. Subsection (g)(3) requires that the
21 declaration of public-health emergency specify the duration of an initial declaration or of a
22 renewed declaration, but this requirement applies only if the Governor sets a duration shorter
23 than the maximum duration permitted under subsections (a) or (b). If no duration is specified in
24 an initial or renewed declaration, then the declaration is deemed to have a duration of the
25 maximum length permitted under subsections (a) and (b).
26

27 11. Subsection (h) requires that a declaration of public-health emergency be "rationally
28 based" on information about the nature of and risks posed by the agent or toxin the threat or
29 presence of which justifies the declaration. This requirement is not intended to change any
30 applicable constitutional standard of review. It is intended to promote accountability and
31 transparency by creating a public record of the evidentiary basis for the Governor's declaration,
32 which will protect against an arbitrary or capricious declaration. The obligation imposed on the
33 Governor to base an initial or a renewed declaration of public-health emergency on evidence of
34 the nature and risks of the relevant agent or toxin is limited to evidence "then-available" to the
35 Governor. Information about the nature and risks of a public-health threat may be scant at the
36 time the Governor initially determines that a declaration of public-health emergency is
37 warranted. For example, there may be little information about the nature and risks of a novel
38 virus that is spreading and harming all or part of a state's population. In such a case, this section
39 requires only that the Governor account for the little information that is then-available when
40 assessing whether a public-health emergency exists and whether a declaration of a public-health
41 emergency is warranted. The Governor is not required to wait for more complete or definitive
42 evidence about the nature and risks posted by an agent or toxin before making those
43 determinations.
44

45 12. Subsection (i) requires that the Governor prepare a report within seven days of an
46 initial or renewed declaration of public-health emergency, which report describes the information

1 on which the Governor relied to make the initial or renewed declaration as well as a description
2 of how this information rationally led to the Governor's decision to make the initial or renewed
3 declaration of public-health emergency. This section is intended to promote accountability and
4 transparency by creating a public record of the evidentiary basis for the Governor's declaration,
5 which will protect against an arbitrary or capricious declaration. The seven-day period permitted
6 by this subsection between an initial or renewed declaration and the time by which the Governor
7 must complete the report balances the need for the Governor to declare or renew a public-health
8 emergency quickly and the need to promote accountability by creating a record describing the
9 information and reasons that justify the initial or renewed declaration. Subsection (i) also
10 requires that the Governor make the report publicly available.
11

12 13. Subsection (i) creates an option for a state to require that the Governor, in addition to
13 preparing a report and making it publicly available within seven days of declaring or renewing a
14 declaration of a public-health emergency, also submit the report to the Legislature at or before
15 the time the Governor makes the report publicly available.
16

17 14. Subsection (j) clarifies the contents of the Governor's report in three ways. First, it
18 requires that the Governor include in the report all of the evidence on which the Governor relied
19 to determine that a public-health emergency exists, including any "additional evidence" that may
20 have come to light after the Governor declared the public-health emergency and before the
21 Governor has made publicly available the report required under subsection (i). Yet, this
22 requirement no longer applies once the Governor has made the report publicly available. In that
23 way, subsection (j) does not require the Governor to continuously update the report with new
24 information. So, for example, a Governor might declare a public-health emergency on January 1
25 because there is an unusually high number of deaths that have resulted from a novel virus. On
26 January 3 the Governor is preparing the report required under subsection (i), but the Governor
27 has yet to make that report publicly available. On January 3, the Governor learns that infections
28 with the virus are so widespread as to risk depleting certain medical resources, which new
29 evidence further supports declaring a public-health emergency. Under subsection (j), the
30 Governor must include in the report both the unusually high number of deaths from the virus and
31 the fact that infections with the virus are causing certain medical resources to be depleted. On
32 January 5, the Governor makes the report publicly available, and the Governor's obligation
33 under subsection (j) to include "additional evidence" in the report ends. Second, subsection (j)
34 clarifies that the Governor is not required to include in the report any information that is
35 protected from disclosure by other state law. So, for example, if other state law declares that any
36 personal information (e.g., name, address, medical history) contained in a medical record is
37 confidential, the Governor is not required, under subsection (j), to include it in the report. Third,
38 subsection (j) clarifies that, in the report, the Governor must explain how a declaration of a
39 public-health emergency is rationally based on the evidence shared in the report.
40

41 15. The Act does not limit the number of times the Governor may renew a declaration of
42 a public-health emergency, but, under subsections (c) through (j), each renewal imposes on the
43 Governor the same procedural obligations as the initial declaration. This is intended to require
44 that the Governor reassess whether a public-health emergency continues to exist given any new
45 developments since the initial declaration and to require that the Governor account for any new
46 developments through the reporting obligation that is triggered upon each renewal. By setting a

1 maximum duration for initial or renewed declarations while also permitting the Governor to
2 renew a declaration without limitation so long as the procedural requirements are met with each
3 renewal, this section balances the need to empower the Governor to respond effectively in the
4 case of a public-health emergency of indeterminant duration with the need to assure
5 accountability and transparency each time the Governor extends the duration of a declaration of a
6 public-health emergency.

