Report to the Mississippi Legislature

A Legal Analysis of Mississippi's Emergency Powers Statutes and Actions Taken During the COVID-19 Pandemic

#647
November 17, 2020

PEER MISSISSIPPI
Joint Legislative Committee on Performance Evaluation and Expenditure Review

PEER: The Mississippi Legislature's Oversight Agency

The Mississippi Legislature created the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Committee) by statute in 1973. A joint committee, the PEER Committee is composed of seven members of the House of Representatives appointed by the Speaker and seven members of the Senate appointed by the Lieutenant Governor. Appointments are made for four-year terms, with one Senator and one Representative appointed from each of the U.S. Congressional Districts and three at-large members appointed from each house. Committee officers are elected by the membership, with officers alternating annually between the two houses. All Committee actions by statute require a majority vote of four Representatives and four Senators voting in the affirmative.

Mississippi's constitution gives the Legislature broad power to conduct examinations and investigations. PEER is authorized by law to review any public entity, including contractors supported in whole or in part by public funds, and to address any issues that may require legislative action. PEER has statutory access to all state and local records and has subpoena power to compel testimony or the production of documents.

PEER provides a variety of services to the Legislature, including program evaluations, economy and efficiency reviews, financial audits, limited scope evaluations, fiscal notes, special investigations, briefings to individual legislators, testimony, and other governmental research and assistance. The Committee identifies inefficiency or ineffectiveness or a failure to accomplish legislative objectives, and makes recommendations for redefinition, redirection, redistribution and/or restructuring of Mississippi government. As directed by and subject to the prior approval of the PEER Committee, the Committee's professional staff executes audit and evaluation projects obtaining information and developing options for consideration by the Committee. The PEER Committee releases reports to the Legislature, Governor, Lieutenant Governor, and the agency examined.

The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

PEER Committee
Post Office Box 1204
Jackson, MS 39215-1204

(Tel.) 601-359-1226
(Fax) 601-359-1420
(Website) www.peer.ms.gov

The Mississippi Legislature

Joint Committee on Performance Evaluation and Expenditure Review

PEER Committee

SENATORS
LYDIA CHASSANIOL
Chair
KEVIN BLACKWELL
DEAN KIRBY
CHAD McMAHAN
SOLLIE NORWOOD
JOHN POLK
CHARLES YOUNGER

TELEPHONE:
(601) 359-1226

FAX:
(601) 359-1420

Post Office Box 1204
Jackson, Mississippi 39215-1204

James A. Barber
Executive Director

www.peer.ms.gov

REPRESENTATIVES
TIMMY LADNER
Vice Chair
RICHARD BENNETT
Secretary
CEDRIC BURNETT
CAROLYN CRAWFORD
BECKY CURRIE
JERRY TURNER
PERCY WATSON

OFFICE:
Woolfolk Building, Suite 301-A
501 North West Street
Jackson, Mississippi 39201

November 17, 2020

Honorable Tate Reeves, Governor
Honorable Delbert Hosemann, Lieutenant Governor
Honorable Philip Gunn, Speaker of the House
Members of the Mississippi State Legislature

On November 17, 2020, the PEER Committee authorized release of the report titled ***A Legal Analysis of Mississippi's Emergency Powers Statutes and Actions Taken During the COVID-19 Pandemic.***

Senator Lydia Chassaniol, Chair

This report does not recommend increased funding or additional staff.

Table of Contents

List of Exhibits

PEER MISSISSIPPI
Joint Legislative Committee on Performance Evaluation and Expenditure Review

Joint Legislative Committee on Performance Evaluation and Expenditure Review
Report Highlights
November 17, 2020

A Legal Analysis of Mississippi's Emergency Powers Statutes and Actions Taken During the COVID-19 Pandemic

CONCLUSION: Mississippi's Emergency Powers statutes provided sufficient protection to Mississippi citizens.

Background

Mississippi law has always made provisions for addressing emergencies. Such laws have evolved incrementally since the beginning of the twentieth century with the laws initially focusing on emergencies involving riots, insurrection or military threats, and communicable disease epidemics. Since World War II, Mississippi's more recent emergency powers statutes have transitioned from the realm of civil defense to address a broader range of threats posed by natural, man-made, and technological emergencies.

How adequate are Mississippi's emergency laws?

Mississippi's laws address the following categories of emergency response, which are the categories found in other states' laws:

- findings, purposes, and policy;
- preparedness and planning;
- surveillance and detection;
- state of emergency and emergency declarations;
- special powers, such as acquisition and management of property;
- protection of persons; and,
- communication.

What are some policy concerns?

- The Governor's decision to declare an emergency is subject only to his own review every 30 days, while the Legislature has no formal role in the process.
- According to NCSL, 25 states provide the Legislature with the power to set an emergency declaration aside.
- Six states limit the duration of an emergency, giving the Legislature a role in the process of determining how the state should respond to the emergency.
- The COVID emergency has required the Governor to take actions that many never contemplated ever taking place.
- A good argument can be made that Mississippi should join the majority of states in giving the Legislature a stronger voice in emergency policy making.
- A broad grant of power without legislative oversight and assent could constitute an unconstitutional delegation of powers.
- Two executive orders appear to exceed the Governor's authority to suspend the operation of state laws. Executive Order 1499 suspended the requirements of several CODE sections requiring the appointment of members to certain boards and commissions. Executive Order 1504 suspended the application review and selection deadline for the position of the Director of the Public Utilities staff.

How have Mississippi state and local governments responded to the pandemic?

Governor Reeves issued an emergency proclamation on March 14, 2020, and additionally issued over 60 executive orders addressing a broad range of matters. The Mississippi State Department of Health has also issued mandatory quarantine directives for persons exposed to COVID-19. Local governments have the authority to issue emergency orders when such are not in conflict with those issued by the Governor. While not indicative of all such orders, three orders issued by local governments suffered from constitutional defects that resulted in litigation in federal court (see conclusion 6 on back page).

Report Conclusions

1. In its *Jacobson v. Commonwealth of Massachusetts* decision, the U.S. Supreme Court concluded that when addressing emergencies, a state can adopt regulations to protect the many in the face of a threat, even if the regulations impair personal liberty, unless the governmental action is unreasonable or palpably impairs a constitutionally protected right.

2. In its *Hawkins v. Hoye* decision, the Mississippi Supreme Court upheld as reasonable a legislative delegation of the state's police powers to a local government to regulate health conditions.

3. Model state health emergency powers laws promulgated by two groups define the criteria or attributes that states should consider when enacting such laws, but the groups' model laws have been met with considerable criticism.

4. While Mississippi has not adopted the Model State Emergency Health Powers Act, Mississippi's current emergency powers laws address most subjects contained in the model act.

5. The Governor's executive orders issued in response to the COVID-19 pandemic, some of which appear to exceed the scope of the Governor's emergency powers conferred by law, were generally directed toward the protection of Mississippi citizens. However, current state management laws on which the orders were based lacked formal provisions for the Legislature to have oversight of policy for long-term emergencies.

6. Executive orders issued by the mayors of the City of Jackson, the City of Holly Springs, and the City of Greenville to address the COVID-19 pandemic appeared to abridge the fundamental freedoms protected by the U.S. Constitution and the Mississippi Constitution.

Recommendations

1. The Legislature should consider adopting a law such as the ones in Kansas or Utah that limit the duration of an emergency to a finite number of days, thereby requiring legislative action for any extensions.

2. The Legislature should amend MISS. CODE ANN. Section 33-15-5 (1972) to include within the definition of "natural emergency" the terms "epidemic" and "pandemic" to ensure that the Governor could invoke the broadest emergency powers in the event of such occurrences.

3. The Legislature should enact laws to accomplish the following:
   a) empower the Governor to direct, in certain instances, that local health care professionals be used to provide medical assistance in areas impacted by natural, man-made, or technological disasters and to address the licensure of out-of-state volunteer providers who come to Mississippi to assist in the wake of a disaster; and,
   b) provide that the Mississippi State Department of Health may, in certain emergencies, take responsibility for human remains in local jurisdictions.

4. On a periodic basis, the Attorney General's office should conduct training sessions, in conjunction with the Mississippi Municipal League and the Mississippi Association of Supervisors, regarding the proper crafting of local emergency orders.

PEER MISSISSIPPI
Joint Legislative Committee on Performance Evaluation and Expenditure Review

A Legal Analysis of Mississippi's Emergency Powers Statutes and Actions Taken During the COVID-19 Pandemic | November 17, 2020
For more information, contact: (601) 359-1226 | P.O. Box 1204, Jackson, MS 39215-1204
Senator Lydia Chassaniol, Chair | James A. Barber, Executive Director
A copy of the full report is available at: www.peer.ms.gov

A Legal Analysis of Mississippi's Emergency Powers Statutes and Actions Taken During the COVID-19 Pandemic

Introduction

Authority

In light of the COVID-19 worldwide pandemic, the PEER Committee reviewed state laws concerning the state's capacity to deal with such emergencies. The Committee conducted this review in accordance with MISS. CODE ANN. Sections 5-3-51 et seq. (1972).

Scope and Purpose

Following Governor Tate Reeves's March 14, 2020, declaration of a state of emergency due to the COVID-19 pandemic, it became obvious that Mississippi would face a public health emergency of major proportions. The government's response to the pandemic required the Governor, the Mississippi Emergency Management Agency (MEMA), the Mississippi Department of Health (MSDH), and local governments to rely on the state's emergency powers and issue orders that were controversial and intrusive since they limited how Mississippians functioned in their everyday lives.

This report examines Mississippi's statutes that govern the state's response to emergency situations, specifically public health pandemics. In conducting this review, PEER sought to answer the following questions:

1. What is the history and scope of the executive branch's powers to address emergencies in Mississippi?
2. Were Mississippi's emergency powers laws adequate to protect Mississippi citizens from the threats of the COVID-19 pandemic?
3. Were the actions taken by state and local government officials during the COVID-19 pandemic appropriate?
4. Are there statutory changes to Mississippi's emergency powers statutes that the Legislature should consider?

Method

In conducting this review, PEER reviewed:

- literature on the evolution of modern laws dealing with public health emergencies;
- the history of Mississippi's statutes dealing with the executive branch's powers to address emergencies of varied types;
- Mississippi's current emergency powers statutes in light of several model laws and constitutional case laws from the U.S. Supreme Court, Mississippi courts, and other U.S. jurisdictions; and,

- executive proclamations and orders in light of the powers conferred upon the executive branch of government by the *Mississippi Constitution of 1890* and Mississippi statutes.

What is the History and Scope of the Executive Branch's Powers to Address Emergencies in Mississippi?

Legal authority for executive responses to emergencies has evolved incrementally over the past 100 years from narrow statutes and constitutional mandates designed to address specific issues, such as public health quarantines, or the suppression of insurrection or riots, to modern comprehensive statutes designed to ensure that state and local agencies are prepared to face the wide ranges of natural, technological, and man-made disasters that may occur at any time. Mississippi's current body of emergency management statutes provides the Governor, executive branch agencies, and local governing authorities with broad powers to carry out emergency management functions to protect the health and welfare of Mississippi citizens.

U.S. Supreme Court Decision Relative to Emergency Powers

In its *Jacobson v. Commonwealth of Massachusetts* decision, the U.S. Supreme Court concluded that when addressing emergencies, a state can adopt regulations to protect the many in the face of a threat, even if the regulations impair the liberties of the few.

The U.S. Constitution reserves to the states a broad authority to legislate for the health and welfare of each state's residents. This authority is generally referred to as police power,[1] with emergency powers being a subspecies of police power. Emergency response legislation in the United States presumes the existence of cooperative federalism[2] in which the federal government and the states have critical roles. For example, this cooperative federalism is exhibited in a response to hurricanes and floods where the state and its political subdivisions act to address the immediate problems of public order and health, with the federal government acting to provide economic, and in some cases, technical assistance essential to long term issues of recovery.[3] While considerable debate exists as to the scope of the federal government's role in addressing pandemics, long established practices, statutes, and court decisions have articulated the roles and responsibilities of the states in addressing emergencies including epidemics, pandemics, and other public health emergencies.

Jacobson v. Commonwealth of Massachusetts

The constitutional breadth of a state's police power to protect its residents from public health threats was first set out in a landmark decision of the United States Supreme Court,

[1] "The states' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens." See *Wilcher v. State*, 227 So.3d 890, (Miss. 2017).
[2] Cooperative federalism refers to a concept in which the state governments, local governments, and the federal government share responsibility in the governance of the people. They cooperate in working out details concerning which level of government takes responsibility for particular areas and creating policy in that area. The concept of cooperative federalism put forward the view that the national and state governments are partners in the exercise of governmental authority. It is also referred to as the new federalism.
[3] Examples of federal assistance include disaster recovery funds made available to states through the Federal Emergency Management Agency under the Stafford Act and administered for the benefit of the states and local governments by state emergency management agencies.

Jacobson v. Commonwealth of Massachusetts.[4] In *Jacobson*, Massachusetts enacted legislation authorizing local governments to require immunizations that in the opinion of the locality's governing authorities were necessary to protect the public health. The City of Cambridge noted that smallpox cases had been increasing in that community and ordered the residents of the City to be vaccinated.

When Jacobson refused vaccination, the City proceeded criminally against him. Jacobson asserted that the ordinance adopted by the City violated the United States Constitution—specifically the Fourteenth Amendment—and guaranteed against deprivations of life, liberty, and property without due process of law and further violated the "spirit" and the preamble of the Constitution. Jacobson was found guilty, with the Massachusetts Supreme Judicial Court upholding his conviction.

On appeal to the United States Supreme Court, Jacobson raised the same arguments. After rejecting the appellant's general arguments which were based on the preamble and the "spirit" of the Constitution, the Court moved on to determine if the statute in question violated the appellant's liberty that was protected by the Fourteenth Amendment.

To preface its analysis, the Court noted that police powers are broad and generally empower the state to enact laws to protect the public health and safety of its citizens. These may include quarantine laws and a broad range of public health measures. Additionally, the state may invest local governments with the power to enact regulations addressing the protection of public health.

As to the appellant's liberty, the Court noted that under our system of government liberty does not mean a license to do what one wants. Specifically, the Court quoted from *Crowley v. Christensen:*[5]

> *The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. In the constitution of Massachusetts adopted in 1780, it was laid down as a fundamental principle of the social compact that the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good," and that government is instituted "for the common good, for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of any one man, family or class of men." The good and welfare of the Commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts...*[6]

The Court concluded that when addressing emergencies, regulations can be adopted to protect many in the face of a threat, even if those regulations impair the liberties of the few. For enactments to be constitutional, they must be:

- reasonable exercises of the state's police powers; and,
- not be a plain, palpable invasion of rights secured by the fundamental law.

---

[4] *Jacobson vs. Massachusetts,* 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, (1905).
[5] *Crowley v. Christiansen,* 137 U.S. 86, 89, 34 L. ed. 620, 621.
[6] Supra.

In concluding that the regulation met these criteria, the Court found that the legislative decision to mandate vaccination, while not unanimously accepted by experts, was a reasonable means of protecting the public that is supported by many countries. Further, it was not for the court to substitute its judgment for that of the Legislature in view of the fact that vaccination is considered by some to be a reasonable response to the problem of epidemics. Likewise, the law could not require an arbitrary result in a case, such as a requirement that someone medically unfit for vaccination be vaccinated. Further, the Court balanced the appellant's general concept of "liberty" against what the majority considered to be the community's need for protection against a particularly dangerous disease. Under the conditions outlined in the case, the Court affirmed the conviction of Jacobson.

While much has changed since *Jacobson* was decided, regarding the Court's recognition of fundamental rights protected by the U.S. Constitution, recent cases addressing issues posed by the COVID-19 pandemic have cited *Jacobson* and have found its deferential constitutional tests requiring minimal scrutiny of emergency measures controlling, with some exceptions, particularly in instances where restrictions singling out religious services impaired the right to free exercise of religion.[7] These recent cases show that a court's analytical approach to certain liberty issues may differ somewhat from that employed by the Court in J*acobson*, but that most emergency measures to protect the public health are still widely upheld.

Mississippi Supreme Court Decision Relative to Emergency Powers

In its *Hawkins v. Hoye* decision, the Mississippi Supreme Court upheld as reasonable a legislative delegation of the state's police powers to a local government to regulate health conditions.

Roughly contemporaneous with *Jacobson* is a case from the Mississippi Supreme Court which follows the logic of *Jacobson* regarding the police powers of the state extending to public health measures designed to protect citizens from infectious disease.

