

IN THE SUPREME COURT OF THE STATE OF OREGON

ELKHORN BAPTIST CHURCH, an Oregon non-profit corporation; CALVARY CHAPEL NEWBERG, an Oregon non-profit corporation; CALVARY CHAPEL LINCOLN CITY, an Oregon non-profit corporation; CALVARY CHAPEL SOUTHEAST PORTLAND, an Oregon non-profit corporation; NEW HORIZON CHRISTIAN FELLOWSHIP, an Oregon non-profit corporation; CAMAS VALLEY CHRISTIAN FELLOWSHIP, an Oregon non-profit corporation; PEOPLES CHURCH, an Oregon non-profit corporation; PREPARE THE WAY, an Oregon non-profit corporation; BEND COMMUNITY CHURCH, an Oregon non-profit corporation; COVENANT GRACE CHURCH, an Oregon non-profit corporation; JEDIDIAH MCCAMPBELL, an individual; RONALD OCHS, an individual; BRIAN NICHOLSON, an individual; JAMES B. THWING, an individual; MARK RUSSELL, an individual; PHIL MAGNAN, an individual; RONALD W. RUST, an individual; TRAVIS HUNT, an individual; MASON GOODKNIGHT, an individual; MARK MAYBERRY, an individual; LORI MAYBERRY, an individual; BENJAMIN STEERS, an individual; MICHAEL CARROLL, an individual; KEVIN J. SMITH, an

Baker County Circuit Court
No. 20CV17482

SC S067736

Continued...

individual; POLLY JOHNSON, an individual; BENJAMIN BOYD, an individual; ANNETTE LATHROP, an individual; ANDREW S. ATANSOFF, an individual; SHERRY L. ATANSOFF, an individual; MICAH AGNEW, an individual; and ANGELA ECKHARDT, an individual,

Plaintiffs-Adverse Parties,

and

RED ROCK COWBOY CHURCH, an Oregon non-profit corporation et al.,

Plaintiffs,

and

BILL HARVEY, SAM PALMER, GLENN PALMER, JERRY SHAW, MATTHEW R. CUNNINGHAM, DONALD A. JAY, JACOB A. BROWN, SAMUEL N. BROWN, VIRGINIA STEGEMILLER, B. DAVID HURLEY, and DOUGLAS W. HILLS,

Intervenors-Adverse Parties

and

KATHERJNE BROWN, Governor of the State of Oregon and DOES 1 THROUGH 50,

Defendants-Relators.

Continued...

RESPONSE BRIEF OF INTERVENORS-ADVERSE PARTIES

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RESPONSE BRIEF OF INTERVENORS-ADVERSE PARTIES**STATEMENT OF THE CASE**

On March 8, 2020, Oregon Governor Kate Brown entered Executive Order Number 20-03 in regard to the coronavirus pandemic. This Executive Order twice described the coronavirus pandemic as a “public health emergency.” The order “Directed and Ordered” that the Office of Emergency Management, “in consultation with the Director of the Oregon Health Authority and state Public Health Director, if necessary, take any action authorized under ORS 433.441.” ER-32.

The cited statute, ORS 433.441, is the heart of the public health emergency laws, and contains what we shall later explain to be the unique extraordinary power clause, ORS 433.441(3).

The Governor also relied upon the general emergency law provisions in ORS 401.168 through 401.192. ER-33.

Thereafter, the Governor entered 18 additional Executive Orders relating to this public health emergency, culminating in Executive Order 20-24, entered on May 1, 2020.

The only Executive Orders, from numbers 20-03 to 20-24, not related to the coronavirus pandemic, as a public health emergency, were Executive Orders 20-04, 20-21, and 20-23.

On May 6, 2020 attorney Ray D. Hacke filed a Complaint in Baker County Circuit Court on behalf of Plaintiffs Elkhorn Baptist Church, *et al.*, challenging Executive Orders 20-03, 20-12, and 20-24, on the basis that they impinge upon the constitutionally protected religious rights to assemble and worship, and contending that the Executive Orders were invalid. The Plaintiffs sought a Declaration that Executive Orders 20-03, 20-12, and 20-24 have expired by operation of law, and an injunction enjoining enforcement of these Executive Orders.