7
8 16. Subsection (k) exempts an initial or renewed declaration of public-health emergency
9 under this Act from any rule-making procedures that might otherwise apply under state law to
10 administrative statements of general applicability. Because a public-health emergency may
11 require quick action with respect to substantial parts or all of the population of a State,
12 subsection (k) exempts initial or renewed declarations under the Act from rule-making
13 procedures that might delay appropriate action and thereby permit unnecessary harm to public
14 health. Subsection (k) exempts initial or renewed declarations under this Act from any and all
15 rule-making procedures, including emergency rule-making procedures because, in most
16 jurisdictions, even these procedures can cause some delay in the effective implementation of
17 administrative actions. This Act imposes other procedural requirements that promote
18 transparency and accountability while still empowering the Governor to act quickly and broadly
19 to a public-health emergency.

20 21 **Section 5. Termination of Declaration of Public-Health Emergency**

22 (a) If the [Governor] determines that a public-health emergency no longer exists, the
23 [Governor] may terminate a declaration of a public-health emergency before its term expires.

24 (b) If the [Governor] terminates a declaration of a public-health emergency under
25 subsection (a), the [Governor] must do so by [executive order] in a record. The termination must
26 be rationally based on evidence then available to the [Governor] about the nature of the agent or
27 toxin giving rise to the public-health emergency and the risks posed by the agent or toxin.

28 (c) At the same time the Governor issues an [executive order] under subsection (b), the
29 [Governor] shall:

30 (1) prepare a report in a record describing the evidence on which the [Governor]
31 relied and the [Governor's] rationale that a public-health emergency no longer exists; [and]

32 (2) make the report publicly available [; and

33 (3) submit the report to the [Legislature].

(d) The [Governor] shall exclude from the report under subsection (c) information protected by law as confidential, privileged, or otherwise exempt from disclosure.

Comment

The Governor may terminate a declaration of a public-health emergency prior to the expiration of the duration set by this Act or by the Governor in the terms of such a declaration if and when the Governor determines that circumstances have changed such that they no longer meet the definition of a “public-health emergency” as defined in this Act. When the Governor terminates a declaration of a public-health emergency for this reason, this section requires that the Governor have a rational basis for doing so and that the Governor articulates that rational basis in a report made publicly available and, if a state so chooses, submitted to the Legislature. The purpose of this requirement is to prevent the Governor from arbitrarily or capriciously terminating a declaration of a public-health emergency prematurely.

Section 6. Public-Health Emergency Order

(a) During the term of a declaration of public-health emergency, the [Governor] may issue one or more public-health emergency orders under this section. An order may apply to all or part of a political subdivision or geographic area subject to the declaration.

(b) The [Governor] may issue an order in response to a public-health emergency addressing:

(1) acquisition, stockpiling, commandeering, management, distribution, or use of drugs, devices, equipment, or tests;

(2) acquisition, allocation, distribution, management, or spending of authorized funds;

(3) 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;

(4) testing, isolation, quarantine, movement, gathering, evacuation, or relocation of individuals;

- 1 (5) testing, isolation, quarantine, culling, movement, evacuation, relocation, or
2 management of plants or animals;
- 3 (6) management of state executive-branch operations, offices, agencies, or
4 programs;
- 5 (7) surveillance, monitoring, or assessment of the public-health emergency or any
6 of its effects;
- 7 (8) suspension of a provision of any statute, order, rule, or regulation if strict
8 compliance would hinder efforts to respond to the public-health emergency or pose hardship or
9 undue risk for compliance;
- 10 (9) access to and security of electronic communication in support of activities,
11 including commerce, employment, education, notifications, and warnings;
- 12 (10) assessment of and response to the nature, degree, and variation of harm
13 related to the public-health emergency, including the need for food, clothing, housing, and other
14 necessities of life;
- 15 (11) acquisition, allocation, distribution, or management of goods, services,
16 equipment, materials, or personnel;
- 17 (12) coordination or cooperation between or among federal, state, tribal, or local
18 governmental entities, officials, employees, or authorities;
- 19 (13) public-health emergency planning, implementation, coordination, or training;
- 20 (14) making or performance of executive branch agreements;
- 21 (15) development, function, operation, use, assessment, or management of
22 warning or notification systems;
- 23 (16) assessment, operation, or management of, or access to emergency services,

1 including fire, police, and health-care services; and

2 (17) assessment, operation, or management of public transportation.