In the 1914 case *Hawkins v. Hoye*,[8] the Mississippi Supreme Court upheld the constitutionality of the Mississippi State Board of Health rules that were adopted to ensure that dairy cows infected with tuberculosis could not be used in the production of milk sold for human consumption. In so doing, the Court reasoned that:

- the adoption of statutes to protect the health of Mississippi residents was a valid exercise of the police powers of the state;
- the rules of the State Board of Health that carry forth the policy of protecting the health of residents did not constitute an unconstitutional delegation of the Legislature's powers; and,
- the rules that prohibited sellers of milk whose cows were infected with tuberculosis did not constitute an unconstitutional taking of property.[9]

The following passage from *Hoye* echoes the reasoning in *Jacobson*:

> *The regulation is within the police power of the state. It is in aid of good health and consequently tends to the welfare and safety of the people. Tuberculosis is a disease dangerous and destructive to human life. It is recognized that tuberculosis may be communicated to human beings by use*

[7] See Appendix A for recent federal appeals court cases applying *Jacobson* in COVID-19 settings.
[8] *Hawkins vs. Hoye*, 108 Miss. 282, 66 So. 741, (1914).
[9] Supra at 743-744.

> *of milk from cows affected with the disease. Therefore, it was proper for the board of health, the body empowered and enjoined by the statute to supervise the health interests of the people and to prevent the spread of epidemic diseases to make this regulation.*[10]

Subsequently, the Mississippi Supreme Court upheld as reasonable a legislative delegation of the state's police powers to a local government to regulate health conditions by requiring that children be inoculated for smallpox as a precondition to being admitted to public schools,[11] and a general requirement that Mississippi public school children be inoculated as a precondition to their being admitted to school.[12]

Thus, Mississippi state courts have long held that the Legislature may enact reasonable laws that rationally advance the state's interest in protecting the health and welfare of its citizens and residents.

Mississippi's Early Laws Addressing Emergencies

Mississippi law addressing emergencies has evolved incrementally since the beginning of the twentieth century with the laws initially focusing on emergencies involving riots, insurrection or military threats, and communicable disease epidemics.

As with most states, Mississippi's early emergency powers statutes addressed the basic physical protection of the state's citizens.

Riots and Insurrection or Military Threats

While the National Guard has evolved over the past century into an important component of the nation's national defense strategies, the militia and the National Guard have always been important in maintaining peace and security inside Mississippi's borders. Article 9, Section 217 of the Mississippi Constitution, which has antecedents dating back to 1817,[13] provides:

> *The Governor shall be Commander-in-Chief of the militia, except when it is called into the service of the United States, and shall have power to call forth the militia to execute the laws, repel invasion and to suppress riots and insurrections.*

Additionally, state law has long provided authority to the Governor to deploy the National Guard to address unlawful assemblies or breeches of the peace as well as the authority to deploy the National Guard to assist the civil authorities in certain cases when such authorities believe assistance is necessary.[14]

---

[10] Supra at 744.
[11] *See Hartman v. May*, 168 Miss. 477, 151 So. 737, (1934).
[12] See *Brown v. Stone*, 378 So 2d 318, (Miss. 1979) cert. den'd. 449 U.S. 887, 101 S.Ct 242, 66 L. Ed 2d 112, citing *Jacobson* as authority.
[13] See *Constitution of 1817*, Article "Militia" Section 4; *Constitution of 1832*, Article "Militia" Section 4; and *Constitution of 1868*, "Article IX" Section 4.
[14] As examples, See Section 5540, *Code of 1930*; Section 8519-81 et seq. *Code of 1942*; and MISS. CODE ANN. Section 33-7-301 and 33-7-309 (1972). See also *Brady v. State,* 91 So.2d 751, 229 Miss. 677, (Miss. 1957); *McBride v. State*, 221 Miss. 508, 73 So.2d 154, (Miss. 1954); and *State v. McPhail*, 182 Miss. 360, 180 So. 387, (1938), involving the use of the National Guard to conduct searches

Communicable Disease Epidemics

At the beginning of the twentieth century, infectious diseases were the leading cause of death in the United States[15] and public health programs were organized primarily at the state and community levels to address the problems of epidemics. In Mississippi, diseases such as yellow fever, smallpox, and tuberculosis were serious threats to the well-being of residents.

In 1898, the Mississippi Legislature enacted legislation directing the Mississippi State Board of Health (Board) to "act upon virulent, contagious epidemic diseases."[16] Regarding epidemics, the law provided:

> *When yellow fever, cholera, dengue, smallpox, or other virulent epidemic contagious disease shall make their appearance in the state, the state board of health shall take charge of the infected district or locality, and shall make such rules and prescribe such measures as it may deem necessary to prevent the spread of the disease, or to suppress it…*

To provide the Board with the tools to fight epidemics, the Legislature acted to empower the Board to impose quarantines,[17] to require physicians to report on the occurrences of certain diseases,[18] and to authorize the Governor to direct the militia to aid in any enforcement efforts required by the Mississippi State Board of Health.[19]

As the twentieth century progressed, additional powers were given to the Board to address the serious issues associated with the spread of tuberculosis and smallpox. In 1916, Mississippi established a sanatorium for the care of patients suffering from tuberculosis. The hospital became the treatment facility for patients who could not be properly cared for in the community, or who refused to follow the course for treatment prescribed by their county health officer. Civil commitment to the sanatorium was provided for in law for such recalcitrant patients who had to remain at the sanatorium until released by the facility director.[20]

The Mississippi State Board of Health was also given considerable power to deal with persons infected with smallpox. Counties were also empowered to adopt mandatory vaccination ordinances under which persons could be forced to undergo vaccination. Additionally, vaccinations could be required of school children as a precondition of admittance to a public school.[21]

In general, Mississippi laws have long provided for a swift response to the threat of communicable diseases, and have provided state and local governments with the power to confine or quarantine persons, or even destroy property that may in some way threaten the safety of Mississippi residents regarding the spread of communicable diseases.

---

and seizures of illegal liquor in localities where there was "resistance to the execution of the laws."

[15] Tavia Gordon, "Mortality in the United States 1900-1950," *Public Health Reports*, Vol. 68, Number 4, (April 1953); and "Achievements in Public Health, 1900-1999, Control of Infectious Diseases, Morbidity and Mortality Weekly Report," Center for Disease Control, (District of Columbia: July 30, 1999).

[16] Section 2, Chapter 79, *Laws of 1898*.

[17] Section 3, Chapter 79, *Laws of 1898*.

[18] Section 6, Chapter 79, *Laws of 1898*.

[19] Section 2501, *Code of 1906*.

[20] Chapter 109, *Laws of 1916*; Chapter 304, *Laws of 1956*.

[21] Chapter 108, *Laws of 1900*; and Chapter 17, *Extraordinary Session Laws of 1953*.

Mississippi's More Recent Laws for Addressing Emergencies

Since World War II, Mississippi's more recent emergency powers laws have transitioned from the realm of civil defense to address a broader range of threats posed by natural, man-made, and technological emergencies.

Mississippi's early statutes regarding emergencies were narrowly tailored to address specific types of emergencies. The move toward more comprehensive emergency powers statutes that placed broad authority with the Governor began in 1942.

Civilian Defense

Chapter 206, *Laws of 1942*, provided a means of coordinated civilian defense planning to address the demands of a war effort that entailed mobilizing not only an army, but the productive functions of society. Passed after the United States declared war on the Axis Powers, this act gave the Governor the power to work with the federal government and other states on common defense. It appears that the disasters contemplated under this act were man-made related to wars. The act empowered the Governor to appoint a State Defense Council, cooperate with local civil defense councils and, if necessary, conduct law enforcement activities and other activities related to national defense.

Following World War II, the civilian defense laws were amended several times. While Cold War considerations appear to have been a key motivation in the modifications, amendments also provided for responses to a broader range of disasters than those associated with war. Chapter 312, *Laws of 1952*, amended the 1942 legislation by creating a Civil Defense Council, empowered to approve civil defense plans for Mississippi and to coordinate planning efforts with the federal government, surrounding states, and local governments in the state. The definitional section of this act is also significant because it includes within the definition of civil defense emergency, fire, flood or other cause, as well as things associated with military actions.[22] Further amendments in 1962 included a provision in a policy section recognizing the increasing possibility of natural disasters occurring that could affect the state.[23]

Following the adoption of the Federal Disaster Act of 1974,[24] Mississippi adopted legislation that specifically dealt with the receipt and disbursement of funds made available from federal sources following natural disasters such as floods, tornados, and hurricanes. Chapter 331, *Laws of 1978*, created a Disaster Emergency Funding Board that was authorized to receive and disburse federal disaster funds.

Emergency Management Laws Since the 1980s

Beginning in 1980, Mississippi's emergency management laws began to move away from the theme of civil defense and began to address a broader range of threats posed by natural, man-made, and technological disasters. These major scope changes did not occur at once but were part of a continuing process that began in 1980 and lasted through the next 25 years.

Emergencies Requiring Immediate Response

In the modern era, Mississippi's emergency management law was no longer tied to the state's military preparedness laws dating back to the beginning of World War II. Chapter

[22] See Section 3, Chapter 312, *Laws of 1952*.
[23] See Section 1, Chapter 482, *Laws of 1962*.
[24] PL 93-288, (1974).

491, *Laws of 1980*, known as the Mississippi Emergency Management Law, was noteworthy for three significant changes to Mississippi's handling of emergencies and disasters. These changes were:

- the creation of the Mississippi Emergency Management Agency that is responsible for managing and coordinating executive responses to emergencies and disasters;
- amendments to existing laws to reflect that emergencies could come in the form of man-made emergencies, technological emergencies, or natural disasters; and,
- Amendments to MISS. CODE ANN. Section 33-13-11 (1972) that empowers the Governor to take action in the event of emergencies to reflect that gubernatorial powers extend to all such disasters. Earlier statutes empowering action by the Governor tended to reflect only emergencies that were related to war or the threat of invasion.[25]

Legal Definitions of a State of Emergency[26]

Chapter 420, *Laws of 1983*, makes clear that Mississippi's emergency management law must address two broad types of emergencies—the traditional civil defense emergencies characterized by the existence of a declared war and other types of emergencies or conditions of disaster or extreme peril to the safety of persons or property within the state caused by air or water pollution, fire, flood, storm, epidemic, earthquake, hurricane, resource shortages, or other natural or man-made conditions other than conditions causing a "state of war emergency." These definitions are included in MISS. CODE ANN. Section 33-15-5 (1972).

Governor's Authority to Seek Federal Disaster Assistance

In accordance with Legislation passed in 1984 to comply with the 1983 separation of powers lawsuit,[27] the Governor was given the authority previously placed in the hands of the Commission on Budget and Accounting to apply for federal disaster assistance. The 1984 legislation also repealed the authority of the Commission on Budget and Accounting to administer disaster aid directed to Mississippi from federal sources.

Definitional Changes and Statements of Public Policy[28]

During 1995, the Legislature enacted major legislation related to emergency management. The most significant legislation since 1980, Chapter 333, *Laws of 1995*, achieved the following by:

- providing definitions of "emergency management," "emergency," "man-made emergency," "natural emergency," "technological emergency," and "disaster;"
- defining the duties of the Mississippi Emergency Management Agency with respect to comprehensive planning for disaster and post-disaster programs; and,
- adding a legislative statement of intent, MISS. CODE ANN. Section 33-15-2 (1972), that outlines the need for comprehensive disaster planning, the need to coordinate service delivery in the face of disaster, the broad range of disasters that can impact the health and safety of the people of Mississippi, and the need to provide

[25] Chapter 491, *Laws of 1980.*
[26] Chapter 420, *Laws of 1983.*
[27] Chapter 488, *Laws of 1984.*
[28] Chapter 333, *Laws of 1995.*

assistance where the capacity of local governments may be exceeded by the demands for assistance.

Temporary Housing[29]

In 2004 the Mississippi Legislature revised legislation in force and effect since 1978 regarding providing disaster assistance and temporary housing to persons in the wake of a disaster. The Executive Director of MEMA was given the responsibility for the managing and planning of the disbursement of such assistance.

Following many years of emergency powers expansion, a recent case decided by the Mississippi Supreme Court[30] perhaps best captures the purpose and goal of Mississippi's current emergency management laws:

> *…the Emergency Management Law as currently in force and effect gives state agencies freedom to deploy their emergency-management responsibilities rapidly and focus on reducing the vulnerability of the people and property of this state…*

[29] Chapter 405, *Laws of 2004.*
[30] *Miss. Dep't of Transp. v. Musgrove* (Miss. 2020).

Were Mississippi's Emergency Powers Laws Adequate to Protect Mississippi Citizens from the Threat of the COVID-19 Pandemic?

As stated on page 1, the worldwide COVID-19 pandemic required state and local officials to utilize Mississippi's emergency powers laws to enact orders for the health and protection of the state's citizens. This process required that the Governor and local governing authorities carefully consider the options and strategies available to them on the occasion of a pandemic.

Criteria for Evaluating the Adequacy of a State's Emergency Powers Laws

Model state health emergency powers laws promulgated by two groups define the criteria or attributes that states should consider when enacting such laws, but the groups' model laws have been met with considerable criticism.

Finding a broadly accepted criterion for evaluating the adequacy and comprehensiveness of a state's emergency powers laws is difficult. Some public health experts have championed comprehensive root and branch reform of state public health emergency laws, citing as reasons the age of existing laws that were adopted in the early twentieth century and a concern over these laws' enforceability in view of a constitutional landscape that has changed since many of these statutes were enacted, particularly those regarding civil liberties.

The most noteworthy attempt to change state emergency laws since the civil defense era occurred in October 2001 with the development of the Model State Emergency Health Powers Act (MSEHPA) by the Center for Law and Public Health at Georgetown and Johns Hopkins Universities. The MSEHPA was designed to provide states with a broad array of powers to respond to emergencies, with primary emphasis on preparedness, surveillance, management of property, protection of persons, and communication. In September 2003, the Turning Point Public Health Statute Modernization Collaborative—part of a larger Robert Wood Johnson Foundation effort to strengthen public health infrastructures—developed the Turning Point Model State Public Health Act (Turning Point Act). The Turning Point Act proposed a template of key public health powers for state, tribal, and local governments with primary emphasis on surveillance, reporting, mandatory testing and evaluation, compulsory treatment, quarantine and isolation, and security safeguards.

Criticism of the two acts came quickly from groups as varied as the American Civil Liberties Union (ACLU) and the American Legislative Exchange Council (ALEC)—two groups which traditionally have been at opposite ends of the political continuum. Both groups found cause for concern due to the acts' very broad and imprecise definition of a public health emergency, and believed that this breadth could allow minor health matters, such as an annual influenza outbreak, to rise to the level of an emergency triggering broad powers over people and their property. In general, some experts believed that the compulsive aspects of the acts' emergency powers were not workable in the modern age. (See Appendix C, page 48, for a more detailed discussion of the model acts and criticism of the acts.)

Adequacy of Mississippi's Current Emergency Powers Laws

While Mississippi has not adopted the Model State Emergency Health Powers Act, Mississippi's current emergency powers laws address most subjects contained in the model act through provisions in the Mississippi Emergency Management Law (Title 33, Chapter 15, *MISSISSIPPI CODE of 1972*) and other specific longstanding public health provisions of the MISSISSIPPI CODE.

Regardless of the concerns raised by critics, the Model State Emergency Health Powers Act has been successful in being enacted in the states. The concerns most critics have raised have tended not to be with the subject areas that the model acts address but with how the model acts deal specifically with each area. By 2011, 40 states had either considered or adopted the Act in its entirety or in part, but Mississippi has not yet adopted the Act.

While Mississippi's laws dealing with the problems posed by health threats have been adopted in a piecemeal manner over time, the following subject-area criteria espoused by the MSEHPA can be used to evaluate Mississippi's current emergency powers laws:

- statement of policy;
- preparedness and planning;
- surveillance and detection;
- states of emergency/declarations;
- special powers in an emergency;
- protection of persons; and,
- communication and dissemination of information.

Statement of Policy

MISS. CODE ANN. Section 33-15-3 (1972) outlines the general statement of policy for Mississippi's emergency powers laws. Section 33-15-3 declares:

> *(a) Because of the existing and increasing possibility of the occurrence of disasters or emergencies of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action, and from natural, man-made or technological disasters, and in order to insure that preparations of this state will be adequate to deal with, reduce vulnerability to, and recover from such disasters or emergencies, and generally to provide for the common defense and to protect the public peace, health and safety, and to preserve the lives and property of the people of this state, it is hereby found and declared necessary: (1) To create a state emergency management agency, and to authorize the creation of local organizations for emergency management in the municipalities and counties of the state, and to authorize cooperation with the federal government and the governments of other states; (2) to confer upon the Governor, the agency and upon the executive heads or governing bodies of the municipalities and counties of the state the emergency powers provided herein; (3) to provide for the rendering of mutual aid among the municipalities and counties of the state, and with other states, and with the federal government with respect to the carrying out of emergency management functions and responsibilities; (4) to authorize the establishment of such organizations and the development and employment of such measures as are necessary and appropriate to carry out the provisions of this article; and (5) to provide the means to assist*

in the prevention or mitigation of emergencies which may be caused or aggravated by inadequate planning for, and regulation of, public and private facilities and land use.