Plaintiffs also sought a temporary restraining order and a preliminary injunction pending adjudication of the matter.

Hereinafter, Plaintiffs, now Plaintiffs-Adverse Parties before this Supreme Court, shall be referred to as “Plaintiffs.” Intervenors-Adverse Parties in this Supreme Court case, shall be referred to herein as “Intervenors.” Governor Kate Brown, Defendant-Relator before this Supreme Court, shall be referred to herein as “Defendant”.

On May 11, 2020, Plaintiffs filed an Amended Complaint, expanding their cause of action to relate to Executive Orders 20-03, 20-05 through 20-20, 20-22, and 20-24. Plaintiffs contended that all of these Executive Orders have expired by operation of law.

On May 13, 2020, Plaintiffs filed their second Amended Complaint, expanding and clarifying their allegations, and seeking the same relief as in the Amended Complaint.

On May 12, 2020, Proposed Intervenors-Plaintiffs Bill Harvey and 10 others filed a Motion to Intervene, and a Proposed Intervenors' Complaint. The Proposed Intervenors-Plaintiffs concurred with the Plaintiffs' Jurisdiction and Venue, Request for Declaratory Relief, Request for Injunctive Relief, and Prayer for Relief. Intervenors-Plaintiffs alleged their own factual basis for relief.

On May 14, 2020 the Baker County Circuit Court conducted a three-hour hearing in which the Circuit Court approved the intervention by Intervenors, without objection. The Circuit Court admitted Intervenors' Complaint for filing. Defendant presented a Motion to Dismiss the Complaints.

During the May 14, 2020 hearing, Defendant advised the Circuit Court that the Governor was in the process of entering a new Executive Order that morning. This did occur. The new Executive Order, again relating to the coronavirus pandemic, is Executive Order 20-25. A copy of Executive Order 20-25 was presented by Defendant to Baker County Circuit Court Judge Matthew B. Shirtcliff by way of email on May 14, 2020 with a request that Executive Order 20-25 be made a part of the record on the motions argued at the May 14, 2020 hearing.

On May 18, 2020 the Parties appeared before the Circuit Court by electronic means. Judge Matthew B. Shirtcliff orally presented his Opinion. He then filed his Opinion Letter and entered an Order Granting Preliminary Injunctive Relief and Denying the Motion to Dismiss.

On the same day, May 18, 2020, Defendant filed a Petition for a Peremptory or Alternative Writ of Mandamus with this Court. Defendant also filed an Emergency Motion for a Stay of the Preliminary Injunction. That evening (May 18, 2020) this Court entered an Order Granting Temporary Stay and directed that Plaintiffs and Intervenors file responses no later than May 22, 2020. Plaintiffs and Intervenors filed Memoranda in Opposition on May 22, 2020.

On May 23, 2020, this Court issued its Order Allowing Alternative Writ of Mandamus. On May 26, 2020, in response, Judge Matthew B. Shirtcliff wrote a letter to the parties, with a copy to this Court, electing to stand by his original ruling, and not vacating the May 18, 2020 Order Granting Preliminary Injunctive Relief and Denying the Motion to Dismiss.

Accordingly, the matter is now before this Court. Defendant filed its Opening Brief on May 28, 2020. The following is the Answering Brief on behalf of Intervenors.

INTRODUCTION

The issues in this case relate to the depth and range of the power of the Governor of Oregon to address the coronavirus pandemic. It is helpful to put the issues in context, so that the analysis of the Governor's power is not skewed by failing to review the full range of authority provided by existing Oregon law.

The Governor has four sets of tools available to deal with public health issues:

1. The public health laws centered in ORS Chapter 431A allow comprehensive activity to address a variety of public health issues, including communicable diseases and epidemics. These laws include appropriate, balanced authority, without time limits, to address epidemics.