3 (c) Without limitation to the authority to issue an order under subsection (b), the
4 [Governor] also may issue any order to eliminate or reduce a risk of harm posed by the public-
5 health emergency or to eliminate, reduce, contain, or mitigate an effect of the public-health
6 emergency, including an effect attributable to the response to the public-health emergency.

7 (d) A public-health emergency order must be designed rationally to eliminate, reduce,
8 contain, or mitigate a risk posed by, or an effect of, the public-health emergency.

9 (e) When issuing an order under this section, the [Governor], based on then available
10 information, shall consider:

11 (1) the scope and degree of each risk of and effect from the public-health
12 emergency that the order is designed to eliminate, reduce, contain, or mitigate;

13 (2) the likelihood that the order will result in the outcome it is designed to
14 achieve;

15 (3) the proportion of the affected population that likely will benefit from the
16 outcome the order is designed to achieve;

17 (4) the likelihood that the order will meet the needs of, or disproportionately
18 burden, individuals in the affected population who are particularly vulnerable to the risks of or
19 harm from the public-health emergency because of unique characteristics, including, age,

20 disability, income and other financial resources, education, employment, location, and race; and

21 (5) the burdens likely to result from issuing the order, including deaths, illnesses,
22 injuries, financial losses, job losses, business closures, depletion of available financial resources,
23 and other relevant health and economic burdens.

1 (f) A public-health emergency order is not subject to the rule-making procedures of [cite
2 to state administrative procedure act].

3 (g) The [Governor] may renew an order issued under this section if the renewal complies
4 with Section 7.

5 (h) The [Governor] may delegate authority as authorized by other law of this state.

6 **Comment**

7 1. As specified in subsection (a), the Governor’s power to issue public-health emergency
8 orders as described in this section is triggered by the Governor’s declaration of a public-health
9 emergency under this Act.

10
11 2. Subsections (b) and (c) each separately describe the authority of the Governor to issue
12 public-health emergency orders. Subsection (b) describes specific categories of orders the
13 Governor is authorized to issue. Meanwhile, subsection (c) describes the general authority of the
14 Governor to issue orders to reduce, eliminate, contain, or mitigate the risks or the effects of the
15 public-health emergency even when the order does not serve one of the purposes enumerated in
16 subsection (b). The Act deliberately separated the description of these two independent powers to
17 increase the likelihood that courts will treat them as severable and will interpret them as
18 independent powers. During the COVID-19 pandemic, some courts treated as inseverable
19 general and specific powers to issue emergency public health orders that appeared in the same
20 statutory provision, See, e.g., *In re Certified Questions*, 958 N.W.2d 1, 25 (Mich. 2020) (after
21 ruling that general statutory authority of Governor to take all “reasonable” and “necessary”
22 actions to address an emergency violated separation of powers doctrine, and despite rules of
23 construction to preserve statutory language when possible, court holds that specific authority for
24 Governor to issue emergency orders about traffic, building occupancy, and liquor sales, are not
25 severable from general authority appearing in same statutory provision). Similarly, when a broad
26 grant of public health authority appears in the same statutory subsection as specific statements of
27 authority, some courts have interpreted the specific powers as examples that constrain and limit
28 the broad grant of power. See, e.g., *Corman v. Acting Sec’y of Pennsylvania Dep’t of Health*,
29 266 A.3d 452, 478-485 (Pa. 2021) (statute empowering public-health official to order
30 “isolation,” “quarantine,” or “any other appropriate control measure” does not authorize that
31 official to issue a mask mandate because requiring people to wear masks without first finding
32 that they have been exposed to COVID-19 is not sufficiently similar to “isolation” and
33 “quarantine,” which terms narrow actions that constitute “other appropriate control measures”
34 under the statute); *James v. Heinrich*, 960 N.W.2d 350, 360–61 (Wis. 2021) (statute authorizing
35 public health official to “take all measures necessary to prevent, suppress and control
36 communicable diseases” does not empower official to close schools because legislature must
37 have meant to exclude that power when, in same provision, legislature authorized official to
38 “inspect schools” but remained silent about closing schools); *Health Freedom Def. Fund, Inc. v.*
39 *Biden*, 599 F. Supp. 3d 1144, 1157 (M.D. Fla. 2022) (statutory authority for CDC to regulate as
40 “necessary” to prevent the spread of disease permits only actions such as “sanitation” and

1 “disinfection” listed as specific measures authorized in the same provision, and the phrase “and
2 other measures” may only include actions “akin” to the measures such as “sanitation” and
3 “disinfection” that are expressly authorized).