(b) It is further declared to be the purpose of this article and the policy of the state that all emergency management functions of this state be coordinated, to the maximum extent, with the comparable functions of the federal government, including its various departments and agencies, of other states and localities, and of private agencies of every type, to the end that the most effective preparation and use may be made of the nation's manpower, resources, and facilities for dealing with any disaster or emergency, or both, that may occur as enumerated in this section.

Thus, the Legislature has declared that Mississippi's emergency management efforts should be wide-ranging and coordinated to address a broad range of disasters and emergencies. MISS. CODE ANN. Sections 33-15-5 (g) through (k) (1972) further define the various types of emergencies that must be addressed by state and local authorities, as enumerated below:

(f) "State of emergency" means the duly proclaimed existence of conditions of disaster or extreme peril to the safety of persons or property within the state caused by air or water pollution, fire, flood, storm, ***epidemic,*** *earthquake, hurricane, resource shortages, or other natural or man-made conditions other than conditions causing a "state of war emergency," which conditions by reasons of their magnitude are or are likely to be beyond the control of the services, personnel, equipment and facilities of any single county and/or municipality and requires combined forces of the state to combat.* [emphasis added]

(g) "Local emergency" means the duly proclaimed existence of conditions of disaster or extreme peril to the safety of persons and property within the territorial limits of a county and/or municipality caused by such conditions as air or water pollution, fire, flood, storm, epidemic, earthquake, hurricane, resource shortages or other natural or man-made conditions, which conditions are or are likely to be beyond the control of the services, personnel, equipment and facilities of the political subdivision and require the combined forces of other subdivisions or of the state to combat.

(h) "Emergency" means any occurrence, or threat thereof, whether natural, technological, or man-made, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.

(i) "Man-made emergency" means an emergency caused by an action against persons or society, including, but not limited to, emergency attack, sabotage, terrorism, civil unrest or other action impairing the orderly administration of government.

(j) "Natural emergency" means an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought or an earthquake.

(k) "Technological emergency" means an emergency caused by a technological failure or accident, including, but not limited to, an explosion, transportation accident, radiological accident, or chemical or other hazardous material incident.

Preparedness and Planning

Planning and preparation are critical to emergency management. This idea is captured in the general policy statement that prefaces several sections on emergency management. MISS. CODE ANN. Section 33-15-3 (1972) makes clear Mississippi's policy on ensuring that preparations for emergencies will be adequate to deal with and reduce vulnerability to disasters and emergencies. Additionally, MISS. CODE ANN. Section 33-15-11 (b) (1972) provides ample planning authority to the Governor and emergency management entities. Specifically, this section provides:

> *(b) In performing his duties under this article, the Governor is further authorized and empowered:*
>
> *…*
>
> *(2) To work with the Mississippi Emergency Management Agency in preparing a comprehensive plan and program for the emergency management of this state, such plan and program to be integrated into and coordinated with the emergency management plans of the federal government and of other states to the fullest possible extent, and to coordinate the preparation of plans and programs for emergency management by the political subdivisions of this state, such local plans to be integrated into and coordinated with the emergency management plan and program of this state to the fullest possible extent.*

Regarding the development of coordinated and comprehensive plans, MISS. CODE ANN. Section 33-15-14 (1972) directs the Mississippi Emergency Management Agency to be:

> *(1) …. responsible for maintaining a comprehensive statewide program of emergency management. The agency is responsible for coordination with efforts of the federal government with other departments and agencies of state government, with county and municipal governments and school boards and with private agencies that have a role in emergency management.*

Surveillance and Detection

Specific CODE provisions dealing with the Mississippi State Department of Health (MSDH) provide authority regarding the detection of diseases. While not part of the state's emergency management laws, the MSDH and its resources are directly utilized in all forms of emergencies and are directed by the Governor's orders to work on the planning and management of emergency matters. Regarding the surveillance and detection of diseases, MISS. CODE ANN. Section 43-23-1 (1) (1972) provides broad authority for the MSDH to adopt rules and regulations requiring the reporting of communicable diseases to the MSDH. This subsection provides:

> *(1) The State Board of Health shall adopt rules and regulations (a) defining and classifying communicable diseases and other diseases that are a danger to health based upon the characteristics of the disease; and (b) establishing reporting, monitoring and preventive procedures for those diseases.*

Subsections (4) and (5) of the same section describe reporting responsibilities for physicians, hospitals, and other health care providers. These provisions state:

> *(4) Every practicing or licensed physician, or person in charge of a hospital, health-care facility, insurance company which causes to be performed blood tests for underwriting purposes or laboratory, shall report immediately to the Executive Officer of the State Board of Health or to other authorities as required by the State Board of Health every case of such diseases as shall be*

required to be reported by the State Board of Health. Such reporting shall be according to procedures, and shall include such information about the case, as shall be required by the State Board of Health. Insurance companies having such blood test results shall report immediately to the Executive Officer of the State Board of Health or to other authorities as required by the State Board of Health every case of such diseases as shall be required to be reported by the State Board of Health. The insurance company shall notify the individual on whom the blood test was performed in writing by certified mail of an adverse underwriting decision based upon the results of such individual's blood test but shall not disclose the specific results of such blood tests to the individual. The insurance company shall also inform the individual on whom the blood test was performed that the results of the blood test will be sent to the physician designated by the individual at the time of application and that such physician should be contacted for information regarding the blood test results. If a physician was not designated at the time of application, the insurance company shall request that the individual name a physician to whom a copy of the blood test can be sent.

(5) Any practicing or licensed physician, or person in charge of a hospital or health-care facility, who knows that a patient has a medical condition specified by the Department of Health as requiring special precautions by health-care providers, shall report this fact and the need for appropriate precautions to any other institution or provider of health-care services to whom such patient is transferred or referred, according to regulations established by the State Board of Health.

Finally, subsection 7 of this section establishes a criminal penalty for non-compliance. Specifically, this provision provides:

(7) Any person other than a practicing or licensed physician, or person in charge of a hospital or health-care facility, willfully failing to make the reports required under this section shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by confinement in the county jail for not more than thirty (30) days, or both.[31]

States of Emergency/Declarations

Mississippi's provision on states of emergency is sufficiently broad to empower the Governor to declare a state of emergency in the face of a natural disaster such as an epidemic or pandemic. MISS. CODE ANN. Section 33-15-11 (b) (17) (1972) states:

(17) To proclaim a state of emergency in an area affected or likely to be affected thereby when he finds that the conditions described in Section 33-15-5 (g) exist, or when he is requested to do so by the mayor of a municipality or by the president of the board of supervisors of a county, or when he finds that a local authority is unable to cope with the emergency. Such proclamation shall be in writing and shall take effect immediately upon its execution by the Governor. As soon thereafter as possible, such proclamation shall be filed with the Secretary of State and be given widespread notice and publicity. The Governor, upon advice of the director, shall review the need for continuing the state of emergency at least every

[31] Mississippi State Department of Health regulations were amended on March 13, 2020, to include COVID-19 as a disease whose detection must be reported to the Mississippi State Department of Health.

thirty (30) days until the emergency is terminated and shall proclaim a reduction of area or the termination of the state of emergency at the earliest possible date that conditions warrant.

In support of these declarations, the same section contains a subsection (c) which provides:

(c) In addition to the powers conferred upon the Governor in this section, the Legislature hereby expressly delegates to the Governor the following powers and duties in the event of an impending enemy attack, an enemy attack, or a man-made, technological or natural disaster where such disaster is beyond local control:

(1) To suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with a disaster or emergency.

(2) To transfer the direction, personnel or functions of state agencies, boards, commissions or units thereof for the purpose of performing or facilitating disaster or emergency services.

(3) To commandeer or utilize any private property if necessary, to cope with a disaster or emergency, provided that such private property so commandeered or utilized shall be paid for under terms and conditions agreed upon by the participating parties. The owner of said property shall immediately be given a receipt for the said private property and said receipt shall serve as a valid claim against the Treasury of the State of Mississippi for the agreed upon market value of said property.

(4) To perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency.

Special Powers in an Emergency

The Emergency Management Law provides the Governor with considerable power over property within Mississippi to utilize, if necessary, in order to meet the demands of an emergency. In general, MISS. CODE ANN. Section 33-15-11 (b) (3) provides:

(3) In accordance with such plan and program for emergency management of this state, to ascertain the requirements of the state or the political subdivisions thereof for food or clothing or other necessities of life in the event of attack or natural or man-made or technological disasters and to plan for and procure supplies, medicines, materials and equipment, and to use and employ from time to time any of the property, services and resources within the state, for the purposes set forth in this article; to make surveys of the industries, resources and facilities within the state as are necessary to carry out the purposes of this article; to institute training programs and public information programs, and to take all other preparatory steps, including the partial or full mobilization of emergency management organizations in advance of actual disaster, to insure the furnishing of adequately trained and equipped forces of emergency management personnel in time of need.

Stronger authority exists in the same section. MISS. CODE ANN. Section 33-15-11 (c) (3) (1972) empowers the Governor:

(3) To commandeer or utilize any private property if necessary, to cope with a disaster or emergency, provided that such private property so commandeered or utilized shall be paid for under terms and conditions agreed upon by the participating parties. The owner of said property shall immediately be given a receipt for the said private property and said receipt shall serve as a valid claim against the Treasury of the State of Mississippi for the agreed upon market value of said property.

Protection of Persons

This broad authority relates to the powers of state agencies to address the following categories.

Imposition of Restrictions on a Person's Behavior

Broad authority exists under MISS. CODE ANN. Section 33-15-11 (b) and (c) (1972) under which Governor Reeves ordered such actions such as mask requirements, shelter-at-home requirements, and social distancing. While these have not been challenged in Mississippi courts, similar orders of governors have been challenged, notably in Louisiana and Virginia.[32] In such cases, the courts have noted that considerable scientific evidence exists to support the reasonableness of such orders when challenged on the grounds of an impairment of individual rights.

Quarantines of Infected Persons

Provisions in law since the early 1900s empower the Mississippi State Department of Health to impose quarantines of persons. MISS. CODE ANN. Section 41-2-15 (4) (c) (1972) provides:

(4) The State Board of Health shall have authority:

…

(c) To direct and control sanitary and quarantine measures for dealing with all diseases within the state possible to suppress same and prevent their spread.

Specifically, MISS. CODE ANN. Section 41-23-5 (1972) states:

The State Department of Health shall have the authority to investigate and control the causes of epidemic, infectious and other disease affecting the public health, including the authority to establish, maintain and enforce isolation and quarantine, and in pursuance thereof, to exercise such physical control over property and individuals as the department may find necessary for the protection of the public health. The State Department of Health is further authorized and empowered to require the temporary detainment of individuals for disease control purposes based upon violation of any order of the State Health Officer. For the purpose of enforcing such orders of the State Health Officer, persons employed by the department as investigators shall have general arrest powers. All law enforcement officers are authorized and directed to assist in the enforcement of such orders of the State Health Officer.

MISS. CODE ANN. Section 41-23-2 (1972) gives penalties for persons who fail to abide by a quarantine order. Specifically, the section says:

---

[32] See *910 E Main LLC v. Edwards,* (W.D. La. August 21, 2020); *4 Aces Enters. v. Edwards,* (E.D. La. August 17, 2020); and *Dillon v. Northam,* (Va. Cir. 2020).

> *Any person who shall knowingly and willfully violate the lawful order of the county, district or state health officer where that person is afflicted with a life-threatening communicable disease or the causative agent thereof shall be guilty of a felony and, upon conviction, shall be punished by a fine not exceeding Five Thousand Dollars ($5,000.00) or by imprisonment in the penitentiary for not more than five (5) years, or by both.*[33]

MSDH has considerable authority to direct quarantines in its own name, or when working under the direction of the Governor in the case of an emergency.[34]

Protection of Confidential Information

While state law does not address the issue of confidentiality of the disease reports physicians make to the MSDH, agency regulations make such reports confidential, as stated in Mississippi State Department of Health Rule 1.1.1 (1).

Communication and Dissemination of Information

MISS. CODE ANN. Section 33-15-11 (b) (3) (1972) empowers the use and implementation of public information efforts regarding emergency preparation and response. Historically, the Governor, the Mississippi Emergency Management Agency, and the Mississippi State Department of Health were active in providing information to Mississippi's citizens in the cases of weather emergencies as well as the current COVID-19 pandemic.

While it should be apparent that Mississippi's emergency management laws, and long-standing public health laws address the subject of providing protection to persons from a wide range of disasters, the laws were created to address the types of disasters and emergencies known to Mississippi legislators and state executives based on experience. Because of the uniqueness of the COVID-19 pandemic, state executives have had to rely on very general provisions of law to address matters such as social distancing, business closures, and face coverings, with the benefit of mandatory legislative oversight and review.

---

[33] See *Carter v. State*, 803 So.2d 1191, (Miss. App. 1999). A case upholding a five-year prison sentence for violating an HIV quarantine order.

[34] Up to this point, the Mississippi State Department of Health has offered directives on isolation and self-quarantine for individuals who have tested positive for COVID-19 and has issued isolation and quarantine guidelines for students and staff at state universities.

Were the Actions Taken by State and Local Government Officials During the COVID-19 Pandemic Appropriate?

Mississippi elected officials, on both the state and local levels, were challenged with managing an unprecedented public health crisis with the advent of the COVID-19 pandemic in March 2020. These officials had to rely on existing state and local emergency powers statutes to address the crisis.

State Government Officials' Responses to the COVID-19 Pandemic

The Governor's executive orders issued in response to the COVID-19 pandemic were generally directed toward the protection of Mississippi citizens. However, current state emergency management laws on which the orders were based lacked provisions for the Legislature to have oversight of policy for long-term emergencies, such as the COVID-19 pandemic. Additionally, some orders appear to exceed the scope of the Governor's emergency powers conferred by law.

Governor Tate Reeves, as the state's chief executive officer, played a major role in Mississippi's response to COVID-19. Current emergency powers statutes provided the Governor with a potent arsenal with which to protect the state's citizens.

Governor Reeves's COVID-19 Executive Orders from March Through November 2020

MISS. CODE ANN. Section 35-15-11 (1972) enumerates the emergency management powers of the Governor. Specifically, MISS. CODE ANN. Section 35-15-11 (b) (17) provides the Governor with the authority to proclaim a state of emergency when he finds the existence of conditions of disaster or extreme peril to the safety of persons and property within a county or municipality.

On March 14, 2020, due to the worldwide COVID-19 pandemic, Governor Tate Reeves issued a proclamation declaring a state of emergency under the authority of MISS. CODE ANN. Section 33-15-11 (b) (17) (1972). From March 16, 2020, through November 17, 2020, Governor Reeves issued 65 orders addressing the COVID-19 pandemic. These orders involved emergency powers provided for in MISS. CODE ANN. Section 33-15-11 and accomplished the following:

- established planning bodies responsible for recommending policy related to our response to the pandemic;
- directed specific actions to reduce the spread of COVID-19, including social distancing requirements, closures of business and governmental offices except for essential services as clearly defined by orders, closure of schools, and requirements that persons residing in the state wear protective face coverings under certain conditions;
- preempted local ordinances and orders that conflicted with emergency directives;
- authorized local orders that were not in conflict with the directives of the Governor;
- delegated certain powers to the Mississippi State Department of Health and the Mississippi Emergency Management Agency;

- suspended the operations of state laws under the authority of MISS. CODE ANN. Section 33-15-17 (c) (1972) when the provisions of any regulatory statute prescribing the procedures for the operation of state business, or the orders, rules, or regulations of any state agency, if the strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder, or delay necessary action in coping with a disaster or emergency; and,
- authorized the use of administrative leave for public employees deemed not essential.

The orders have generally been directed toward achieving protection for the residents of Mississippi in the face of a dangerous pandemic where considerable uncertainty existed regarding the best action necessary to ensure the safety of our residents.

Mississippi's emergency management law provides for unlimited executive authority to renew an emergency declaration without legislative oversight. This is outside the mainstream of present-day emergency powers legislation.

