

To: Uniform Law Commission

From: Diane Boyer-Vine, Chair, MPHEAA Drafting Committee
Heidi Tseu, Vice Chair, MPHEAA Drafting Committee
Rob Gatter, Reporter, MPHEAA Drafting Committee

Date: June 7, 2023

Re: Model Public-Health Emergency Authority Act (MPHEAA)

In 2021, the Uniform Law Commission's Scope and Program Committee approved the formation of a drafting committee to draft a model law related to public health emergency authorities. A drafting committee was created and charged with drafting a model law addressing:

the allocation of authority between state executive branch officials and the legislature (including with respect to preemption of local governments) and the processes that should apply to the use of such authorities.

The MPHEAA Drafting Committee has fulfilled its charge and presents to the Uniform Law Commission for approval the Model Public-Health Emergency Authority Act (MPHEAA). On June 1, 2023, the Committee met for an informal ULC review session and incorporated several into the MPHEAA based on feedback from that session.

The Committee believes that the MPHEAA balances the need to empower Governors to respond to public health emergencies and the need to hold Governors accountable to the facts of a public health emergency and to the interests of individuals, businesses, and other stakeholders. This memorandum highlights key issues the Committee addressed as it drafted the MPHEAA.

Assuring that States are Prepared to Respond to Public Health Emergencies

The MPHEAA authorizes a Governor to declare a "public-health emergency" whenever a toxin or "an infectious, biologic, radiologic, or chemical agent" poses or threatens to pose risks of death, disability, or other substantial harm to a degree that is significantly higher than would otherwise be expected, or that poses or threatens to pose a risk of adversely affecting resources available for emergency response. The cause underlying the appearance of an agent or toxin is irrelevant under the statute, and so a Governor may declare a public-health emergency when an agent or toxin appears as part of a natural or human-made disaster or as a result of bioterrorism or any other cause.

During a declared public-health emergency, the MPHEAA empowers a Governor generally to issue any order rationally designed either to reduce a risk of harm or to mitigate an effect of the emergency. The MPHEAA grants a Governor such broad authority to assure that a State is prepared to respond in any way that is sensible given the particulars of the emergency at issue. Because it is impossible to anticipate every emergency that could arise and every rational way a State might respond, the Committee determined that such a general delegation of authority is necessary. Unlike the general statutory authority to issue emergency orders that exists in most

states, the general authority created by the MPHEAA is limited by the requirement that any order issued must be designed either to reduce a risk of harm or to mitigate an effect of the emergency. As a result, the general authority created by the MPHEAA is much more likely to survive challenges based on the major-questions or non-delegation doctrines, which challenges were common during the COVID-19 pandemic.

Additionally, the MPHEAA authorizes a Governor during a declared public-health emergency to issue any order that falls within one or more categories of specific, enumerated purposes. In theory, any order a Governor issues to serve a specific purpose also could have been issued under the general authority described above. Nonetheless, the MPHEAA separately authorizes a Governor to issue orders that serve one or more specific, enumerated purpose to assure that a State is adequately prepared to respond to a public-health emergency even if the general authority created by the MPHEAA were to be limited as a result of judicial application of the non-delegation, major-question, or other related doctrine.

Holding Governors Accountable during a Public-Health Emergency

The MPHEAA not only assures that a State is prepared to respond to a public-health emergency, it also creates several mechanisms that combine to act as a check on a Governor's emergency powers. These include (1) assuring that state legislatures will have opportunities to pass and present bills related to the management of a public-health emergency, (2) creating substantive and procedural limitations on a Governor's exercise of powers delegated to a Governor under MPHEAA, (3) requiring a Governor to make and share reports describing a Governor's basis for declaring or renewing a public-health emergency and for issuing emergency orders, and (4) facilitating a process by which a person can seek judicial review of a Governor's declarations or orders.

First, the MPHEAA incentivizes a Governor to assure that the Legislature will have an opportunity to be in session at the time the Governor renews a public health emergency declaration. If so, then the MPHEAA permits the Governor to renew a public-health emergency declaration. Otherwise, a Governor must allow a declaration to terminate and wait at least 15 days before issuing another declaration for the same public-health emergency. This is particularly important for any State with a part-time Legislature that does not have the power to call itself into session. In such a State, a Governor has an incentive to call a special legislative session so as to trigger the Governor's power to renew a public-health emergency declaration without any lapse of time. This incentive is designed to give a State's Legislature an opportunity to pass bills related to the public-health emergency and to present them to the Governor. This, in turn, will engage the political process because a Governor must consider the political consequences of approving or vetoing legislation passed by the Legislature.