4
5 3. Subsection (b) authorizes the Governor to issue public-health emergency orders in
6 response to a public-health emergency and that fall within one or more of the purposes
7 categorized in the subsection. The authority of the Governor to issue orders for one or more of
8 the categorized purposes must be read in conjunction with the requirement elsewhere in the
9 subsection that any such orders are “in response to the public-health emergency.” Additionally,
10 the authority of the Governor under this subsection to issue orders for one or more of the
11 enumerated purposes must be read in conjunction with the requirement in subsection (d) that any
12 such order be designed rationally to eliminate or reduce the risks posed by the public-health
13 emergency or to contain or mitigate the effects of the public-health emergency. Moreover, the
14 authority of the Governor under this subsection to issue orders for one or more of the enumerated
15 purposes must be read in conjunction with the requirement in subsection (e) that the Governor
16 consider several factors relating to the benefits and burdens any order the Governor might issue.

17
18 4. The purposes categorized in subsection (b) that a public-health emergency order might
19 serve are intended to encompass an array of actions Governors or executive branch officials
20 might rationally take in response to a public-health emergency. These include actions that
21 Governors have commonly taken in response to a public-health emergency, such as testing,
22 quarantine, isolation, and disease surveillance. They also include actions that a Governor might
23 take to respond to a novel public-health emergency or to a public-health emergency that lasts
24 beyond the short-term.

25
26 5. Subsection (b)(6) authorizes a Governor to issue public-health emergency orders
27 addressing the management of “executive-branch” operations, offices, agencies, or programs.
28 The phrase “executive-branch” is intended to clarify that the Governor is not authorized by this
29 statute to interfere in the operation of the legislative and judicial branches.

30
31 6. Subsection (c) authorizes the Governor generally to issue public-health emergency
32 orders designed to reduce, eliminate, contain, or mitigate the risks or the effects of the public-
33 health emergency even when the order does not serve one of the purposes enumerated elsewhere
34 in subsection (b). This more general authority is intended to assure that the Governor has the
35 authority needed to respond quickly and effectively to a wide range of public-health
36 emergencies, including those that might pose novel risks requiring a broader range of authority
37 than the enumerated purposes provide. Yet, even this more general authority is cabined by the
38 legislative requirement in subsection (d) that any such order be designed rationally to reduce,
39 eliminate, contain, or mitigate the risks or the effects of the public-health emergency.
40 Additionally, any order issued under this more general authority is subject to the procedural and
41 reporting requirements elsewhere in the Act.

42
43 7. Subsection (c) begins with the phrase “Without limitation to the authority to issue an
44 order under subsection (b)” and states expressly that the Governor “also” has a general power to
45 issue orders. This wording is intended clarify that the general power described in subsection (c)
46 is independent of and should not be interpreted as constrained by the specific categories of

1 powers listed in subsection (b). It is intended to avoid interpretations made by some courts of
2 public health statutes during the COVID-19 pandemic. For example, some courts ignored general
3 statements of public-health authority when they appeared in a statute together with specific
4 statements of authority. See *James v. Heinrich*, 960 N.W.2d 350, 360–61 (Wis. 2021) (statute
5 authorizing public-health official to “take all measures necessary to prevent, suppress and control
6 communicable diseases” does not empower official to close schools because legislature must
7 have meant to exclude that power when, in same provision, legislature authorized official to
8 “inspect schools” but remained silent about closing schools); *Health Freedom Def. Fund, Inc. v.*
9 *Biden*, 599 F. Supp. 3d 1144, 1157 (M.D. Fla. 2022) (statutory authority for CDC to regulate as
10 “necessary” to prevent the spread of disease permits only actions such as “sanitation” and
11 “disinfection” listed as specific measures authorized in the same provision, and the phrase “and
12 other measures” may only include actions “akin” to the measures such as “sanitation” and
13 “disinfection” that are expressly authorized). Other courts construed specific statements of
14 public-health authority in a statute to limit the scope of general statements of public-health
15 authority in the same statute. See e.g., *Corman v. Acting Sec’y of Pennsylvania Dep’t of Health*,
16 266 A.3d 452, 478-485 (Pa. 2021) (statute empowering public-health official to order
17 “isolation,” “quarantine,” or “any other appropriate control measure” does not authorize that
18 official to issue a mask mandate because requiring people to wear masks without first finding
19 that they have been exposed to COVID-19 is not sufficiently similar to “isolation” and
20 “quarantine,” which terms narrow actions that constitute “other appropriate control measures”
21 under the statute).