As presented on pages 12 through 18, Mississippi's current emergency management law provides the Governor with substantial authority to manage emergencies, primarily through the issuance of orders compelling compliance of public health directives by the state's citizens. The only limitations on the Governor's emergency powers authority is found in MISS. CODE ANN. Section 33-15-17 (b) (17) (1972), which provides:

> *…The Governor, upon advice of the director, shall review the need for continuing the state of emergency at least every thirty (30) days until the emergency is terminated and shall proclaim a reduction of area or the termination of the state of emergency at the earliest possible date that conditions warrant.*

Thus, the Governor and the director—i.e., the Executive Director of the Mississippi Emergency Management Agency—are the sole judges as to when a state of emergency shall be considered concluded.

Doubtless, considerable authority needs to be vested in the Governor to address the exigencies of an emergency, but such authority without checks is contrary to the current trend in emergency legislation within the states. According to the National Conference of State Legislatures (NCSL) and the State Legislative Leaders Foundation (SLLF), most states allow their legislative bodies some degree of formal oversight over the emergency declaration process. In summary, regarding non-war emergencies, NCSL and SLLF report:

- Mississippi and Tennessee are two of 18 states in which the legislative branch cannot terminate an emergency declared by the Governor.[35]
- In Louisiana, either house of the Legislature may terminate an emergency.
- In Arkansas, an emergency may be terminated by concurrent resolution.
- In Alabama, the Legislature may not terminate an emergency but may extend one.
- In Georgia, the Governor must call the Legislature into special session after declaring a public health emergency to consider either concurring on or terminating the emergency.

[35] Some states have multiple emergency laws. South Carolina is an example. When one law gives the Governor complete discretion of an emergency, PEER counts that state as having gubernatorial control.

The precise terms of the Legislature's involvement in an emergency situation vary from state to state. In Alaska, Kansas, Montana, Utah, Washington, and Wisconsin, an emergency declared by the Governor must end at a statutorily prescribed time. The Legislature then has the authority to renew the emergency should it choose. In Kansas and Utah, the Legislature may also terminate an emergency declared by a Governor. In 25 other states,[36] the Legislature may terminate an emergency at any time.

These states have found a way to strike a balance between the need for a Governor to act quickly to address an emergency and for the Legislature, the lawmaking body of the state, to have some oversight to ensure that the actions taken in an emergency are in substance, scope, and duration protective of the health and welfare of the residents. In states where a declaration is of limited duration and the Legislature must be called into special session to determine if the emergency will continue, the legislative branch is given an opportunity to craft a revised set of mandates, processes, and/or procedures to address a continuing emergency.

The lack of a provision in Mississippi's emergency powers laws mandating legislative oversight of the Governor's emergency proclamations and orders may also give rise to unintended consequences threatening the legality of broadly framed emergency orders dealing with the pandemic.

Broad, unchecked powers of the Governor may constitute an unconstitutional delegation of legislative authority.

Generally, lawmaking power is restricted to the legislative branch of government. Mississippi courts have recognized that in complex, modern legal environments, some authority needs to be afforded to the executive branch to make rules and standards. Constitutionally, this may be done when the Legislature establishes meaningful standards to limit the executive branch's authority.[37]

In a recent case from the Michigan Supreme Court challenging the constitutionality of Michigan's Emergency Powers of the Governor Act, the majority concluded that the act was an unconstitutional delegation of legislative power because it covered extremely broad subject matter, provided no meaningful limits on the duration of an emergency, and provided no meaningful constraints on the powers to be exercised by the Governor. The only limits to the Governor's powers were that exercises of emergency powers must be reasonable and necessary to accomplishing the ends of protecting the life and property of the state's residents.[38]

Such objections could be leveled against Mississippi's emergency management law as it provides similar broad authority, places no effective limits on the duration of the Governor's authority to issue orders in an emergency, and tends to use imprecise language of limitations on the Governor's powers. For example, orders setting out requirements for the Governor Reeves's COVID-19 directives, commonly referred to as

[36] Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Minnesota Missouri, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, and West Virginia.

[37] In *Howell v. State*, 300 So.2d 774, (Miss. 1974) and *State v. Allstate Ins. Co.*, 231 Miss. 869, 97 So.2d 372, (Miss. 1957) stand for the proposition that in Mississippi "Legislative power or functions may be delegated to an administrative agency only in the limited sense that the statute must set forth the legislative decision and must prescribe adequate standards or rules for the agency's guidance. It cannot be vested with an arbitrary and uncontrolled discretion."

[38] *In re Certified Questions from the United States District Court, Western District of Michigan Southern Division Midwest Institute of Health PLLC v. Governor of Michigan et al,* October 2, 2020.

Shelter in Place[39] and *Safer at Home*,[40] tended to cite as authority the same provisions of the CODE. These were MISS. CODE ANN. Section 33-15-11 (b) (1); (b) (4); (b) (6); (c) (1); and (c) (4) (1972), as well as MISS. CODE ANN. Section 33-15-31 (1972).

The cited paragraphs from MISS. CODE ANN. Section 33-15-11 state that:

> *b) In performing his duties under this article, the Governor is further authorized and empowered:*
>
> *(1) To make, amend and rescind the necessary orders, rules and regulations to carry out the provisions of this article with due consideration of the plans of the federal government, and to enter into disaster assistance grants and agreements with the federal government under the terms as may be required by federal law.*
>
> *…*
>
> *(4) To cooperate with the President and the heads of the Armed Forces, and the Emergency Management Agency of the United States, and with the officers and agencies of other states in matters pertaining to the emergency management of the state and nation and the incidents thereof; and in connection therewith, to take any measures which he may deem proper to carry into effect any request of the President and the appropriate federal officers and agencies, for any action looking to emergency management, including the direction or control of (a) blackouts and practice blackouts, air raid drills, mobilization of emergency management forces, and other tests and exercises, (b) warnings and signals for drills or attacks and the mechanical devices to be used in connection therewith, (c) the effective screening or extinguishing of all lights and lighting devices and appliances, (d) shutting off water mains, gas mains, electric power connections and the suspension of all other utility services, (e) the conduct of civilians and the movement and cessation of movement of pedestrians and vehicular traffic during, prior and subsequent to drills or attack, (f) public meetings or gatherings under emergency conditions, and (g) the evacuation and reception of the civilian population.*
>
> *…*
>
> *(6) To employ such measures and give such directions to the state or local boards of health as may be reasonably necessary for the purpose of securing compliance with the provisions of this article or with the findings or recommendations of such boards of health by reason of conditions arising from enemy attack or the threat of enemy attack or natural, man-made or technological disaster.*
>
> *…*
>
> *(c) In addition to the powers conferred upon the Governor in this section, the Legislature hereby expressly delegates to the Governor the following powers and duties in the event of an impending enemy attack, an enemy attack, or a man-made, technological or natural disaster where such disaster is beyond local control:*
>
> > *(1) To suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules or regulations of any state agency, if strict compliance with the provisions*

[39] Executive Orders 1466 and 1473 (2020).
[40] Executive Orders 1477, 1478, 1480, 1483, 1486, 1487, 1488, and 1491 (2020).

of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with a disaster or emergency.

…

(4) To perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency." See Section 33-15-11 (c) (4).

With the exception of paragraph (b) (4), these provisions make use of terms such as "reasonable" and "necessary," which are not accompanied by any legislative language of setting standards or limits to the exercise of emergency powers. Paragraph (b) (4) is apparently a provision from the era when civil defense was the principal purpose of Mississippi's emergency management statutes. While it specifically deals with restrictions on the movement of civilians, the use of the terms such as "blackouts," "air raid drills," "warnings," and "civilians" connote a military purpose for this subsection. The subsection would certainly be appropriate for use in instances where there is a threatened attack, but there is cause for doubt as to whether or not the provision is adequate authority for addressing a pandemic. MISS. CODE ANN. Section 33-15-31 (1972) confers enforcement power and makes a violation of an emergency order a misdemeanor.

Safe Return[41] *and Safe Recovery*[42] directives tended to cite earlier executive orders as authority, presumably relying on their statutory basis for authority.

PEER notes that this argument has been raised unsuccessfully in a case arising in Pennsylvania. Appendix B, page 42, contains a discussion of all authority on this subject including cases from several jurisdictions and other commentary on the issue of the delegation of legislative powers.

The Governor's use of the authority found in MISS. CODE ANN. Section 33-15-11 (c) (1) (1972) to suspend certain laws may have exceeded his statutory authority.

MISS. CODE ANN. Section 33-15-11 (c) (1) authorizes the Governor to suspend the operation of certain state laws and regulations under certain conditions. Unlike several other provisions of Title 33, Chapter 15—i.e., the Mississippi Emergency Management Law—Section 33-15-11 (c) (1) provides explicit restrictions on the Governor's exercise of suspension powers. Specifically, the Section states:

1) *To suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder, or delay necessary action in coping with a disaster or emergency.*

The term "regulatory statutes" as used in this section has been defined[43] to include those statutes that prescribe the method or manner in which certain actions may lawfully be taken by public and private entities, officers, and employees. For example, the state's competitive bidding requirements of MISS. CODE ANN. Section 31-7-13 (1972) are regulatory provisions that may be suspended pursuant to Section 33-15-11 (c) (1).

Most of Governor Reeves's actions in the executive orders to suspend the operations of state laws appear to fall within the scope of Section 33-15-11 (c) (1). For example, the

[41] Executive Orders 1492, 1496, 1500, 1505, 1508, 1511, 1514, 1516, 1518, 1519, 1520, and 1522, (Repealed, Executive Order 1525 [2020]).
[42] Executive Orders 1525, 1527, 1528, 1530, and 1531 (2020).
[43] See *Attorney General's Opinion to Stringer*, November 4, 2005.

Governor's executive orders suspended requirements regarding the processing of unemployment claims by the Department of Employment Security; the requirement for the training of county purchase, inventory, and receiving clerks; and the deadlines for preparing local government budgets.

Provisions of two of Governor Reeves's executive orders—Executive Order 1499 (June 26, 2020) and Executive Order 1504 (June 30, 2020) appear to exceed the Governor's authority granted in Section 33-15-11 (c) (1). Executive Order 1499 suspended the operation of certain CODE sections mandating the appointment of members to 24 boards and commissions. Based on a review of the Secretary of State's Register of Commissions, this order enables 47 persons whose terms have currently expired to continue to serve on their respective boards and commissions. Under this executive order, an additional 22 appointees with expired terms will be able to continue to serve when their terms expire in 2021. (See Exhibit 1, page 24, for a list of the boards and commissions affected by Executive Order 1499.) In addition, Executive order 1504 suspended the operations of MISS. CODE ANN. Section 77-2-7 (1) (1972) that required the Governor to appoint the Director of the Public Utilities Staff by July 1, 2020. The order extended the deadline to July 15, 2020.

Exhibit 1: Appointments Affected by Executive Order 1499

Board or Commission	Terms Expired on September 24, 2020	Terms Expired by September 30, 2021
Animal Health, Board of	3	3
Business Finance Corporation, Mississippi	4	2
Charter School Authorizer Board	1	2
Commercial Mobile Radio Service Board	1	0
Educational Television Authority	2	0
Environmental Quality, Mississippi Commission on	1	0
Foresters, Board of Registration for	2	4
Forestry Commission	2	0
Gaming Commission	0	1
Information Technology Services Authority	1	1
Marine Resources, Commission on	3	0
Massage Therapy, Mississippi State Board of	2	2
Medical Licensure, State Board of	3	0
Mental Health, Board of	1	2
Oil and Gas Board, State	1	0
Personnel Board, Mississippi State	1	1
Prison Industries Corporation Board	7	1
Public Defender, Office of the State	1	0
Tort Claims Board, Mississippi	1	0
Transportation Commission Appeals Board	1	0
Veterans Affairs Board	3	1
Veterinary Medicine, State Board of	2	1
Wildlife, Fisheries, and Parks, Commission on	1	1
Women, Mississippi Commission on the Status of	3	0
Total	**47**	**22**

SOURCE: PEER staff analysis of the Mississippi Secretary of State's summary list of boards and commissions.

It would appear that neither of these relate to the manner in which agencies conduct business. Further, in the case of Executive Order 1499, the order actually impairs the Legislature's oversight of many agencies of state government by delaying the appointment and Senate confirmation process to a date that may be well past the conclusion of the current emergency. Legislative oversight again could have addressed this matter through an enactment either embracing the delays set out in these orders or repudiating them. In either case, the issue of permissible scope would have been addressed.

Local Government Officials' Responses to the COVID-19 Pandemic

Executive orders issued by the mayors of the City of Jackson, the City of Holly Springs, and the City of Greenville to address the COVID-19 pandemic appeared to abridge the fundamental freedoms protected by the U.S. Constitution and the Mississippi Constitution.

Local government officials have statutory powers to issue emergency orders to address health emergencies, such as the COVID-19 pandemic. MISS. CODE ANN. Section 33-15-17 (d) (1972) provides the following authority to local officials:

> *(d) A local emergency as defined in Section 33-15-5 may be proclaimed by the mayor or governing body of a municipality, or the president of the board of supervisors of a county or the governing body of a county. In the event a local emergency is proclaimed by the mayor of a municipality or the president of the board of supervisors of a county, the governing body of such municipality or the governing body of such county shall review and approve or disapprove the need for continuing the local emergency at its first regular meeting following such proclamation or at a special meeting legally called for such review. Thereafter, the governing body of such municipality or the governing body of such county shall review the need for continuing the local emergency at least every thirty (30) days until such local emergency is terminated, and shall proclaim the termination of such local emergency at the earliest possible date that conditions warrant. During a local emergency, the governing body of a political subdivision may promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety. Such orders and regulations and amendments and rescissions thereof shall be in writing and shall be given widespread notice and publicity. The authorization granted by this section to impose a curfew shall not be construed as restricting in any manner the existing authority to impose a curfew pursuant to police power for any other lawful purpose.*

Two other provisions grant certain emergency powers to municipalities. MISS CODE ANN. Section 21-19-3 (1972) provides:

> *The governing authorities of municipalities shall have the power to make regulations to prevent the introduction and spread of contagious or infectious diseases; to make quarantine laws for that purpose, and to enforce the same within five miles of the corporate limits; and to establish pesthouses outside the corporate limits, and to provide for the support and government of the same.*

Similarly, MISS. CODE ANN. Section 45-17-1 et seq. (1972) empowers the chief executive officer of a municipality to issue emergency proclamations and declare the hours and

terms of curfews. Additionally, MISS. CODE ANN. Section 45-17-7 (1972) empowers the chief executive officer to:

- order the closing of all retail liquor stores;
- order the discontinuance of the sale of intoxicating liquor and/or beer;
- order the discontinuance of the manufacture, transfer, use, possession, or transportation of a Molotov cocktail or any other device, instrument, or object designed to explode or produce uncontained combustion;
- order the discontinuance of selling, distributing, dispensing, or giving away of any firearms or ammunition of any form whatsoever; and,
- issue such other orders as are necessary for the protection of life and property.

Local Government Officials' COVID-19 Executive Orders

According to the Mississippi Municipal League, several Mississippi municipalities issued emergency orders to address the COVID-19 pandemic. Some were orders that were narrow in scope, such as the order issued by the City of Ruleville limiting gatherings of more than ten persons.[44] Others, such as the one issued by the City of Hattiesburg, covered a broader range of subjects such as limits on non-essential gatherings to ten or fewer persons, the closure of certain businesses, and other business operation conditions—such as requiring restaurant take-out service only.[45]

While the provisions of law cited on page 25 empower localities to address emergency situations, such authority has limits. For example, the orders may not conflict with orders issued by the Governor. In addition, as with any governmental action, the orders may not violate any constitutionally protected rights. While courts are applying a highly deferential standard of review for emergency orders, at least three COVID-19-related municipal executive orders raised constitutional issues.

City of Jackson's Mayor's Executive Order to Prohibit Open Carry of Handguns

On April 25, 2020, the Mayor of Jackson issued an executive order that temporarily suspended the right for an individual to carry an unconcealed loaded or unloaded pistol or revolver on his/her person. The order also suspended the carrying of firearms in a purse, satchel, handbag, or briefcase that is wholly or partially concealed. Following guidance from the Mississippi Attorney General that the municipality lacked the authority under Mississippi law to suspend a statutory or constitutional right, a lawsuit was filed against the City of Jackson by a member of the Mississippi Legislature challenging the order as an abridgement of rights protected by both the United States Constitution and the Mississippi Constitution.