The Committee considered whether to include a provision in MPHEAA purporting to empower a Legislature, by joint or concurrent resolution, to terminate a Governor's public-health emergency declaration or emergency orders. The Committee decided against such a provision because it would permit a legislative veto that would likely violate most states' constitutions. In making this decision, the Committee reviewed Pennsylvania's experience with such a statutory provision during the COVID-19 pandemic. In June 2020 the Governor of Pennsylvania renewed

an initial public-health emergency proclamation. Shortly thereafter, Pennsylvania's Legislature, under an authorizing statute, approved a concurrent resolution terminating the Governor's proclamation. The Governor challenged the resolution, claiming that it was not legally binding or was unconstitutional. In Wolf v. Scarnati, 233 A.3d 679 (Pa. 2020), the Pennsylvania Supreme Court held that the Legislature's resolution violated Pennsylvania's constitutional requirement that every legislative "order, resolution, or vote . . . be presented to the Governor" for approval or disapproval. Because the concurrent resolution purporting to terminate the public-health emergency proclamation was not presented to the Governor for approval or veto, the Court held that the resolution was void as unconstitutional.

Second, the MPHEAA creates several substantive requirements that cabin a Governor's authority during a public-health emergency. It requires that a declaration and any order be based in the facts available to the Governor at the time the Governor declares or renews a public-health emergency or issues or renews an emergency order. It also requires that each order issued by a Governor during an emergency be designed rationally to address the risks or mitigate the effects of the emergency. Moreover, it requires that a Governor consider a variety of factors when deciding to issue an emergency order.

Third, the MPHEAA imposes related procedural requirements. A Governor must write and publicize a report memorializing the Governor's reasons and basis in fact for declaring a public-health emergency, for renewing such a declaration, and for issuing or renewing each emergency order. Each report in support of an emergency order must also address the substantive factors a Governor must consider when deciding whether or not to issue a particular order. As noted below, a Governor who fails to satisfy any of the substantive or procedural requirements risks that a court will set aside the Governor's declaration of a public-health emergency or one or more of a Governor's emergency orders.

A particularly noteworthy limitation imposed by the MPHEAA is that a public-health emergency declaration has a term of no longer than 90 days and that all emergency orders issued during the term of the declaration will terminate at the end of that term. While a Governor may renew such a declaration and its related orders at the end of the term, doing so triggers the obligation of the Governor to establish again the then-current basis for renewing the declaration and renewing each order. This structure assures that a State is prepared to manage a public-health emergency for as long as it may last, and it assures that a Governor is required periodically to go on record with the reasons and evidence supporting the Governor's actions in response to an ongoing emergency; but this structure does more. When the MPHEAA is read as a whole, it requires a Governor's orders to be rationally designed to reduce risks or mitigate harms during the immediate 90-day term of the declaration. Indeed, the Committee deliberately chose to build into each order this form of immediacy rather than to add an immediacy requirement elsewhere in the statute.

Fourth, the MPHEAA facilitates the power of any person with standing to seek judicial review of a Governor's declaration of a public-health emergency or a Governor's emergency order on the grounds that it is inconsistent with the MPHEAA's substantive or procedural standards described above or that the declaration or order is arbitrary or capricious. It does so by requiring a Governor to write and publicize a report describing the basis for the Governor's

decision to declare a public-health emergency or to renew such a declaration or to issue or renew an emergency order. Such reports, if inadequate, also provide a basis for a person with standing to petition a court to set aside the declaration or order because it fails to meet the standards set by the MPHEAA or because the Governor's action is arbitrary or capricious. Additionally, the MPHEAA includes a judicial review section, the wording of which largely mimics the wording of the judicial review section of the Uniform Law Commission's Revised Model State Administrative Procedure Act. By including such a judicial review section, the MPHEAA clearly signals that a person with standing may pursue an administrative challenge in court of the Governor's actions during a public-health emergency. In this way, if and when a person sues over a public-health emergency declaration or order, the MPHEAA encourages them to challenge the declaration or order rather than attack the constitutionality of the authorizing statute itself, which could undermine a State's preparedness for future public-health emergencies.