22
23 8. Subsection (d) establishes any public-health emergency order issued by the Governor
24 must be rationally designed to reduce, eliminate, contain, or mitigate one or more risks or one or
25 more effect of the underlying public-health emergency. This standard is intended to provide
26 legislative guidance to the Governor, to place a limitation on the scope of the Governor’s
27 authority to issue orders during a public-health emergency, and to prevent the Governor from
28 issuing arbitrary or capricious orders. This requirement must be read in conjunction with the
29 reporting requirements established in Section 7.

30
31 9. Subsection (e) requires that the Governor consider several factors as a condition of
32 issuing any order under the section. The factors are intended to assure that the Governor account
33 for the likelihood that the order can achieve its goal, that the benefits and the burdens are
34 distributed fairly taking into consideration vulnerable individuals, and that the benefits of issuing
35 an order justify the burdens of doing so. The requirement that the Governor take these factors
36 into consideration is intended to provide additional legislative guidance to the Governor and to
37 prevent the Governor from issuing arbitrary or capricious orders. This requirement must be read
38 in conjunction with the reporting requirements established in Section 7.

39
40 10. Subsection (f) exempts orders issued under this section from any rule-making
41 procedures that might otherwise apply under state law to administrative statements of general
42 applicability. Because a public-health emergency may require quick action with respect to
43 substantial parts of or all of the population of a state, subsection (f) exempts orders issued under
44 this section from rule-making procedures that might delay action and thereby permit unnecessary
45 harm to public health. Subsection (f) exempts orders issued under this section from any and all
46 rule-making procedures, including emergency rule-making procedures because, in most

jurisdictions, even these procedures can cause some delay in the effective implementation of administrative actions. This Act imposes other procedural requirements that promote transparency and accountability while still empowering the Governor to act quickly and broadly to a public-health emergency.

11. Subsection (g) authorizes the Governor to renew an order, and it does not set a limit on the number of times that an order may be renewed so long as a renewed order meets the same standards that are required for an initial order.

12. Subsection (h) acknowledges that the Governor has authority elsewhere under state law to delegate to others in the executive branch the power to issue orders under this section. While this subsection does not limit those to whom the Governor may delegate this power because a variety of agencies and officials may be appropriate to involve in response to a public-health emergency.

13. An initial or renewed public-health emergency order issued under this section may be applicable to individuals, businesses and state or local governments as determined by the Governor.

Section 7. Requirements for Public-Health Emergency Order

(a) A public-health emergency order is effective only if:

(1) a declaration of a public-health emergency is in effect at the time the

[Governor] issues the order;

(2) the order is based on evidence then available to the [Governor] about the

nature of and risk posed by the public-health emergency, and the order is rationally designed to:

(A) eliminate or reduce the risk of harm giving rise to the public-health emergency; or

(B) eliminate, reduce, contain, or mitigate the effect of the public-health emergency;

(3) the order is based on a consideration of all of the factors under Section 6(e);

(4) the order states the goal it is designed to achieve;

(5) the order identifies the date on which it will expire, unless renewed, and the date may not be later than the expiration of the declaration of public-health emergency; and

1 (6) the order states the governmental agency or official responsible for
2 administering each provision of the order.

3 (b) Failure of a public-health emergency order to name an agency or official under
4 subsection (a)(6) does not nullify an action taken by an unnamed agency or official under the
5 order.

6 (c) Not later than [seven] days after issuing or renewing a public-health emergency order,
7 the [Governor] shall:

8 (1) prepare a report in a record describing the evidence on which the [Governor]
9 based the initial or renewed order; [and]

10 (2) make the report publicly available[; and

11 (3) submit the report to the [Legislature] at or before the time the report is made
12 publicly available].

13 (d) The report under subsection (c) must include any additional evidence the [Governor]
14 considered after issuing or renewing the order. The [Governor] shall exclude from the report
15 information protected by law as confidential, privileged, or otherwise exempt from disclosure.
16 The report must describe how the initial or renewed order meets each of the requirements under
17 subsection (a)(2).