2. The Governor may declare a public health emergency under ORS 433.441, and exercise unique, extraordinary powers under ORS 433.441(3). The only statute authorizing a Governor's closure orders and "reopening" orders affecting businesses and religious congregations is found in ORS 433.441(3)(d). These extraordinary powers expire no more than 28 days after the date the public health emergency is declared. ORS 433.441(5).

3. During the pendency of a public health emergency, declared pursuant to ORS Chapter 433, the Governor may also use the powers of the general emergency laws under ORS Chapter 401 to the extent the powers of the general emergency laws

do not conflict with the public health emergency limitations contained in ORS Chapter 433. ORS 433.441(3)(f).

It is possible, during a general emergency, for the Governor to also declare a public health emergency and avail herself of the unique, extraordinary powers of the public health emergency laws – but only if the circumstances support the declaration of a public health emergency. The general emergency law may co-exist with a public health emergency, but the existence of the general emergency does not cancel the 28-day expiration provision for the unique, extraordinary powers granted by ORS 433.441(3).

4. If the Governor determines that a public health emergency rises to the level of a catastrophic disaster, as defined in Article X-A of the Oregon Constitution, the Governor may issue such a declaration. The Governor has extraordinary powers under this provision – but they expire in 30 days unless extended by the legislature.

QUESTIONS PRESENTED

1. Did the Circuit Court properly exercise its discretion in entering the preliminary injunction?

Answer: Yes. The Circuit Court properly applied Oregon law to require the Governor to honor the 28-day expiration of the unique, extraordinary powers granted by ORS 433.441(3).

2. Can the Governor, having invoked the unique, extraordinary powers of ORS 433.441(3) relating to a public health emergency, maintain and exercise those powers beyond the 28-day expiration clause in ORS 433.441(5) by also declaring a general state of emergency under ORS 401.165 *et seq.*?

Answer: No. But the Governor does have powers under ORS Chapter 431A to address the coronavirus pandemic.

SUMMARY OF ARGUMENT

The general emergency law, which has no automatic expiration time limit, does not authorize restrictions or closures as to churches, businesses, or public gatherings during a public health emergency. The general emergency law can incorporate the provisions of the public health emergency law, which does authorize restrictions or closures as to churches, businesses, or public gatherings. But those unique, extraordinary powers of the public health emergency law expire 28 days after the public health emergency is declared. Any Executive Order based on a public health emergency loses all its unique, extraordinary powers listed in ORS 433.441(3) after 28 days. This does not prevent the Governor, and the Executive Branch, from exercising ordinary statutory powers in response to the coronavirus pandemic, such as the powers and authority allowed under ORS 431A.005 to 431A.900 (Public Health Programs and Activities). It does prevent the Governor from continuing to exercise extraordinary powers authorized under a declaration of

public health emergency pursuant to ORS 433.441, which has a time limit of 14 days, extendable to 28 days, under ORS 433.441(5).

ARGUMENT

A. The Governor Does Not Need to Maintain Extraordinary Powers of a Public Health Emergency Declaration in Order to Address the Coronavirus Pandemic

The underlying theme of the Defendant's arguments to this Court seems to be that the Executive Branch and the Governor will be incapable of appropriately responding to the coronavirus pandemic unless the Governor is given the power to continue to impose unique and extraordinary restrictions, authorized by ORS 433.441(3), beyond the 28 days allowed in ORS 433.441(5).

This premise is incorrect. There is an entire separate chapter of the Oregon Revised Statutes which addresses public health programs and activities. This is ORS Chapter 431A. This comprehensive chapter of Oregon Law was enacted in 2007 as part of House Bill 2185, which became Oregon Laws 2007, Chapter 445.

Intervenors have not identified any reference to ORS Chapter 431A in any portion of the Defendant's brief.