The Jackson City Council refused to adopt the prohibition as an ordinance and the order expired on April 30, 2020. Nonetheless, the plaintiff continued the lawsuit and on June 12, 2020, the parties entered into a consent decree under which the City agreed not to attempt to limit the right to open carry again.[46]

---

[44] City of Ruleville, issued on March 20, 2020.
[45] City of Hattiesburg Executive Orders 2020-2 (March 17, 2020) and 2020-3 (March 21, 2020).
[46] *Criswell v. City of Jackson* (2020).

Cities of Holly Springs and Greenville's Executive Orders to Limit First Amendment Freedoms

Two cases from the cities of Holly Springs and Greenville dealt with local emergency orders that singled out religious worship for specific restriction.

In a lawsuit styled *First Pentecostal Church of Holly Springs v. City of Holly Springs* (ND, Miss. 2020), the church challenged the order of Holly Springs twice during the early months of the COVID-19 pandemic. A March 22, 2020, stay-at-home order of the City placed churches in a category of non-essential functions along with businesses such as gyms, barber shops, and dance studios. For such non-essential activities, the order imposed a blanket prohibition against gatherings. On April 23, 2020, the church sought relief in federal court challenging the ban under both state and federal grounds including the First Amendment to the U.S. Constitution. An order of the federal court dated April 24, 2020, denied the plaintiff a temporary restraining order, but noted that the City agreed not to enforce the order against drive-in services and would amend its order accordingly.

Further activity in this case followed in which some confusion arose regarding the Governor's guidance on worship procedures, the City's revised standards involving worship services, and whether or not the guidance pre-empted the City's orders. After the City of Holly Springs agreed to follow the guidance from the Governor's office on safe worship practice, the United States Court of Appeals for the Fifth Circuit ruled that the City's orders on worship would be enjoined pending future consideration. Specifically, the Court stated:

> *We do this upon the assurances by the Church that it will "satisfy[y] the requirements entitling similarly situated businesses and operations to reopen." In this vein, we refer the Church to the Governor's new "Safe Worship Guidelines for In-Person Worship Services," which appear similarly rigorous to the City's requirements for reopening businesses but are tailored to church operations. These guidelines, if implemented in the spirit of the City's orders, may help the Church abide by its safety pledge during this intervening period while the district court considers the injunction request and while the City continues the ongoing process of evaluating and revising its orders related to COVID-19.*[47]

In a lawsuit styled *Temple Baptist Church v. City of Greenville* (ND, Miss, 2020), the church challenged an order of the city council regarding worship. On April 7, 2020, the City adopted an order that banned drive-in and in-person worship, and commenced enforcement of the order on April 8, 2020. Enforcement consisted of having police appear at the drive-in service of Temple Baptist Church and issue citations to persons in attendance. The church challenged the constitutionality of the worship bans and filed suit on April 10, 2020, seeking injunctive relief against the enforcement of the ordinance. The church also sought a temporary restraining order against further enforcement on April 11, 2020.

The suit gained considerable national attention and on April 14, 2020, the U.S. Department of Justice filed a Statement of Interest on behalf of the plaintiff, setting out arguments against orders that impair the free exercise of religion. The statement sets out the current understanding that facially neutral prohibitions that apply to gatherings other than religious services that are enforced uniformly may pass constitutional muster under less rigorous standards of review, but those which single out religious practices will be held to the highest standard—the compelling interest test. On the following day, the Mayor of Greenville issued a revised executive order permitting drive-in services so long

[47] *First Pentecostal Church of Holly Springs v. City of Holly Springs*, (5th Cir. 2020).

as the vehicle windows remained closed. The plaintiffs moved to dismiss their petition for a temporary restraining order on April 21, 2020.[48]

[48] *Temple Baptist Church v. City of Greenville* (ND, Miss 2020, Case No.4:20-cv-64-DMB-JMV).

Are There Statutory Changes to Mississippi's Emergency Powers Statutes that the Legislature Should Consider?

The COVID-19 pandemic has been a unique experience in our nation and Mississippi's recent history. Mississippi and the nation have not faced such a challenge from a disease since tuberculosis and polio in the 1940s and 1950s. Mississippi's emergency management laws are well tailored to address problems associated with floods, storms, or even diseases such as influenza, about which the public knows a considerable amount. The particular problem with COVID-19 is that many of the actions required to protect the public were not contemplated by the persons who participated in the incremental development of Mississippi's emergency management laws. This explains the reliance on general provisions in Mississippi's emergency management laws cited in the numerous executive orders issued by Governor Reeves since March 2020. Given the severity and complexity of the COVID-19 pandemic and without statutory specificity to address such a pandemic, it would appear prudent that the Legislature should have a more active role in addressing a pandemic emergency through public policy.

Some states' legislatures exert their influence over emergency policy making by being able to adopt joint resolutions ending an emergency. In a recent publication of the National Conference of State Legislatures, that organization noted that 24 state legislatures have such power, with an additional one, Louisiana, vesting that power in each house of its Legislature.[49] This authority may give a Legislature considerable leverage in cases where it has the power to call itself into special session as is the case in 36 states.[50] Mississippi is not such a state.

Other states provide their legislatures with considerable policy influence by enacting laws that address the duration of a declared emergency. Following the expiration date, the emergency may only be extended by legislative enactment. States using this approach to legislative inclusion in the policy making process have experienced mixed results. As Appendix D notes, Alaska appears to have had a relatively smooth process of legislative and executive cooperation. Wisconsin, on the other hand, has experienced an impasse that may have contributed to the increasing COVID-19 caseload in that state. In both Utah and Kansas, the process has been marked by some conflict, and in Kansas—litigation, but ultimately these states were able to address the pandemic constructively through the legislative process and executive action.

Since the Mississippi Legislature cannot call itself into extraordinary session, it would appear that legislative participation in the policy-making process may be affected only through the adoption of durational limits on emergencies like those in Alaska, Kansas, Utah, and Wisconsin, requiring legislative action to extend an emergency. PEER notes that this is also a check on potential executive action that arguably overreaches the legal authority to act.

[49] Two states, Utah and Kansas discussed as states that limit the duration of emergencies also allow their Legislatures to terminate an emergency through resolutions.
[50] Nicholas Birdsong, "Balancing Legislative and Executive Powers in Emergencies," National Conference of State Legislatures' *Legisbrief*, Vol. 28, Number 25, (July 2020).

Additional Recommendations

1. The Legislature should amend MISS. CODE ANN. Section 33-15-5 (1972) to include within the definition of "natural emergency" the terms "epidemic" and "pandemic" to ensure that the Governor could invoke the broadest emergency powers in the event of such occurrences.
2. The Legislature should enact laws to accomplish the following:
    a. empower the Governor to direct, in certain instances, that local health care professionals be used to provide medical assistance in areas impacted by natural, man-made, or technological disasters and to address the licensure of out-of-state volunteer providers who come to Mississippi to assist in the wake of a disaster; and,
    b. provide that the Mississippi State Department of Health may, in certain emergencies, take responsibility for human remains in local jurisdictions.
3. On a periodic basis, the Attorney General's office should conduct training sessions, in conjunction with the Mississippi Municipal League and the Mississippi Association of Supervisors, regarding the proper crafting of local emergency orders.

Appendix A: *Jacobson* in the Era of COVID-19: Appeals to the Federal Courts

To date, several of the United States Courts of Appeals have heard cases dealing with state and local responses to the COVID-19 pandemic. Additionally, one case from the United States Supreme Court dealt with the question of temporary relief. Most of these cases have involved interlocutory appeals of either denials or grants of temporary relief.[51] A few cases have involved petitions for writs of mandamus in cases where district courts granted temporary restraining orders against COVID-19 emergency measures.

Appropriate Level(s) of Scrutiny

A question that has arisen in the first months of the pandemic was whether or not *Jacobson vs. Massachusetts*, an old precedent, offered states the broad latitude to address the pandemic through any reasonable, non-discriminatory means, or whether it is greatly modified by the considerable weight of twentieth century case law mandating tiered, more nuanced reviews of individual state measures. Especially when those measures impact preferred freedoms such as those protected by the United States' Constitution's First Amendment, or when protected by the constitutional right to privacy—a right protected only in common law at the time *Jacobson* was decided.

In a recent article, *Tiered Scrutiny in a Pandemic: Symposium Pandemics and the Constitution,*[52] the author contends that *Jacobson* did not establish a special standard for review for governmental action taken in the face of an emergency such as a pandemic, but instead applied the tests of rationality and nondiscrimination that were commonly applied in reviewing constitutional claims at the dawn of the twentieth century. The author concludes that since *Jacobson* establishes no special category of analysis for emergency measures, levels of constitutional scrutiny established by cases decided in subsequent years should be applied in reviewing any constitutional claims against an emergency order. In cases dealing with such issues as economic loss or protective measures such as mask requirements, applying higher levels of scrutiny could be significant where First Amendment freedom of association issues arise regarding the size of gatherings, or in cases where free exercise of religion cases arise. These subjects are discussed more fully below.[53] At least one United States District Court has taken the approach that tiers of scrutiny are essential in reviewing COVID-19 emergency orders.[54]

---

[51] Generally when seeking a preliminary injunction prior to trying a case on the merits, a plaintiff must show (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. See *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

[52] Jeffery Jackson, "Tiered Scrutiny in a Pandemic: Symposium Pandemics and the Constitution," *ConLaw Now*, Vol. 12, No. 39, 2020, 42.

[53] See also Lindsay F. Wiley and Stephen I. Vladeck, "Coronavirus Civil Liberties and the Courts: The Case Against 'Suspending'," *Judicial Review*, Harvard Law Review Forum, Vol. 133, No. 9, (July 2020), wherein the authors equate the level of scrutiny extended to emergency measures by such Federal Circuits as the Fifth constitutes a suspension of judicial review. The Fifth Circuit Court case of *In re Abbott* is discussed infra.

[54] See *Cnty. of Butler v. Wolf* (W.D. Pa. 2020).

In contrast, several cases from the circuit courts appear to take a different view of what *Jacobson* permits in a time of emergency. *In re Abbott*,[55] the United States Court of Appeals for the Fifth Circuit Court considered a temporary restraining order against a Texas emergency order that restricted access to abortions. In determining a scope of review that is proper in such cases, the Court, citing *Jacobson*, noted:

> *To be sure, individual rights secured by the Constitution do not disappear during a public health crisis, but the Court plainly stated that rights could be reasonably restricted during those times. Jacobson, 197 U.S. at 29, 25 S.Ct. 358. Importantly, the Court narrowly described the scope of judicial authority to review rights-claims under these circumstances: review is "only" available if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.*[56]

Most cases to date have followed the lead of the Fifth Circuit Court and have treated *Jacobson* as creating a special level of scrutiny to be applied in dealing with emergency measures. Cases involving free exercise of religion, when a regulation or order is directed toward religion and similar restrictions are not placed on secular uses or activities, appear to be the area where higher or strict scrutiny has been applied.

The Subject Matter of the Challenges

In general, these cases have tended to address:

- free exercise of religion issues within the context of local or state shelter-at-home or phased return-to-work orders;
- abortion rights and restrictions on voluntary medical procedures;
- jail environments; and,
- matters related to the conduct of state elections.

These cases reflect the changed constitutional environment since *Jacobson* was decided as the twentieth century witnessed the move toward federal courts becoming both the source and protectors of a broad range of individual rights that were not firmly grounded in the constitutional doctrines of the early twentieth century.

The following sections discuss these cases by category.

<u>Free Exercise of Religion</u>

State adopted social distancing and limits on the size of gatherings often impact religious practices. While some denominations self-limited by curtailing traditional worship services, others continued to conduct services. Some restrictions adopted by state and/or local governmental entities specifically singled out religious services as activities that were to be limited. Others made general restrictions under which worship, as well as other gatherings, would be limited.

[55] *In re Abbott*, 954 F.3d 772, (5th Cir. 2020) (Abbott II).
[56] Supra. See Also *In re Abbott*, 956 F.3d 696, (5th Cir. 2020) (Abbott IV).

1. R*oman Catholic Diocese of Brooklyn v. Cuomo*[57]

Most recently, the United States Supreme Court granted a temporary injunction against the enforcement of a state of New York executive order that limited attendance at religious services in areas most impacted by the COVID-19 pandemic. While Governor Cuomo chose not to pursue enforcement, the parties pressed their argument for a temporary injunction.

In *Cuomo,* a divided court issued a preliminary injunction against the executive orders. The Per Curiam opinion cited the fact that the two zones set out in the order, the red and orange zones, sharply restricted permissible attendance at services to 10 persons and 25 persons respectively. These restrictions, on the surface, singled out religious services in differential treatment that was not imposed upon secular entreprises.

Noteworthy was the separate concurrence of Justice Kavanaugh who noted that the case differed sharply from cases rendered earlier this year, particularly *South Bay United Pentecostal Church v. Newsome,*[58] in that it dealt with orders creating a preferred class of secular enterprises that were treated more leniently than religious gatherings, and by the extremely restrictive requirements of the attendance maximums set in the New York court order establishing the red and orange zones.

2. *South Bay United Pentecostal Church v. Newsome*[59]

Differing from the outcome in *Roman Catholic Diocese of Brooklyn* is the case of *South Bay United Pentecostal Church v. Newsome*. The South Bay Pentecostal Church sought a temporary injunction against the enforcement of California's restrictions on group gatherings. The California restrictions barred religious institutions from using more than 25% of capacity or having more than 100 congregants for a service. Similar restrictions were placed on secular gatherings. The United States Court of Appeals for the Ninth Circuit Court denied a preliminary injunction against the restrictions citing their neutrality.

The United States Supreme Court, by a 5 to 4 vote, denied the church's petition for an injunction. In a separate concurrence, Chief Justice Roberts noted:

- Similar or more severe restrictions were placed on secular gatherings.
- The order exempted or was more lenient towards dissimilar activities, such as operating grocery stores, banks, and laundromats, where people neither congregated in large groups nor remained in close proximity for extended periods.
- The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement.
- Citing *Jacobson*, Chief Justice Roberts wrote:

> *Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect.*

[57] 592 U.S. — (2020).
[58] *South Bay United Pentecostal Church v. Newsome*, 390 U.S. ___ (2020).
[59] Supra.

- When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary which lacks the background, competence, and expertise to assess public health and is not accountable to the people.[60]

Thus, Chief Justice Roberts read the broad regulatory mandate of *Jacobson* to be consistent with modern trends in constitutional law in those instances wherein the regulation complained of is facially neutral and is not applied in a discriminatory fashion.[61]

Several of the circuit courts of appeals, however, dealt with religious restrictions that dealt differently with secular and sectarian activity.

3. *Roberts v. Neace*[62]

This case involved introductory appeals from a denial of a preliminary injunction against the Kentucky Governor's orders restricting types of gatherings during the COVID-19 pandemic sought in the United States District Court for the Eastern District of Kentucky. One prohibition was for faith-based gatherings.

The first order, issued on March 19, 2020, prohibited all mass gatherings, including, but not limited to, community, civic, public, leisure, faith-based, or sporting events. It exempts "normal operations at airports, bus and train stations, shopping malls and centers, and typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing." The second order, issued on March 25, 2020, required organizations that are not "life-sustaining" to close. The order listed 19 broad categories of life-sustaining organizations and over 100 sub-categories spanning four pages. Among the many exempt entities were laundromats, accounting services, law firms, hardware stores, airlines, mining operations, funeral homes, landscaping businesses, and grocery stores. Religious organizations do not count as "life-sustaining," except when they provide "food, shelter, and social services."[63]

The Court noted that facially neutral regulations with the incidental effect of restricting free exercise are constitutional so long as they are not imposed arbitrarily or in a discriminatory fashion. The Court found the restrictions problematic because:

- the restrictions referred to faith-based gatherings; and,

- a lengthy list of permitted activities led the court to believe that the allegedly neutral restrictions on faith-based and other types of gatherings were in fact targeted against certain gatherings including faith-based gatherings.

These orders likely fall on the prohibited side of the line, because while they appear to be generally applicable on the surface, they may not be so in practice due to exceptions for comparable secular activities. The regulations must be viewed in light of strict scrutiny tests, which they are not likely to survive.[64]

---

[60] *South Bay United Pentecostal Church, supra at 2.*
[61] In *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1991), the United States Supreme Court held that facially neutral regulations with an incidental impact on free exercise rights if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.
[62] *Roberts v. Neace,* 958 F.3d. 489, (6th Cir. 2020).
[63] *Roberts*, supra at pages 412 through 413.
[64] *Roberts,* supra at pages 413 through 415.

Neutral social distancing restrictions applicable to all gatherings could be applied to faith-based gatherings and worship services without constitutional infirmity as a less restrictive alternative if they were applied to secular activities alike.[65] See the earlier case, *Maryville Baptist Church, Inc. v. Beshear*, -- F.3d --, (6th Cir. May 2, 2020).