18 **Comment**

19 1. Section 7 establishes substantive and procedural standards for any order issued under
20 this Act. It is intended to promote accountability to the facts related to the relevant agent or toxin
21 and the risks they may pose to all or part of the state's population as those facts exist at the time
22 the Governor issues or renews an order in response to a declared public-health emergency.
23 Additionally, the process is intended promote transparency for and accountability to both the
24 public and the Legislature through the reporting requirement established in subsection (c).
25

26 2. Subsection (c) creates an option for a state to require that the Governor, in addition to
27 preparing a report and making in publicly available within seven days of issuing or renewing a
28 public-health emergency order, also submit the report to the Legislature at or before the time the

1 Governor makes the report publicly available.

2
3 3. Subsection (d) clarifies the contents of the Governor’s report in three ways. First, it
4 requires that the Governor include in the report all of the evidence on which the Governor relied
5 to issue or renew a public-health emergency order, including any “additional evidence” that may
6 have come to light after the Governor issued order and before the Governor has made publicly
7 available the report required under subsection (c). Yet, this requirement no longer applies once
8 the Governor has made the report publicly available. In that way, subsection (d) does not require
9 the Governor to continuously update the report with new information. Second, subsection (d)
10 clarifies that the Governor is not required to include in the report any information that is
11 protected from disclosure by other state law. Third, subsection (d) clarifies that, in the report, the
12 Governor must explain how an order issued by the Governor meets the requirements in
13 subsection (a)(2).
14

15 4. Subsection (a)(2) requires, among other things, that each order issued under the Act be
16 based on evidence about the nature of and risks posed by the agent or toxin the threat or presence
17 of which the order is designed to respond. Additionally, subsection (a)(2) requires that an order
18 be rationally designed either to eliminate or reduce a risk posed by the public-health emergency
19 or to eliminate, reduce, contain or mitigate an effect of the public-health emergency. This
20 requirement is not intended to change any applicable constitutional standard of review. It is
21 intended to promote accountability and transparency by creating a public record of the
22 evidentiary basis for an order issued under this Act, which will protect against an arbitrary or
23 capricious declaration.
24

25 5. The requirement to base any order issued under this Act on information about the
26 nature and risks of the relevant agent or toxin is limited to evidence “then-available” to the
27 Governor. Information about the nature and risks of a public-health threat may be scant at the
28 time the Governor must respond to a public-health emergency. For example, there may be little
29 information about the nature and risks of a novel virus that is spreading and harming all or part
30 of a state’s population. In such a case, this section requires only that the Governor account for
31 the little information that is then-available when issuing or renewing an order to respond to the
32 declared public-health emergency. This section does not require that the Governor wait for more
33 complete or definitive information about the nature or risks posed by an agent or toxin before
34 issuing any order.
35

36 **Section 8. Termination of Public-Health Emergency Order**

37 A public-health emergency order terminates at the time the first of the following occurs:

38 (1) the [Governor] terminates the order;

39 (2) the order expires; or

40 (3) the [Governor] terminates the declaration of a public-health emergency under

41 Section 5.

1 **Comment**

2 1. This section identifies the different ways that a public-health emergency order is
3 terminated.

4
5 2. Paragraph (3) establishes that a public-health emergency order terminates when the
6 declaration of public-health emergency terminates under Section 5. This provision reflects the
7 fact that the Governor's power to issue any public-health emergency order derives from a current
8 and effective declaration of public-health emergency. Because the Governor is authorized to
9 renew a declaration of public-health emergency under Section 4, the Governor may renew any
10 public-health emergency orders under a properly renewed declaration of public-health
11 emergency. If, however, a declaration of public-health emergency expires, then any public-health
12 emergency order expires as a result at the same time.

13
14 **Section 9. Conflict with Local Law**

15 A public-health emergency order does not preempt an order, regulation, or ordinance of a
16 political subdivision, except to the extent the order, regulation, or ordinance conflicts with the
17 public-health emergency order.

18 **Comment**

19 This section specifies that a public-health emergency order issued by the Governor
20 preempts the law of a political subdivision only when there is a conflict between the public-
21 health emergency order and the law of a political subdivision and only to the extent necessary to
22 resolve the conflict. This section is intended to permit conflict preemption and not field
23 preemption of local law. This section is not intended to alter the authority granted to a political
24 subdivision by other law of the state.

25
26 **Section 10. Judicial Review**

27 (a) A person with standing may file an action in court seeking to have a declaration of a
28 public-health emergency or all or part of a public-health emergency order set aside.

29 (b) In judicial review of a declaration of public-health emergency or all or part of a
30 public-health emergency order:

31 (1) The burden of demonstrating the invalidity of the declaration or all or part of
32 the order is on the party asserting invalidity.