This is surprising to Intervenors since ORS Chapter 431A works in conjunction with other Oregon laws to provide a comprehensive system to respond to a pandemic without the need to declare a public health emergency and empower the Governor to impose the draconian restrictions of ORS 433.441(3). Intervenors

referred to ORS Chapter 431A in Intervenor’s May 22, 2020 Memorandum in Opposition to Defendants-Relators’ Petition (hereinafter referred to as “Intervenor’s Memorandum”). Defendant referred to this Memorandum in its brief, so Defendant is aware of Chapter 431A. Yet Defendant’s brief omits any reference to this important pandemic legislation. It is so important that Intervenor’s present key elements here.

ORS Chapter 431A.005 contains the following definitions, *inter alia*:

- (2) “Communicable disease” means a disease or condition, the infectious agent of which may be transmitted by any means from one person or from an animal to another person, that may result in illness, death or severe disability.
- (3) “Condition of public health importance” means a disease, syndrome, symptom, injury or other threat to public health that is identifiable on an individual or community level.
- (4) “Disease outbreak” means a significant or notable increase in the number of cases of a disease or other condition of public health importance.
- (5) “Epidemic” means the occurrence in a community or region of a group of similar conditions of public health importance that are in excess of normal expectancy and derived from a common or propagated source.

Because of its importance in addressing a pandemic, without resorting to the extraordinary powers under a public health emergency declaration, Intervenor’s ask this Court to consider the baseline capabilities authorized by ORS 431A.010:

- (1) The Oregon Health Authority and local public health administrators shall have the power to enforce public health laws. The enforcement powers authorized by this section include, but are not limited to, the authority to:
 - (a) Investigate possible violations of public health laws;

- (b) Issue subpoenas requiring testimony or the production of physical or other evidence;
 - (c) Issue administrative orders to enforce compliance with public health laws;
 - (d) Issue a notice of violation of a public health law and impose a civil penalty as established by rule not to exceed \$500 a day per violation;
 - (e) Enter private property at any reasonable time with consent of the owner or custodian of the property to inspect, investigate, evaluate or conduct tests, or take specimens or samples for testing, as may be reasonably necessary to determine compliance with any public health law;
 - (f) Enter a public place to inspect, investigate, evaluate, conduct tests, or take specimens or samples for testing as may be reasonably necessary to determine compliance with the provisions of any public health law;
 - (g) Seek an administrative warrant from an appropriate court authorizing the inspection, investigation, evaluation or testing, or taking of specimens or samples for testing, if denied entry to property;
 - (h) Restrict access to contaminated property;
 - (i) Require removal or abatement of a toxic substance on any property and prescribe the proper measures for the removal or abatement;
 - (j) Maintain a civil action to enforce compliance with public health laws, including a petition to a court for an order imposing a public health measure appropriate to the public health threat presented;
 - (k) Refer any possible criminal violations of public health laws to a district attorney or other appropriate law enforcement official; and
 - (l) Request the Attorney General to assist in the enforcement of the public health laws.
- (2) Any administrative actions undertaken by the state under this section shall comply with the provisions of ORS chapter 183.
- (3) State and local law enforcement officials, to the extent resources are available, must assist the Oregon Health Authority and local public health administrators in ensuring compliance with administrative or judicial orders issued pursuant to this section.

(4) Nothing in this section shall be construed to limit any other enforcement authority granted by law to a local public health authority or to the state.

The above statute was adopted as Oregon Laws 2007, Chapter 445, Section 4.

The above powers are subject to the provisions of ORS Chapter 183, the Oregon Administrative Procedures Act (OAPA). ORS 431A.010(2). This is unlike Governor Brown's Executive Order 20-25, which specifically disclaims any due process under the OAPA. This issue is further discussed later in this brief.