4. *Elim Romanian Pentecostal Church v. Pritzker*[66]

In March 2020, Illinois Governor Pritzker issued an executive order to reduce transmission of the coronavirus. Specifically, the order provided:

- *All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited, except for the limited purposes permitted by this Executive Order. Pursuant to current guidance from the CDC, any gathering of more than ten people is prohibited unless exempted by this Executive Order. Nothing in this Executive Order prohibits the gathering of members of a household or residence.*

- *All places of public amusement, whether indoors or outdoors, including but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, museums, arcades, fairs, children's play centers, playgrounds, funplexes, theme parks, bowling alleys, movie and other theaters, concert and music halls, and country clubs or social clubs shall be closed to the public.*

Executive Order 2020-32 § 2 (3) (April 30, 2020) Section 2 (5) (vi) adds that people are free to leave their homes to engage in the free exercise of religion, provided that such exercise must comply with social distancing requirements and the limit on gatherings of more than 10 people in keeping with CDC guidelines for the protection of public health. Religious organizations and houses of worship are encouraged to use online or drive-in services to protect the health and safety of their congregants.[67]

The plaintiffs sued, arguing that the limit effectively foreclosed in-person religious services, even though they were free to hold multiple 10-person services, and that alternatives—online services or services in parking lots while worshipers remain in cars—are inadequate. Before the case was argued, Governor Pritzker issued a new order, which permits the resumption of all religious services, with the 10-person cap as a "recommendation." The Seventh Circuit Court of Appeals found that the issue was not moot but declined to grant relief. Illinois has not discriminated against religion and has not violated the First Amendment. While warehouse workers and people who assist the needy may be at the same risk as people who gather for large religious worship services, movies and concerts are a better comparison group. By that standard, any discrimination has been in favor of religion. While all theaters and concert halls in Illinois have been closed since mid-March, sanctuaries and houses of worship were open, though to smaller gatherings.[68]

It should be noted that these cases all deal with the issuance or denial of forms of temporary relief, e.g., temporary injunctions. In the future, these cases may reappear in the appellate courts.

---

[65] *Roberts*, supra at page 416.
[66] *Elim Romanian Pentecostal Church v. Pritzker,* June 16, 2020 (7th Cir.).
[67] Supra at 3.
[68] Supra at 11.

5. *Spell v. Edwards*[69]

The plaintiffs, a Louisiana church and its pastor, filed suit seeking to enjoin stay-at-home orders restricting in-person church services to 10 congregants. The Fifth Circuit Court of Appeals held that the appeal of the denial of injunctive relief and related request for an injunction are moot because the challenged orders expired more than a month prior to the appeal. In this case, the plaintiffs failed to cite any authority applying the "capable of repetition" exception to the mootness doctrine to support an injunction against an order that is no longer in effect.

Abortion Rights and COVID-19 Restrictions on Voluntary Medical Procedures

Many states adopted emergency orders that restricted persons from seeking non-emergency procedures because medical and surgical procedures entail the use of personal protective equipment (PPE) that was often in very short supply, particularly during the early days of the pandemic. These cases placed the broad language of *Jacobson* in conflict with the more recent case law prohibiting undue burdens on the rights of women to seek abortions.

1. *In re Abbott*[70]

In this matter, the United States Court of Appeals for the Fifth Circuit heard for the fourth time a matter dealing with Texas's emergency orders regarding medical procedures. On three prior occasions, the United States District Court for the Western District of Texas issued temporary restraining orders in cases where petitioners charged that the emergency orders imposed an undue burden on a woman's right to an abortion.

The emergency order that was the subject of the temporary restraining order was a public health measure, issued by the Governor of Texas on March 22, 2020, that postponed non-essential surgeries and procedures until April 22, 2020, to combat the COVID-19 pandemic. The order applied to all licensed healthcare providers in Texas, covered a broad range of procedures, did not mention abortion, and contained life and health exceptions committed to a physician's judgment. Specifically, GA-09 required healthcare professionals and facilities to:

> *…postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.*

The order did not apply to procedures that, if performed under accepted standards, "would not deplete the hospital capacity or the personal protective equipment (PPE) needed to cope with the COVID-19 disaster."

In an earlier iteration of the case, the Court explained that the respondents' challenge to the emergency order must satisfy the standards in *Jacobson v. Massachusetts*. Specifically, the Court held that:

---

[69] *Spell v. Edwards*, 962 F. 3d 175, (5th Cir. 2020). On November 11, 2020, Spell sought injunctive relief from the United States Supreme Court. On November 27, 2020, Justice Alito refused action on the petition.

[70] *In re Abbott*, (Abbott IV) supra.

> *When faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Jacobson, 197 U.S. at 31. Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are perpetual—that is, arbitrary or oppressive. Id. at 38. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures. Id. at 28, 30. Abbott II, 2020 WL 1685929. We also articulated how the Jacobson framework works with the Casey undue-burden analysis. Id. at *11 (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)). A court should "ask[ ] whether GA-09 imposes burdens on abortion that 'beyond question' exceed its benefits in combating the epidemic Texas now faces." Id. (quoting Jacobson, 197 U.S. at 31). We emphasized that this analysis would "require[ ] careful parsing of the evidence" and that "[t]hese are issues that the parties may pursue at the preliminary injunction stage, where Respondents will bear the burden to prove, by a clear showing, that they are entitled to relief.*[71]

The Court of Appeals issued a writ of mandamus to the District Court requiring that the lower court's temporary restraining order be partially vacated as it did not follow the Appeals Court's directive to follow the *Jacobson* test.

2. *In re Rutledge*[72]

The Eighth Circuit Court of Appeals granted a writ of mandamus in part and directed the District Court to dissolve a temporary restraining order enjoining Arkansas from enforcing a COVID-19-related health directive against a provider of surgical abortions. The Arkansas Department of Health (ADH) issued a directive requiring that all non-medically necessary surgeries be postponed in response to Executive Order 20-03, directing the Arkansas Department of Health to do everything reasonably possible to respond to and help recover from the COVID-19 virus.

The Eighth Circuit cited *Jacobson* as being good for the proposition that states have broad authority to take actions necessary to protect the public health in the face of a public health crisis. In this case, the emergency directive bears a real and substantial relation to Arkansas's interest in protecting public health in the face of the COVID-19 pandemic. The directive is not, beyond all question, a prohibition of pre-viability abortion in violation of the United States' Constitution because it is a delay, not a ban, and contains emergency exceptions; and the district court clearly abused its discretion in finding that the provider is likely to prevail on its argument that the directive will likely operate as a substantial obstacle to a woman's choice to undergo an abortion in a considerable amount of the cases in which the directive is relevant.

3. *Adams & Boyle, P.C. v. Slattery*[73]

In response to the COVID-19 pandemic, Tennessee Governor Bill Lee issued shelter-in-place orders. On April 8, 2020, Governor Lee ordered that "[a]all healthcare professionals and healthcare facilities ...postpone surgical and invasive procedures that are elective and non-urgent," until April 30, 2020, in order to preserve personal protective equipment and

[71] *In re Abbott,* (Abbott II), supra.
[72] *In re Rutledge*, 956 F.3d 1018, (8th Cir. 2020).
[73] *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, (6th Cir. 2020).

prevent community spread of COVID-19 through nonessential patient-provider interactions. Elective and non-urgent procedures were defined as those that can be delayed because they are not required to provide life-sustaining treatment, to prevent death or risk of substantial impairment of a major bodily function, or to prevent rapid deterioration or serious adverse consequences to a patient's physical condition … as reasonably determined by a licensed medical provider. A Tennessee woman may receive a "medication abortion" within 11 weeks from her last menstrual period or a "procedural abortion" within the first 20 weeks (aspiration or dilation and evacuation), subject to a 48-hour waiting period and in-person visitation requirements.

On April 17, 2020, the District Court enjoined Tennessee from enforcing that ban against doctors performing abortion procedures. The Sixth Circuit Court affirmed, acknowledging the "challenges Tennessee faces in responding to the public health crisis," but concluding that the "response, in this one respect, unduly curtailed constitutional liberty." The Court ordered modification of the injunction so that it prohibits the state from enforcing the ban against plaintiffs to the extent that they provide procedural abortions to specific patients, including women who, in the good-faith professional judgment of the provider, will likely be forced to undergo a dilation and evacuation procedure instead of an aspiration if their procedures are delayed. Regarding the *Jacobson* case, the Sixth Circuit Court wrote:

> *Leave aside the myriad factual differences between this case and Jacobson—asking a person to get a vaccination, on penalty of a small fine, is a far cry from forcing a woman to carry an unwanted fetus against her will for weeks, much less all the way to term—and the challenge of reconciling century-old precedent with the Supreme Court's more recent constitutional jurisprudence. The bottom line is that, even accepting Jacobson at face value, it does not substantially alter our reasoning here. As of today, a woman's right to a pre-viability abortion is part of the fundamental law.*[74]

The Court noted that emergency orders and abortion have been subjects in litigation since the COVID-19 pandemic became a matter of national concern. Other cases have taken different analytical approaches to the problem but the court concluded that clearly the case considered in *Abbott* was distinguishable as it allowed procedures in cases where significant amounts of PPE would not be used.

4. *Robinson v. Attorney Gen.*

The Court of Appeals for the Eleventh Circuit Court upheld a preliminary injunction issued against Alabama's emergency order of March 27, 2020, which mandated the postponement of "all dental, medical, or surgical procedures," with two exceptions: (a) those necessary to treat an emergency medical condition; and (b) those necessary to avoid serious harm from an underlying condition or disease, or necessary as a part of a patient's ongoing and active treatment, insofar as it imposed an undue burden on a woman's right to seek an abortion.

The Eleventh Circuit considered *Jacobson*, but read it together with cases holding that the Fourteenth Amendment generally protects a woman's right to terminate her pregnancy. Reading these two lines of cases together, the Eleventh Circuit Court concluded that the April 3, 2020, order (if applied to proscribe abortions unless necessary for the mother's

[74] *Slatery,* supra at p. 927.

life or health) imposed a "plain, palpable invasion of rights, yet had no real or substantial relation to the state's goals.[75]

The Court noted that the state cited both *In re Abbott* and *In re Rutledge* as the authority to support the constitutionality of the order, but further noted that in both cases, the two circuits in question cited the lower courts for failing to follow the *Jacobson* tests. In *Robinson*, the District Court had considered *Jacobson* in light of the recent line of cases supporting a woman's right to abortion.[76]

Jail Conditions

1. *Valentine v. Collier*[77] (Texas)

The plaintiffs filed suit alleging that Texas's adoption and implementation of measures guided by changing CDC recommendations in regards to the COVID-19 pandemic do not go far enough. The plaintiffs filed a class action lawsuit alleging violations of the Eighth Amendment's prohibition against cruel and unusual punishment and the Americans with Disabilities Act, seeking a preliminary injunction. The Fifth Circuit Court granted the state's motion to stay the district court's preliminary injunction, which regulates the cleaning intervals for common areas, the types of bleach-based disinfectants the prison must use, the alcohol content of hand sanitizer that inmates must receive, mask requirements for inmates, and inmates' access to tissues (amongst many other things). The Court held that the state is likely to prevail on the merits of its appeal because: (1) after accounting for the protective measures the state has taken, plaintiffs have not shown a "substantial risk of serious harm" that amounts to "cruel and unusual punishment"; and (2) the District Court committed legal error in its application of *Farmer v. Brennan*, by treating inadequate measures as dispositive of the defendants' mental state. In this case, even assuming that there is a substantial risk of serious harm, the plaintiffs' lack evidence of the defendants' subjective deliberate indifference to that harm. The Court also held that the state has shown that it will be irreparably injured absent a stay, and that the balance of the harms and the public interest favor a stay. Finally, the Court held that the plaintiffs have not exhausted their administrative remedies as required in the Prison Litigation Reform Act (PLRA), and the District Court's injunction goes well beyond the limits of what the PLRA would allow even if the plaintiffs had properly exhausted their claims.

2. *Swain v. Junior*[78]

The Eleventh Circuit Court of Appeals held that the District Court erred in issuing a preliminary injunction against Miami-Dade County and the Director of the Miami-Dade Corrections and Rehabilitations Department (MDCR), requiring defendants to employ numerous safety measures to prevent the spread of COVID-19 and imposing extensive reporting requirements.

---

[75] *Robinson v. Attorney General,* 957 F.3d. 1171, 1186, (11th Cir., 2020).
[76] *Robinson*, supra.
[77] *Valentine v. Collier*, 956 F.3d 797, (5th Cir. 2020). Note the United States Supreme Court declined to vacate the Fifth Circuit Court's stay of the District Court's preliminary injunction. See the Supreme Court declined to vacate the stay, *Valentine v. Collier,* (Valentine II), 140 S. Ct. 1598, (2020) (mem.). See also *Valentine v. Collier,* October 13, 2020 (5th Cir. 2020).

[78] *Swain v. Junior*, June 15, 2020 (11th Cir. 2020).

Inmates had filed a class action suit challenging the conditions of their confinement under 42 U.S.C. 1983 and seeking habeas relief under 28 U.S.C. 2241 for the named plaintiffs with a "medically vulnerable" subclass of inmates.

The Eleventh Circuit Court of Appeals held that the plaintiffs failed to show a substantial likelihood of success on the merits of their constitutional claim for deliberate indifference. The Court explained that the District Court erred in relying on the increased rate of infection and in concluding that the defendants' inability to ensure adequate social distancing constituted deliberate indifference. In this case, the Court simply could not conclude that, when faced with a perfect storm of a contagious virus and the space constraints inherent in a correctional facility, the defendants acted unreasonably by "doing their best." The Court also agreed with the defendants that the District Court erred in its likelihood-of-success-on-the-merits analysis because it failed to consider "two threshold issues": (1) the heightened standard for municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658, (1978); and (2) the exhaustion under the Prison Litigation Reform Act. Finally, the Court held that the District Court erred in holding, without any meaningful analysis, that the plaintiffs would suffer irreparable injury absent an injunction. Furthermore, the District Court erred in its determination of the balance-of-the-harms and public-interest factors.

Finally, the Eleventh Circuit Court noted that public interest favors a proper allocation of public-health resources—an allocation that politically accountable (and often local) officials are best equipped to make. See *S. Bay United Pentecostal Church v. Newsom*, No. (Roberts, C.J., concurring in denial of application for injunctive relief) 19A1044, 2020 WL 2813056, (U.S. May 29, 2020).

<u>Overseeing the Political Process</u>

Questions have arisen in several jurisdictions about the safety of the primary election process in light of the pandemic.

1. *Morgan v. White*[79] (7th Cir. 2020). (Illinois)

Illinois permits voters to place initiatives and referenda on both local and statewide ballots but requires proponents to collect a specific number of signatures during a period of 18 months. That period ended for Illinois on May 3, 2020, and will end for cities on August 3, 2020.

Morgan and the other plaintiffs challenged the mandatory process for collecting signatures contending that Illinois's requirements are unconstitutional, given the social-distancing requirements adopted by Illinois's Governor during the COVID-19 pandemic.

A United States District Court judge denied relief. The Seventh Circuit Court affirmed, first holding that at least one plaintiff (Morgan) had standing because Morgan began his petition campaign before filing suit. The other plaintiffs did not do anything of substance until the suit was filed. They had plenty of time to gather signatures before the pandemic began and are not entitled to emergency relief.

Rejecting the argument that the Governor's orders denied the plaintiff's First Amendment free speech rights, the Court concluded that the orders concern conduct, not what anyone may write or say. Although the orders make it hard to obtain signatures, so would the reluctance of people to approach strangers during a pandemic. The U.S. Constitution does

[79] *Morgan v. White,* July 8, 2020 (7th Cir. 2020).

not require any state or local government to put referenda or initiatives on the ballot; if the Governor's orders, coupled with the signature requirements, amount to a decision to skip all referenda for the 2020 election cycle, there is no federal problem.

2. *Texas Democratic Party v. Abbott* [80] (Texas)

During the Coronavirus pandemic, Texas Governor Greg Abbott postponed the May 2020 primary runoff elections to July 14, 2020; doubled the period for early voting by personal appearance; and declared that election officials would issue further guidance on social distancing and other precautions.

The plaintiffs filed federal claims that Texas's rules for voting by mail discriminate by age, restrict political speech, are unconstitutionally vague, and that an open letter sent by the Texas Attorney General on the subject of voting was a threat constituting voter intimidation. The Fifth Circuit Court of Appeals denied relief, referring to the District Court's "audacity" in entering a sweeping preliminary injunction, weeks before the election, that required officials to distribute mail-in ballots to any eligible voter who wants one. Citing *Jacobson*, the Fifth Circuit Court of Appeals stated that the U.S. Constitution principally entrusts the safety and the health of the people to politically accountable state officials and the spread of the virus has not given unelected federal judges a roving commission to rewrite state election code.