33 (2) The court shall make a ruling on each material issue on which the court's

1 decision is based.

2 (3) The court may grant relief only if it determines that a person seeking judicial
3 review has been prejudiced because:

4 (A) the [Governor] erroneously interpreted the law;

5 (B) the [Governor] committed an error of procedure;

6 (C) the declaration or all or part of the order is arbitrary, capricious, an
7 abuse of discretion, or otherwise not in accordance with law;

8 (D) an agency determination of fact in a contested case is not supported by
9 substantial evidence in the record as a whole; or

10 (E) to the extent that the facts are subject to a trial de novo by the
11 reviewing court, the action was unwarranted by the facts.

12 (c) In making a determination under this section, the court shall review the governmental
13 record or the parts designated by the parties. The governmental record supporting a public-health
14 emergency declaration or order includes a report or record prepared in accordance with Section
15 4(i), 5(c), or 7(c). The court shall apply the harmless error rule.

16 (d) To reduce the likelihood of harm to public health that could result by immediately
17 setting aside a declaration of a public-health emergency or all or part of a public-health
18 emergency order ruled to be invalid, the court may delay temporarily setting aside the
19 declaration or all or part of the order.

20 (e) If a provision or application of a public-health emergency order is held invalid, the
21 invalidity does not affect another provision or application that can be given effect without the
22 invalid provision.

23 (f) This section supersedes other law of this state only if necessary to resolve a conflict

1 with the other law.

2 **Comment**

3 1. This section creates a right in anyone with standing to file an action in state court
4 seeking a court order setting aside the Governor's declaration of public-health emergency or
5 setting aside all or a portion of a public-health emergency order issued by the Governor.

6
7 2. Subsection (b) sets the rules for judicial review of a declaration of public-health
8 emergency or a public-health emergency order. This subsection was adapted from Section 508 of
9 the Revised Model State Administrative Procedure Act. Subsection (b)(3)(A) authorizes a court
10 to grant relief if it finds that the Governor has erroneously interpreted the law in the course of
11 issuing a declaration of public-health emergency or issuing a public-health emergency order.
12 Subsection (b)(3)(A) is silent on the deference a reviewing court will grant to the Governor's
13 interpretation of the relevant law so as to accommodate the standard of deference already in
14 adopted under existing state law, and this is true despite the preemption language in subsection
15 (f). The arbitrary or capricious standard set in subsection (b)(3)(C) is the same as the arbitrary or
16 capricious standard set in the Revised Model State Administrative Procedure Act. Requirements
17 in this Act that the Governor rationally base a declaration or an order on the then-available
18 evidence of the public health risks and harms associated with the underlying public-health
19 emergency and the obligation of the Governor under this Act to make a report reflecting the
20 evidence and factors on which the Governor rationally based the Governor's declaration or order
21 are intended to assure that such declarations and orders are not arbitrary or capricious and to
22 assure that a record exists for the purposes of judicial review.

23
24 3. Subsection (c) requires a reviewing court to apply the harmless error rule. This
25 subsection was adapted from Section 508 of the Revised Model Administrative Procedure Act.
26 The harmless error rule is particularly important in the review of a declaration of public-health
27 emergency or a public-health emergency order so as to avoid public health harm during an
28 emergency as a result of immaterial errors.

29
30 4. Subsections (d) and (e) grant discretion to a reviewing court to protect public health
31 during an emergency as much as possible even if the court finds that all or part of a declaration
32 of public-health emergency or a public-health emergency order is invalid. Subsection (d)
33 encourages a reviewing court to delay temporarily setting aside an invalid declaration or order so
34 as to minimize the risk of public health harm that could result from doing so immediately.
35 Subsection (e) encourages a reviewing court to sever invalid provisions in a public-health
36 emergency order from the remainder of such an order so as to minimize the risk of public-health
37 harm that could result from setting aside the entire order.

38
39 5. Subsection (f) preempts state law of administrative procedure, but only to the extent
40 that such law conflicts with or otherwise interferes with achieving the purpose of this section.

41 **Section 11. Injunctive Relief**

42
43 The [Governor], or the governmental agency or official responsible for administering a

1 public-health emergency order under Section 7, may seek injunctive relief to enforce a public-
2 health emergency order.

3 ***Legislative Note:*** *With respect to the use of “Governor”, insert appropriate state official*
4 *authorized to bring an action for the state.*

5
6 **Comment**

7 This section should be read in conjunction with Section 12. The Act does not authorize
8 criminal action against those who violate the terms of a public-health emergency order.