Next, ORS 431A.015 provides clear authorization to act. ORS 431A.015 provides, in pertinent part:

(1) Unless the Governor has declared a public health emergency under ORS 433.441, the Public Health Director may, upon approval of the Governor or the designee of the Governor, take the public health actions described in subsection (2) of this section if the Public Health Director determines that:

- (a) (A) A communicable disease, reportable disease, disease outbreak, epidemic or other condition of public health importance has affected more than one county;
- (B) There is an immediate need for a consistent response from the state in order to adequately protect the public health;
- (C) The resources of the local public health authority or authorities are likely to be quickly overwhelmed or unable to effectively manage the required response; and
- (D) There is a significant risk to the public health; or
- (b) A communicable disease, reportable disease, disease outbreak, epidemic or other condition of public health importance is reported in Oregon and is an issue of significant regional or national concern or is an issue for which there is significant involvement from federal authorities requiring state-federal coordination.

(2) The Public Health Director, after making the determinations required under subsection (1) of this section, may take the following public health actions:

- (a) Coordinate the public health response across jurisdictions.
- (b) Prescribe measures for the:
 - (A) Identification, assessment and control of the communicable disease or reportable disease, disease outbreak, epidemic or other condition of public health importance; and
 - (B) Allocation and distribution of antitoxins, serums, vaccines, immunizing agents, antibiotics, antidotes and other pharmaceutical agents, medical supplies or personal protective equipment.
- (c) After consultation with appropriate medical experts, create and require the use of diagnostic and treatment guidelines and provide notice of those guidelines to health care providers, institutions and facilities.
- (d) Require a person to obtain treatment and use appropriate prophylactic measures to prevent the introduction or spread of a communicable disease or reportable disease, unless:
 - (A) The person has a medical diagnosis for which a vaccination is contraindicated; or
 - (B) The person has a religious or conscientious objection to the required treatments or prophylactic measures.
- (e) Notwithstanding ORS 332.075, direct a district school board to close a children's facility or school under the jurisdiction of the board. The authority granted to the Public Health Director under this paragraph supersedes the authority granted to the district school board under ORS 332.075 to the extent the authority granted to the board is inconsistent with the authority granted to the director.
- (f) Issue guidelines for private businesses regarding appropriate work restrictions.
- (g) Organize public information activities regarding the public health response to circumstances described in subsection (1) of this section.
- (h) Adopt reporting requirements for, and provide notice of those reporting requirements to, health care providers, institutions and facilities for the purpose of obtaining information directly related to the public health threat presented.

(i) Take control of antitoxins, serums, vaccines, immunizing agents, antibiotics, antidotes and other pharmaceutical agents, medical supplies or personal protective equipment.

The above statute was enacted as Oregon Laws 2007, Chapter 445, Section 5.

The preliminary injunction in this case does nothing to undermine the above capabilities. It does prohibit the Governor from exercising the extraordinary powers of a declared public health emergency beyond the 28-day expiration of ORS 433.441(5).

The Oregon statutory scheme fits together in a comprehensive, harmonic fashion, as we shall further demonstrate below. The sky will not fall if the preliminary injunction is allowed to take effect and the 28-day time limit is honored as to the extraordinary powers conferred by ORS Chapter 433.

Intervenors have attached Governor Kulongoski's Executive Order Number 09-17 in the appendix on this brief. *See* App-1 to 3. This was entered on November 4, 2009, to address pandemic H1N1 influenza (once referred to as "swine flu"). *Id.* In that Executive Order, Governor Kulongoski lawfully engaged the provisions of the public health law, without invoking the powers of ORS 433.441(3). *Id.* The Executive Order remained in effect for nearly seven months and expired on July 1, 2010.

Intervenors note that Governor Kate Brown, then serving as Secretary of State, attested to the Governor's signature on page three of that document. The

document shows how a pandemic can be seriously addressed even if the extraordinary powers of ORS 433.441(3) have not been invoked, or have expired after the 28th day.