SOURCE: PEER staff analysis.

[80] *Texas Democratic Party v. Abbott,* 961 F.3d 389, 397, (5th Cir. 2020).

Appendix B: COVID-19 Cases in the State Courts

Several significant cases regarding COVID-19 emergency orders have been litigated in the state courts. Unlike the overwhelming majority of cases in the deferral courts, these decisions often deal with important issues related to the roles and responsibilities of the executive and legislative branches during a pandemic and matters related to the interplay between statutory provisions when states adopt multiple laws dealing with emergency responses to health emergencies.

The following sections discuss the most important of these cases.

Statutory Construction and the Interplay between Multiple Emergency Statutes

Elkhorn Baptist Church et. al. v. Brown[81]

In this case, the Oregon Supreme Court was faced with a question of statutory construction dealing with the proper authority for the issuance of certain gubernatorial emergency orders. Oregon has a general emergency statute much like Mississippi's statute that has been amended over the years to cover a broad range of emergencies. Oregon also has a separate Public Health Emergency Act which empowers the Governor to issue emergency orders of limited duration.

Several plaintiffs challenged the orders issued by the Governor requiring limits on gatherings and social distancing and sought a temporary injunction to bar enforcement of the orders pending trial. The trial court granted the preliminary injunctions on the basis of the orders having expired. The trial court reasoned that the short duration of medical emergencies authorized in the state's public health emergency legislation controlled the matter being more specific than the general emergency act.

On appeal, the Oregon Supreme Court granted a writ of mandamus to the Governor directing the dissolution of the temporary injunction. In taking such action, the Court found it necessary to unravel the confusion created by multiple emergency statutes in the state. The Supreme Court concluded that the durational requirements of the public health emergency legislation did not control in this case. The more specific legislation containing limits of 28 days on public health emergency declarations was nothing more than a supplemental power conferred on the Governor by the Legislature. The general statute with no limits was the statute under which the Governor issued the orders. Consequently, the trial court's mistake was to conclude that by expiration of the time limits provided by the public health emergency statute, the orders were not enforceable.

This case provides an example of what can happen when states enact multiple emergency statutes.

Unlawful Delegation of Powers/Separation of Powers

In re Certified Questions from the United States District Court, Western District of Michigan Southern Division Midwest Institute of Health PLLC v. Governor of Michigan et al,[82] October 2, 2020,

---

[81] *Elkhorn Baptist Church et. al. v. Brown,* 366 Or 506, ___ P 3d___, (2020).

[82] *In re Certified Questions from the United States District Court, Western District of Michigan Southern Division Midwest Institute of Health PLLC v. Governor of Michigan et al, (*Michigan, October 2, 2020).

This involves questions certified to the Michigan Supreme Court by the United States District Court for the Western District of Michigan in a cause of action filed by a health care provider challenging an emergency order of the Governor limiting access to non-essential medical procedures. The questions certified were:

1. whether, under the Emergency Powers of the Governor Act, MCL § 10.31 et seq. or the Emergency Management Act, MCL § 30.401, et seq., Governor Whitmer has the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic; and,

2. whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

Regarding the first question, the Michigan Supreme Court concluded that the Governor had no power to issue the order after April 30, 2020, under the Emergency Powers Act (EPA).

Regarding the second question, a majority of the Court concluded that the emergency powers of the Emergency Powers of the Governor Act violated the Michigan Constitution as it constituted an unconstitutional delegation of legislative power to the Governor.

The rationale for the second conclusion is as follows:

- In reviewing governmental action in light of the nondelegation doctrine, three factors are of importance, the scope of the powers conferred, the specificity of standards under which the power is carried out, and the duration of the power conferred.

- As to scope, the Court noted the considerable breadth of the powers conferred under the Emergency Powers of the Governor Act, specifically authorizing the Governor to enter orders "to protect life and property or to bring the emergency situation within the affected area under control. Orders to this end were issued touching a broad range of activities reordering social life and to limiting, if not altogether displacing, the livelihoods of residents across Michigan and throughout wide-ranging industries.

- As to duration, under the EPGA, the power to protect life and property were indefinite and continued until a declaration by the Governor that the emergency no longer existed. Hence, if the emergency lasted for months or longer, the power to issue emergency orders likewise would also exist for months or longer.

- As to standards, when the scope is broad, and the duration is indefinite, the standards constraining the exercise of power need to be precise to protect against arbitrary exercises of power. Under the EOGA, the only constraints were provisions requiring reasonable orders, rules, and regulations as necessary to protect life and property or to bring the emergency situation within the affected area under control. Neither term gives the Governor genuine guidance as to how to exercise the authority delegated by the EPGA nor constrains gubernatorial actions in any meaningful manner. To be constitutional the statute delegating authority must contain standards to constrain the exercise of power.

- Severing an unconstitutional portion of the statute would not be possible in this case because the legislative purpose of the EPGA is to invest the Governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster.

Wisconsin Legislature v. Palm[83] (May 2020).

In this case, the Wisconsin Legislature challenged orders issued by the state's Secretary of Health and Human Services regarding COVID-19 safety precautions for social distancing and business openings. The Governor of Wisconsin had also issued an emergency order, but because of its durational requirements in law, the substance of that order was not in question.

The Wisconsin Supreme Court concluded that any order issued by the Secretary fit within the provisions of Wisconsin's Administrative Procedures Act regarding notice and comment. In this case, the subject of delegation of lawmaking power was considered by the Court. Similar to the Michigan Supreme Court, the Wisconsin Supreme Court concluded:

> *We have allowed the Legislature to delegate its authority to make law to administrative agencies. But as we stated in Martinez v. DILHR, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992), such a delegation is allowed only if there are "adequate standards for conducting the allocated power." Stated otherwise, "[a] delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to ensure that the board or agency acts within that legislative purpose." J.F. Ahern Co. v. Wis. State Bldg. Comm'n, 114 Wis. 2d 69, 90, 336 N.W.2d 679 (Ct. App. 1983) (quoting Watchmaking Examining Bd. v. Husar, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971)).*
>
> *When a grant of legislative power is made, there must be procedural safeguards to prevent the "arbitrary, unreasonable or oppressive conduct of the agency." J.F. Ahern, 114 Wis. 2d at 90...*

Unlike the Michigan Supreme Court, the Wisconsin Supreme Court concluded that the safeguards included adherence to administrative procedures which the Secretary has not followed. Since administrative procedures for adopting emergency rules had not been followed, the orders were unenforceable.

Kelly v. Legislative Coordinating Council[84]

Kansas' Legislative Coordinating Council, made up of members from both houses, has the power to act on behalf of the Legislature when that body is not in session as provided under general laws. Following a legislative extension of the Governor's initial 15-day emergency order, the Council issued a revocation of an extended emergency order issued by the Governor. This order covered, among other things, limits on mass gatherings. The Governor challenged the exercise of legislative power by the Council through a proceeding directed against the Council membership.

---

[83] *Wisconsin Legislature v. Palm*, 391 Wis. 2d. 497, 942 N.W. 2d. 900, (2020).
[84] *Kelly v. Legislative Coordinating Council*, 460 P.3d 832, (Kansas, 2020).

The Kansas Supreme Court granted the Governor's remedy for a declaration that the Council's order was a nullity. Under the resolution extending the original emergency, the Governor had to first seek an extension of an emergency from the State Finance Council before the Legislative Coordinating Council could meet to either extend or terminate the emergency. No application was ever made to the Finance Council as contemplated by the Legislature.

Wolf v. Scarnati[85]

In *Wolf*, the Pennsylvania Supreme Court was posed with a question of whether or not the state's constitutional requirement that bills and resolutions be presented to the Governor for his approval would apply in a case where the Pennsylvania General Assembly has passed a resolution terminating a state of emergency declared by the Governor.

Under Pennsylvania law, the General Assembly has the power to terminate an emergency by concurrent resolution. Upon such resolution, the Governor must issue a proclamation terminating the state of emergency.

The General Assembly adopted such a resolution ending the emergency; however, the Governor did not issue a proclamation calling an end to the declared emergency.

In the ensuing litigation, the Governor argued that the resolution did not comport with the Pennsylvania Constitution's requirement for the presentment of bills and resolutions to the Governor for approval. The Court strictly followed the text of the constitutional provision on presentment and concluded that there was no constitutional exception for the type of resolution the Pennsylvania General Assembly adopted, therefore it had to be presented to the Governor as contemplated by Pennsylvania's Constitution. This renders Pennsylvania's legislative procedure for checking executive power ineffectual.

Friends of Danny DeVito v. Wolf[86]

This case challenged the authority of the Governor to issue order closing non-essential businesses on several grounds. These grounds included:

- a lack of statutory authority under emergency laws;
- a lack of constitutional authority under the Pennsylvania Constitution; and,
- violations of the Takings Clause, procedural due process, and equal protection.

Statutory Authority: The Pennsylvania Supreme Court found that the term "natural disaster" includes a pandemic. The types of natural disasters in the statute do not include epidemics or diseases. Their common trait is that they involve suffering and loss of life or property. This is sufficiently broad to include a pandemic. Additionally, the purpose of Pennsylvania's emergency statute was "to empower the state to address issues of vulnerability of people and communities of this Commonwealth to damage, injury and loss of life, and property resulting from disasters," and to "strengthen" the Governor's role "in prevention of, preparation for, response to, and recovery from disasters."

Separation of Powers Argument: The Court reasoned that the Legislature contemplated that in emergency cases, the Governor would be given certain authority to make law

[85] *Wolf v. Scarnati,* (Pa. 2020).
[86] *Friends of Danny DeVito v. Wolf*, 222 A. 3d. 874, (Pa. 2020).

through executive orders. This extends to such matters as control over the "ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein." Inherent in that authorization is the Governor's ability to identify the areas where movement of persons must be abated and which premises will be restricted in order to mitigate the disaster. That the Governor utilized business classifications to determine the appropriate areas and premises to be directly impacted by the disaster mitigation is likewise inherent in the broad powers authorized by the General Assembly.

Takings Clause Issues: The Court also reasoned that there are differences between takings for public use and takings under police power. Additionally, these were limits to business operations of short duration that do not constitute takings for purposes of the United States Constitution.

Procedural Due Process: The petitioners contended that they were denied procedural due process in instances where orders were devised without notice or an opportunity to be heard. The Court reasoned that in cases such as one posed by COVID-19 protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is one of the oldest examples of permissible summary action.

Equal Protection: DeVito, a candidate for the Pennsylvania General Assembly, argues that he is deprived of equal protection because he had to close his campaign office but his opponent, an incumbent, is allowed to keep his office open. The Court makes clear that all similarly situated persons had to close their offices. Sitting members of the assembly had to continue to carry out their public functions and therefore were distinguishable from a candidate. Campaigns for office by incumbents and challengers alike were treated the same way.

First Amendment Issues: DeVito argues that the ban on gatherings keeps his supporters from meeting relative to his campaign for office. The Court reasons that there were alternatives such as communicating electronically that enable supporters to communicate. States may place content neutral time, place, and manner regulations on speech and assembly "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."

As to the issue of unconstitutional delegation, several advisories have been posted on the Internet regarding this issue.

In an advisory entitled, *Can He Do That? The Governor's Authority to Suspend or Modify Statutes in an Emergency Like the COVID-19 Pandemic,*[87] a Connecticut law firm has opined that a Connecticut statute[88] provides for the Governor to:

> *"…modify or suspend in whole or in part…any statute, regulation or requirement" that he finds to be "in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. "*

The attorneys note that this language Is excessively broad and actually allows the Governor to modify statutes in the event of an emergency. This might constitute an

[87] "Can He Do That? The Governor's Authority to Suspend or Modify Statutes in an Emergency Like the COVID-19 Pandemic," Day, Pitney LLP.
[88] Connecticut General Statutes § 28- 9 (b) (1).

unconstitutional delegation as there is seemingly no limit to the Governor's application of discretion in this case.

More specific is the guidance from lawyers with the California Constitution Center[89] regarding the state's broad authority granted to the Governor to declare emergencies. California allows the Governor to declare an emergency when:

> *…the Governor finds that circumstances amounting to a state of emergency exist, and either a local authority requests the declaration or the Governor finds that local authority is inadequate to cope with the emergency.*

Under California law, a state of emergency is:

> *…the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by such conditions as fire, flood, storm, epidemic, riot, drought and other calamities.*

Despite this breadth, the California Constitution Center's lawyers believe that this is not unconstitutional because the Legislature has retained for itself the authority to enter the fray at any time and end the emergency, by concurrent resolution, thereby reclaiming its power. Because of the capacity for legislative intervention, the granting of this power to the Governor is neither permanent nor irrevocable.

It appears that breadth, lack of meaningful limitations, and the lack of Legislative intervention could result in Mississippi's statute suffering from the same defect as the statute in the Michigan case.

SOURCE: PEER staff analysis.

[89] "The Governor's Powers Under the Emergency Services Act," California Constitution Center, Blog, (March 19, 2020).

Appendix C: Model Acts and Their Critiques

Efforts to reform state emergency laws, especially regarding pandemics and bioterrorism, have not been without considerable discussion and criticism. Perhaps the most noteworthy attempt to change state emergency laws since the civil defense era, is the Model State Emergency Health Powers Act (MSEHPA). Developed by the Center for Law and the Public Health at Georgetown and Johns Hopkins Universities at the request of the Centers for Disease Control and Prevention, the Model Act was first released for public review and comment in October 2001. The release was timely as the United States had recently been the scene of significant acts of foreign terrorism and concerns over possible follow-up acts, particularly bioterrorism, were of considerable concern.

The Model State Emergency Health Powers Act outlines five areas where state public health professionals must act.[90] These areas are:

- **Preparedness:** The MSEHPA facilitates systematic planning for a public health emergency. A state public health emergency plan must include coordination of services; procurement of vaccines and pharmaceuticals; housing, feeding, and caring for affected populations (with appropriate regard for their physical and cultural/social needs); and the proper vaccination and treatment of individuals.

- **Surveillance:** The MSEHPA provides authority for surveillance of health threats and continuing power to follow a developing public health emergency (i.e., detecting a problem, identifying it as a health emergency, then tracking and measuring the episode or outbreak). It requires prompt reporting by health care providers, pharmacists, veterinarians, and laboratories and also provides for the exchange of relevant data among lead agencies such as public health, emergency management, and public safety.

- **Management of property:** The MSEHPA provides comprehensive powers to manage property and protect persons and to safeguard the public's health and security. Public health authorities may close, decontaminate, or procure facilities and materials to respond to a public health emergency; safely dispose of infectious waste; and obtain and deploy health care supplies.

- **Protection of persons:** This is a function that may entail enforced testing, treatment, isolation and quarantine. Similarly, the MSEHPA permits public health authorities to physically examine or test individuals as necessary to diagnose or to treat illness; vaccinate or treat individuals to prevent or ameliorate an infectious disease; and isolate or quarantine individuals to prevent or limit the transmission of a contagious disease. The state public health authority also may waive licensing requirements for health care professionals and direct them to assist in the vaccination, testing, examination, and treatment of patients.

- **Communication**: The state public health authority must provide information to the public regarding the emergency response, including protective measures, to be taken and information regarding access to mental health support.

The Model State Emergency Health Powers Act also provides for governors to declare public health emergencies, which trigger these particular powers and duties. Since being

[90] Lawrence O. Gostin, "Public Health Law in An Age of Terrorism: Rethinking Individual Rights and Common Goods," *Health Affairs*, Vol. 21, No.6 (November/December, 2002).

proposed, some states have adopted portions of the MSEHPA, particularly the parts that relate to declarations of public health emergencies.[91]

Additionally, beginning in 2000, the Turning Point Public Health Statute Modernization Collaborative (Turning Point Collaborative)—part of a larger Robert Wood Johnson Foundation effort to strengthen public health infrastructures—brought together state representatives with federal, tribal, and local public health partners and private sector actors (e.g., health professionals and institutions) to "transform and strengthen the legal framework for the public health system through a collaborative process to develop a model public health law." After three years of development, the Turning Point Collaborative released the final version of the Turning Point Model State Public Health Act (Turning Point Act) in September 2003, proposing it as a template of key public health powers for state, tribal, and local governments considering public health law modernization. While the Turning Point model legislation addressed far more than matters strictly related to pandemics or other public health emergencies, its article on public health emergencies was greatly influenced by the previously discussed Model State Emergency Health Powers Act. Regarding public health emergencies, the Turning Point Act contains sections dealing with:

- surveillance;
- reporting;
- mandatory testing and evaluation;
- compulsory treatment;
- quarantine and isolation; and,
- security safeguards.