9
10 **Section 12. Civil [Penalty][Fine]**

11 (a) It is unlawful knowingly to violate a public-health emergency order.

12 (b) Subject to subsection (c), each governmental agency or official responsible under
13 Section 7 to administer a public-health emergency order may impose a [penalty][fine] for a
14 knowing violation of the order of not more than \$[250] per violation.

15 (c) A [penalty][fine] imposed under subsection (b) may not be imposed on a government
16 or governmental subdivision, agency, or instrumentality or on a public official acting in an
17 official capacity.

18 (d) Except as provided in Section 13, this section does not affect a right or remedy
19 available under other law.

20 **Comment**

21 1. This section should be read in conjunction with Section 11. The Act does not authorize
22 criminal action against those who violate the terms of a public-health emergency order.

23
24 2. Subsection (a) establishes a maximum level of a civil fine or penalty for violations of
25 public-health emergency orders issued under this Act against a person. There is no distinction
26 between a person who is an individual or a person that is a business entity. Any fine or penalty
27 imposed under subsection (b) is subject to existing procedural requirements applicable to the
28 governmental agency or official imposing the fine or penalty, including the requirements of due
29 process.

30
31 3. Subsection (c) clarifies that governmental agencies and officials that violate a public-
32 health emergency order while acting in their official capacities are not subject to any fine or

1 penalty under this section.

2
3 4. Subsection (d) acknowledges that an individual, business, or other person who
4 knowingly violates a public-health emergency order, in addition to being subject to a fine or
5 penalty under this Act, may also be subject to other consequences under other law. The
6 governmental agency or official responsible for administering an order may be authorized under
7 other law to take actions other than the civil fine or penalty described in this section, and
8 subsection (d) does not displace or supersede that authority. Similarly, governmental agencies or
9 officials other than the agency or official responsible for administering a public-health
10 emergency order also may be empowered under other law of the state to pursue a remedy or
11 otherwise take action against a person who knowingly violates a public-health emergency order,
12 and subsection (d) does not displace or supersede that authority. Likewise, subsection (d) does
13 not displace or supersede any criminal law of the state; nor does it interfere or limit the authority
14 of a prosecutor to pursue appropriate criminal charges available under other law of the state
15 against a person who knowingly violates a public-health emergency order.

16 17 **Section 13. Private Right of Action**

18 Sections 11 and 12 do not create a private right of action.

19 **Comment**

20 This section clarifies that Sections 11 and 12 do not create any private rights of action.
21 Rather, Sections 11 and 12 authorize only certain public officials to take action against those
22 who violate a public-health emergency order.

23 24 **Section 14. Relation to Electronic Signatures in Global and National Commerce Act**

25 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National
26 Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or
27 supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
28 described in 15 U.S.C. Section 7003(b).

29 ***Legislative Note:*** *It is the intent of this act to incorporate future amendments to the cited federal*
30 *law. A state in which the constitution or other law does not permit incorporation of future*
31 *amendments when a federal statute is incorporated into state law should omit the phrase “, as*
32 *amended”. A state in which, in the absence of a legislative declaration, future amendments are*
33 *incorporated into state law should omit the phrase.*

34 35 **Comment**

36
37 The federal Electronic Signatures in Global and National Commerce Act, popularly
38 known as “E-Sign”, was adopted in 2000 to facilitate the use of electronic records and signatures

1 in commercial transactions. Subject to exceptions not relevant here, E-Sign mandates the
2 acceptance of electronic contracts and electronic signatures in interstate or foreign commerce. It
3 largely tracks the Uniform Electronic Transactions Act, adopted by the Uniform Law
4 Commission in 1999, but includes consumer consent provisions and prohibits state law from
5 giving greater legal effect to any specific technology or technical specification. Under Section
6 102 of E-Sign, state legislation attempting to regulate electronic records and signatures can opt
7 out of this pre-emption, allowing some modification to the federal law, so long as the State treats
8 the records or signatures substantially in the same manner as they are treated by E-Sign. In order
9 to take advantage of the exception to preemption, the state law must make specific reference to
10 E-Sign as provided in this section. See 15 U.S.C. Section 7002(a)(2)(B).

11 12 **[Section 15. Severability]**

13 If a provision of this [act] or its application to a person or circumstance is held invalid,
14 the invalidity does not affect another provision or application that can be given effect without the
15 invalid provision.]

16 ***Legislative Note:*** *Include this section only if the state lacks a general severability statute or a*
17 *decision by the highest court of the state adopting a general rule of severability.*
18

19 **Section 16. Effective Date**

20 This [act] takes effect . . .