B. The Circuit Court’s Preliminary Injunction is Within the Permissible Range of Discretionary Choices Open to the Trial Court

Mandamus review of a trial court preliminary injunction decision is only appropriate if the trial court committed a “fundamental legal error” or if “a trial court’s actions are outside the permissible range of discretionary choices open to the trial court.” *State ex rel. Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241 (1993). Here, the only “fundamental legal error” that could have been committed by the trial court, in the preliminary injunction context, is weighing the legal likelihood of success. *See Id.* at 624-34; *See generally Lindell v. Kalugin*, 353 Or 338, 297 P3d 1266 (2013); *Oregon State Hospital v. Butts*, 358 Or 49, 359 P3d 1187 (2015); *See also State ex rel Anderson v. Miller*, 320 Or 316, 324, 882 P2d 1109 (1994). Here, this issue only relates to the trial court’s examination of state of emergency laws in ORS Chapter 401 and ORS Chapter 433.

This brief will demonstrate that the Circuit Court got that examination correct: ORS Chapter 433 is preeminent and its time limits govern as to the unique, extraordinary powers available in a public health emergency.

The other factors that matter in a preliminary injunction decision such as hardship, public interest, and the balancing of equities, are determinations by a trial

court that are well within the legal discretionary choices by a trial court. Overruling the trial court on these discretionary choices would be contrary to *Norblad* and its progeny. Nonetheless, this brief confirms that the Circuit Court did balance these factors correctly when making its preliminary injunction decision.

The extraordinary thing about this case is not that the Circuit Court is requiring that something be done outside the regular scope of statutes. Rather, the opposite is true. The Governor is, as the Circuit Court ruled, operating outside of the regular course of statutes. The preliminary injunction granted in this case simply requires that the Governor conform her activities to those activities which are authorized by Oregon law. What the preliminary injunction means is that the law of Oregon will apply and the extraordinary powers which the Governor unlawfully asserts no longer are available to her, under the public health emergency statutory scheme.

C. The Circuit Court's Preliminary Injunction Protects the Separation of Powers

As Intervenors argued in Intervenors' Memorandum, the Circuit Court's preliminary injunction protects the separation of powers among Oregon's three branches of government. (Intervenors' Memorandum 4). The legislature expressly limited the Governor's powers to address public health emergencies to safeguard against the arbitrary exercise of police powers by the executive branch. *Id.* Defendant argues that "the executive orders at issue fall comfortably within the

state’s police powers...” (Defendant’s Opening Brief 21). Intervenors agree that the state’s inherent police powers permit the state to address public health emergencies, but the Governor does not have police powers beyond those which were delegated to the Governor by the legislature and the state constitution. In the present case, the legislature specifically tailored police powers available to the Governor to mitigate public health emergencies through ORS 433.441. As the discussion below further confirms, the legislature enacted ORS 433.441 to “furnish adequate safeguards against the arbitrary exercise of the delegated police power.” *See MacPherson v. Dept. of Admin. Servs.*, 340 Or 117, 136 (2006) (citing *Warren v. Marion County*, 222 Or 307, 313 (1960)).

Defendant’s argument that the limitations contained in ORS Chapter 433 “ha[ve] no bearing on what the Governor can do under Chapter 401” results in an illogical conclusion. (Def. Br. 23). If the Governor already had broad police powers under ORS Chapter 401 to address public health emergencies, there would be no need to enact ORS Chapter 433. ORS Chapter 433 was enacted for the precise purpose of limiting the Governor’s police powers to address public health emergencies so as to avoid the risk of the executive branch arbitrarily exercising police powers delegated to it by the legislative branch by prolonging use of such power, as to a public health emergency, beyond the 28-day limit of ORS 433.441(5).

The Governor's most recent Executive Order 20-25 also oversteps the police powers delegated to the Governor by significantly limiting the powers of the judicial branch. Paragraph 26 of Executive Order 20-25 provides:

Discretion; No Right of Act. Any decision made by the Governor pursuant to this Executive Order is made at her sole discretion. This Executive Order is not intended to create, and does not create, any individual right, privilege, or benefit, whether substantive or procedural, enforceable at law or in equity by any party against the State of Oregon, its agencies, departments, or any officers, employees, or agents thereof.