Criticism of the Model Acts

Criticism of the acts came quickly from libertarians, both civil and economic, policy increment lists, and some experts who believe that the compulsive aspects of emergency laws are no longer workable in the modern age.

Libertarian Criticism Based on Legal Overbreadth: Criticism of the Model State Emergency Health Powers Act came swiftly from groups as ideologically diverse as the American Civil Liberties Union (ACLU) and the American Legislative Exchange Council (AEC).[92] Both for example have found cause for concern in the acts very broad and imprecise definition of a public health emergency, and believe this breadth could allow minor health matters, such as an annual outbreak of the flu to rise to the level of an emergency triggering broad powers over people and their property.[93] The lack of judicial review of the declaration has been a major concern for the ACLU.

---

[91] See page 12.

[92] For a full discussion, see *A Legal Analysis of Emergency Powers Given in Mississippi Law Regarding Pandemics and Bioterrorism*, PEER Committee, Report #491, October 10, 2006.

[93] The MSEHPA also defines the term "public health emergency" as follows:
A "public health emergency" is an occurrence or imminent threat of an illness or health condition that:
(1) is believed to be caused by any of the following:
(i) bioterrorism;

Both the ACLU and ALEC have raised concerns regarding the broad executive powers that would require mandatory treatment and possible quarantine of persons who are infected with an illness that gave rise to the declaration of a public health emergency. These commentators note that these powers provide little in the way of exceptions to the exercise of state power and because of the broad definition of what constitutes an emergency, any number of illnesses (e.g., chicken pox, AIDS) could be the triggers to a round-up of persons into quarantine camps.

Finally, the American Legislative Exchange Council raised the concern that the MSEHPA gives broad authority to confiscate and ration private property. Many of the provisions in the model act authorize a public health agency to make "quick takes" of property, thereby taking immediate possession prior to making any determination of just compensation for property.

Criticism Based on the Need for Voluntary Cooperation and Accountability: One influential critic, George Annas of Boston University, criticized the general tenor and approach of the Model State Emergency Health Power Act. While raising concerns over the possible constitutionality of provisions giving broad authority to public health officials in the face of an emergency, Professor Annas also noted that the compulsive tone of the MSEHPA is also a problem. Specifically, he noted:

> *Just as important as the constitutional questions posed by the model act is the pragmatic question of whether it is likely to undermine the public's trust in public health — trust that is absolutely essential for containing panic in a bioterrorist-induced epidemic. Unlike the situation at the turn of the last century, for example, we have televised news 24 hours a day, cell phones, and automobiles, making a large-scale quarantine impossible unless the public believes that it is absolutely necessary to prevent the spread of fatal disease and is fairly and safely administered. Enactment of a law that made it a crime to disobey a public health officer would rightly engender distrust, because it would suggest that public officials could not provide valid reasons for their actions.*[94]

Equally noteworthy, was his criticism of the broad immunity granted to persons acting under the authority of a declared emergency. Regarding broad and "vague" powers granted to public health officials and care providers under the MSEHPA, Annas noted:

> *These vague standards are especially troublesome because the act's incredible immunity provision remains unchanged. Thus, all state public health officials and all private companies and persons operating under their authority are granted immunity from liability for their actions (except for gross negligence or willful misconduct), even in the case of death or permanent injury. Out-of-state emergency health care providers have even greater protection; they are given immunity from liability for everything*

(ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin; and,
(2) poses a high probability of any of the following harms:
(i) a large number of deaths in the affected population;
(ii) a large number of serious or long-term disabilities in the affected population; or,
(iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.

[94] George J. Annas, "Bioterrorism, Public Health, and Civil Liberties," *New England Journal of Medicine*, (April 25, 2002).

but manslaughter. In my opinion, such immunity is something public health authorities should not want (even though it may have superficial appeal), because it means that they are not accountable for their actions, no matter how arbitrary. The immunity provision thus serves only to undermine the public's trust in public health authorities. Citizens should never be treated against their will by their government, but if they ever are, they should be fully compensated for injuries suffered as a result.[95]

Criticism Based on a Policy Preference for Incrementalism: Approaching both model acts from a different perspective was a publication prepared in 2003 by the Law Center of Louisiana State University (LSU).[96] This "White Paper" noted that the principal impetus for the MSEHPA was a belief by the drafters that comprehensive reform of public health laws is needed because laws that have been in force and effect for the past eighty to one hundred years in most states are most likely unconstitutional and could not be enforced today.

The authors noted that this position does not bear up to careful research and that the courts in most states have been willing to uphold old state laws so long as the enforcement of these laws is not arbitrary. Thus, quarantine laws or immunization laws that have been on the books since the days of smallpox scares and the threat of tuberculosis are most likely still legislative mandates that the courts will enforce.

The LSU commentators also note that the old laws leave room for administrative flexibility in creating procedures for carrying out public health mandates that the MSEHPA does not have. The commentators note that this in itself is not beneficial to the public interest.

Finally, the MSEHPA can conflict with other provisions that states have enacted to address both natural emergencies and health-related problems that have been in force and effect for years. Most states, including Mississippi, have a general emergency statute and some specialized public health statutes that already address such subjects as planning, detection, protection of individuals, property oversight, and declaration of emergencies. New acts overlaid onto the existing laws could create administrative confusion and possibly impair the functioning of old laws that have heretofore worked.[97]

In general, the LSU commentators have expressed a preference for an incremental approach to the enactment of public health reform. This would include taking provisions of model acts that can be woven into the fabric of a state's laws rather than adopting a major overhaul of laws addressing public health emergencies.

Our most recent experience with COVID-19 litigation nationwide illustrates the wisdom of the LSU critique. Cases cited in Appendix A of this report outline the most significant cases handed down during the first five months of the COVID-19 pandemic. To date, the overwhelming majority of these constitutional challenges involving such matters as face masks, mandatory closure of certain businesses, quarantines for persons entering to the state, and neutral restrictions on the number of persons who may gather at indoor and outdoor venues have resulted in the states' positions being vindicated. In these cases, the age of the laws being applied appears not to have been problematic for the courts reviewing them. Additionally, states have used their existing authority to craft such

---

[95] Supra.

[96] "Legislative Alternatives to the Model State Emergency Health Powers Act," LSU Program in Law, Science, and Public Health White Paper #2, (April 21, 2003).

[97] See Appendix B for a discussion of state court litigation in Michigan, Oregon, and Pennsylvania where the existence of two statutes covering similar subject matter caused confusion that had to be resolved by court action.

reforms as shelter-at-home orders and home quarantines that have been tailored to fit the current problems posed by COVID-19.

SOURCE: PEER staff analysis of various critiques of model health emergency legislation.

Appendix D: Statutory Limitations on the Duration of a Declared Emergency

On page 21, this report mentions six states: Alaska, Kansas, Montana, Utah, Washington, and Wisconsin, in which emergency management statutes limit the duration of a declared emergency. These statutes generally require the Legislature to take some action to reaffirm or modify an emergency if it is to remain in effect. The following sections briefly summarize these states' experiences during the ongoing COVID-19 pandemic.

Limited Legislative Authority in Montana and Washington Has Had No Discernable Impact on Legislative Oversight

Montana: In Montana two CODE provisions relate to the duration of emergencies and disasters. These sections[98] provide a 20-day and a 45-day limit on emergencies and disasters declared by the Governor. Emergencies or disasters in both sections may only be extended by a joint resolution of the Legislature, or when there is a nationally declared emergency or disaster.

The Montana Governor's COVID-19 Executive Order 2-2020 is effectively extended indefinitely because on March 13, 2020, President Trump issued a proclamation declaring a national emergency. It states that the COVID-19 outbreak in the United States constitutes a national emergency beginning on March 1, 2020.

Washington: State laws in Washington place some limits on the Governor's authority to suspend laws during an emergency. The specific limitation is as follows:

> *(4) No order or orders concerning waiver or suspension of statutory obligations or limitations under subsection (2) of this section may continue for longer than thirty days unless extended by the legislature through concurrent resolution. If the legislature is not in session, the waiver or suspension of statutory obligations or limitations may be extended in writing by the leadership of the senate and the house of representatives until the legislature can extend the waiver or suspension by concurrent resolution. For purposes of this section, "leadership of the senate and the house of representatives" means the majority and minority leaders of the senate and the speaker and the minority leader of the house of representatives.[99] Thus, when the legislature is out of session the Governor must only give notice of an extension to legislative leadership of an emergency that suspends the provisions of general laws to the legislative leadership.*

This limited form of legislative oversight has been criticized by at least one commentator on public policy, who suggested looking to several states where the Legislature can by resolution completely terminate an emergency. The article also cites the Wisconsin statute where emergencies are to end after 30 days unless extended by the Legislature.[100]

[98] Montana Code Ann. Sections 10-3-302 and 10-3-303.
[99] RCW Section 43.06.220 (Revised Code of Washington).
[100] "Should Governor's Emergency Powers Be Subject to Legislative Check?" Washington Policy Center, (April 3, 2020).

Utah Legislation Extends Emergency Declarations and Adopts Special Rules for Pandemic Emergencies

Utah emergency management statutes limit the duration of a state of emergency. Unless extended by the Legislature, a state of emergency may only last for 30 days.[101] In response to the COVID-19 pandemic, the Utah Legislature called itself into special session in April 2020 to address several related issues. One piece of Legislation adopted was the Pandemic Response and Consultation Act (H.B. 3005, Third Special Session). This act sets out special rules for a state of emergency brought about by pandemics or epidemics. For pandemics and epidemics, the Governor must declare an emergency and consult with legislative leadership on the subject of executive action. The Legislature may by joint resolution revoke or rescind an emergency declaration. The Governor may not suspend the requirements of notice to legislative leadership or the Legislature's power to revoke or rescind an emergency.

The Utah Legislature also adopted resolutions in both regular and special sessions that ultimately extended the emergency to August 20, 2020. During August, the Legislature chose not to extend the emergency. In September, the Governor issued a new executive order extending the emergency, but the order did not direct such things as business closures, distancing, or the use of PPE which tend to be the types of requirements that generate litigation. Recently, the Utah Department of Health executive director has issued state public health orders under separate statutory authority directing the wearing of masks and other restrictions on gatherings and business activities.

Alaska: A Single Bill Addresses All Matters

In Alaska, an emergency has a duration of only 30 days unless extended by the Legislature.[102] Following the Governor's emergency declaration in March 2020, the Legislature enacted S.B. 241 which extended the emergency until November 15, 2020, and also addressed other important matters such as unemployment compensation, evictions, emergency rules for licensure of professionals, and other matters that states have often addressed in general bills dealing with the pandemic.

Wisconsin and Kansas: Stalemates, Legislation, Vetoes, and Litigation

Wisconsin: Like Utah, Wisconsin limits the duration of an emergency.[103] An emergency may not extend past 60 days unless, through joint resolution, the Legislature agrees to an extension. While the Wisconsin General Assembly passed Assembly Bill 1038 that was signed into law on April 15, 2020, addressing various needs associated with the COVID-19 pandemic, it took no action by joint resolution to extend the Governor's state of emergency.

As discussed in Appendix B, Wisconsin's Department of Health and Human Services Executive Director issued a broad range of orders under statutory powers that are separate and distinct from the Governor's emergency powers. These orders included social distancing requirements and were the subject of litigation that resulted in the Wisconsin Supreme Court finding that these orders were in fact "rules" for purposes of the state's Administrative Procedures Act that had to be adopted in accordance with the notice and comment requirements of that act.[104] Subsequently, the Governor chose to issue an additional state of emergency proclamation and related orders directing the use

[101] See Utah Code Ann. § 53-2a-206.
[102] See AK (Alaska Statutes) Section 26.23.020.
[103] Wis. Stat. Ann. § 323.10.
[104] *Wisconsin Legislature v. Palm*, supra at Appendix B.

of masks and social distancing without regarding the requirements of state law. The plaintiffs have challenged the orders as violative of state law as the emergency has not been extended by the Legislature. To date, one state judge has denied a temporary injunction against their enforcement stating that the purpose of the 60-day limit was not to require legislative review and acquiescence, but to require the Governor re-evaluate the need for an emergency. [105] It would appear likely that there will be further litigation in Wisconsin.

Kansas: In Kansas, the Governor's declaration of an emergency is effective for 15 days. Governor Laura Kelly may seek extensions from the State Budget Council and ratification from the Legislative Coordinating Council (LCC), a body comprised of members of the Legislature. Additionally, the Legislature has the power to grant extensions through joint resolutions.[106] The executive and legislative response to the pandemic in Kansas has been marked by considerable conflict that has been evidenced by vetoes and litigation. Briefly, Kansas's legal history of the pandemic is as follows:

- On March 12, 2020, Governor Kelly declared a state of disaster emergency.

- Within the 15-day statutory window, the Legislature adopted House Concurrent Resolution (HCR) 5025 extending the Governor's declaration to May 1, 2020. The resolution provides in part that any revised orders of the Governor must be presented to the Kansas State Finance Council for approval. Following their approval, the Legislative Coordinating Council, a seven-member body comprised of legislative members, may consider and ratify such extensions.

- On April 7, 2020, the Governor added subject matter to her March 12, 2020, emergency proclamation. Among other things, it temporarily prohibited, subject to several exemptions, "mass gatherings," defined as "any planned or spontaneous, public or private event[s] or convening[s] that will bring together or [are] likely to bring together more than 10 people in a confined or enclosed space at the same time." Executive Order 20-18 rescinded and replaced an earlier, substantially similar executive order. But Executive Order 20-18 differed in that it removed "[r]religious gatherings" and "[f]uneral or memorial services or ceremonies" from the list of "activities or facilities" exempt from the temporary prohibition of mass gatherings.

- On April 8, 2020, the Legislative Coordinating Council convened pursuant to HCR 5025. By a 5 to 2 vote, it revoked Executive Order 20-18.

- Governor Kelly filed suit to test the legal effect of the Legislative Council's actions.

- The Kansas Supreme Court ruled on April 11, 2020, that the revocation was not in conformity with the terms of HCR 5025,[107] as that the plain language of the resolution provided that the Governor first seek an extension of an emergency from the State Finance Council before the LCC had any authority to speak for the Legislature regarding the continuation of an emergency.

---

[105] *Lindoo et.al. v. Evers,* October 12, 2020 (Polk County Circuit Court).
[106] Kansas Revised Statutes Section 48-924.
[107] See *Kelly v. Legislative Coordinating Council,* 460 P.3d 832, (Kan. 2020) and discussion in Appendix B.

- Following the above discussed court action, the Kansas Legislature enacted H.B. 2054, which limited the Governor's authority to issue orders closing businesses or imposing other restrictions on the residents of Kansas after May 31, 2020.

- The Governor sharply criticized the legislation and issued a veto message om May 21, 2020. The Governor then issued a new emergency declaration and called a special session of the Legislature for June 3, 2020.

- On June 4, 2020, the Legislature enacted S.B. 2016 which extended the state of emergency until September 15, 2020, but limited the Governor's authority to restrict businesses or to place any restrictions on election or on any rights protected by the Kansas Bill of Rights. The bill also required that at least six members of the Kansas State Finance Committee who are legislators vote to approve any new declarations issued by the Governor.

- On September 11, 2020, The State Finance Committee voted to extend the state of emergency to October 15, 2020.

- Many legislators note that improvements in the Kansas emergency management statute need to be considered. Some believe that broader legislative oversight beyond leadership serving on the Finance Commission needs to be considered.[108]

SOURCE: PEER staff analysis.

[108] "Legislators Target Governor's Emergency Powers, Recommend Changes," *Salina Journal*, (September 24, 2020). Some suggestions include setting out in law what businesses must do to address COVID-19 concerns, and requiring the Governor to call a special session after an emergency has lasted for a certain number of days to consider renewing an emergency declaration.

PEER Committee Staff

James A. Barber, Executive Director

Legal and Reapportionment
Ted Booth, General Counsel
Ben Collins
Barton Norfleet

Administration
Deborah Hardy
Gale Taylor

Quality Assurance and Reporting
Tracy Bobo

Performance Evaluation
Lonnie Edgar, Principal Analyst
David Pray, Principal Analyst
Jennifer Sebren, Principal Analyst
Kim Cummins
Matthew Dry
Samuel Hearn
Matthew Holmes
Taylor Mullins
Sarah Williamson
Julie Winkeljohn
Ray Wright

Performance Accountability
Linda Triplett, Director
Kirby Arinder
Debra Monroe-Lax
Meri Clare Ringer