This declaration arbitrarily removes the right of individuals to appeal adverse decisions made by state agencies in reliance on the Governor's Executive Orders. For example, Executive Order 20-25 prohibits individuals from engaging in conduct inconsistent with guidance provided by the Oregon Health Authority (OHA). *See Id.* at ¶ 2(c). This puts the onus on all Oregonians to check the OHA website for guidance and subjects Oregonians to criminal penalties if OHA guidance is not followed.

The OHA's guidance issued in response to the coronavirus pandemic does not follow OAPA emergency rulemaking procedures contained in ORS 183.335, yet through Executive Order 20-25 this guidance has the force of emergency rules without adhering to the emergency rulemaking safeguards contained in both ORS 183.335 and ORS 433.443. Thus, Executive Order 20-25 grants OHA broad

legislative powers and deprives Oregonians of the opportunity for judicial review of adverse decisions rendered by the OHA in accordance with Executive Order 20-25.

By failing to follow the public health emergency rulemaking procedure provided by the legislature in ORS 183.335 and ORS 433.443, and by issuing Executive Orders that exercise police powers beyond what was delegated by the legislature, the Governor has arbitrarily concentrated the powers of the legislative and judicial branches into the executive branch for the duration of the Governor's Executive Orders relating to the coronavirus pandemic. This arbitrary concentration of power violates Article III, Section 1, of the Oregon Constitution, which divides state government into three separate branches and provides that "no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided."

D. The Legislature and the People Have Established a Comprehensive System Which is Effective and Limits the Extraordinary Powers of the Governor as to Public Health Emergencies

Beyond the capability to act under the extensive provisions of ORS Chapter 431A, Oregon has two statutory systems in place in regard to emergencies. One set of statutes relates to a public health emergency, among other public health issues, and this set is contained in ORS 433.441 through 433.466. The second set of statutes relate to the general state of emergency statutory scheme and this set is found in ORS 401.165 through 401.236.

For purposes of simplicity herein, Intervenors shall often refer to ORS 433.441 to 433.466 as the “Public Health Emergency Law,” and to ORS 401.165 through 401.236 as the “General Emergency Law.”

The Public Health Emergency Law includes a specific definition of “public health emergency.” ORS 433.442(4) provides, in pertinent part:

“Public health emergency” means an occurrence or imminent threat of an illness or health condition that:

- (a) Is believed to be caused by any of the following:
 - ...(C) an epidemic of communicable disease...and
- (b) poses a high probability of any of the following harms:
 - (A) A large number of deaths in the affected population;
 - (B) A large number of serious or long-term disabilities in the affected population; or
 - (C) Widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of persons in the affected population.

The availability of the extraordinary powers in the Public Health Emergency Law is limited in terms of geography and time. Under ORS 433.441(1) the Governor may declare a state of public health emergency as authorized by ORS 433.441 to 433.452 “to protect the public health.” ORS 433.441(2) provides:

A proclamation of a state of emergency must specify:

- (a) the nature of the public health emergency;
- (b) the political subdivision or geographic area subject to the proclamation;
- (c) the conditions that have brought about the public health emergency; and
- (d) the duration of the state of public health emergency, if the duration is less than 14 days.

The Governor is limited in the amount of time in which this proclamation can remain in effect. ORS 433.441(5) provides:

“A proclamation of a state of public health emergency expires when terminated by a declaration of the Governor or no more than 14 days after the date the public health emergency is proclaimed unless the Governor expressly extends the proclamation for an additional 14-day period.”

A review of the second statutory scheme, the General Emergency Law system, shows that it generally contemplates emergencies such as floods, storms, and forest fires. There is no indication in the General Emergency Law that it was designed with a public health emergency in mind other than a reference to “disease” in ORS 401.025. The General Emergency Law has zero references to “public health emergency.” The General Emergency Law does not refer to a “pandemic” or “epidemic.” On the other hand, a review of the Public Health Emergency Law reveals that it refers to “public health emergency” thirty (30) times and contemplates application of the Public Health Emergency Law to “an epidemic of communicable disease” that could result in a large number of deaths. *See* ORS 433.442(4).

The provisions of the General Emergency Law authorize complete authority over all executive agencies of state government within the area designated in the proclamation and authorize exercise of all “public powers vested in the state by the Oregon Constitution in order to *effectuate the purposes of this chapter.*” ORS 401.168(1) (emphasis added). The General Emergency Law also gives the Governor

authority to suspend the provisions of any order or rule of any state agency if the order or rule “would in any way prevent, hinder, or delay mitigation of the effects of the emergency.” ORS 401.168.

The remainder of the General Emergency Law authorizes the Governor to use state agencies and state personnel in responding to the emergency, assume control of all emergency operations in the affected area, direct rescue and salvage work, assume control of police and law enforcement activities in the affected area, close roads or highways in the affected area, designate persons to coordinate emergency relief, and require the aid and assistance of state or other public or quasi-public agencies in the performance of duties and work relating to the emergency conditions in the affected area. ORS 401.175.

The General Emergency Law also authorizes the Governor to clean and remove disaster wreckage and debris and to receive federal emergency funds. ORS 401.178. The Governor may provide temporary housing during the emergency. ORS 401.185. The Governor also has the power, under the General Emergency Law, to manage resources during the emergency. ORS 401.188.

Defendant argues that ORS 401.188(2) gives the Governor some of the powers outlined in ORS 433.441(3). (Def. Br. 21). However, Defendant omits the full text of this section of the statute:

Whenever the Governor has declared a state of emergency, the Governor may issue, amend and enforce rules and orders to:

....

(2) Prescribe and direct activities in connection with use, conservation, salvage and prevention of waste of materials, services and facilities, including, but not limited to, production, transportation, power and communication facilities training, and supply of labor, utilization of industrial plants, health and medical care, nutrition, housing, rehabilitation, education, welfare, child care, recreation, consumer protection and other essential civil needs.

ORS 401.188(2). This statute does not deal with quarantine or the restriction of movement: by its text it deals with production and supply-chain shortages.

Under the General Emergency Law, the Governor may waive the one-week waiting period for unemployment compensation. ORS 401.186. This provision, enacted in 2008, is the only statutory change to the General Emergency Law since 1983. ORS 401.165 to 401.204.

Finally, the Governor's rules and orders in a general emergency have "the full force and effect of law" and all existing laws, ordinances, rules and orders inconsistent with ORS 401.165 through 401.236 "shall be inoperative during the period of time and to the extent such inconsistencies exist." ORS 401.192(1). As we shall explain below, the Public Health Emergency Law is fully consistent with the General Emergency Law.

In fact, it extends the powers of the General Emergency Law when a public health emergency exists contemporaneously with the general emergency. But the

declaration of a public health emergency itself only exists for 28 days, whether or not a general emergency continues.

There is no provision in the General Emergency Law in regard to control of premises. The Public Health Emergency Law contains a specific provision as to this subject. ORS 433.441(3) provides:

During a public health emergency the Governor may:

. . . (d) Control or limit entry into, exit from, movement within and the occupancy of premises in any public area subject to or threatened by a public health emergency if such actions are reasonable and necessary to respond to the public health emergency.

Defendant emphasizes the interconnection between the Public Health Emergency Law and the General Emergency Law, and asserts that the lack of a time limit in the General Emergency Law, when connected to the Public Health Emergency Law, eliminates the 28-day time limit for the Public Health Emergency Law contained in ORS 433.441(5). Defendant relies on ORS 433.441(4), which provides:

Nothing in ORS 433.441 to 433.452 limits the authority of the Governor to declare a state of emergency under ORS 401.165. If a state of emergency is declared as authorized under ORS 401.165, the Governor may implement any action authorized by ORS 433.441 to 433.452. (emphasis added).

This provision establishes that the Public Health Emergency Law does not limit the “authority” of the Governor to “declare” a state of emergency under the

General Emergency Law. It does not provide that the General Emergency Law extends the 28-day time limits contained in the very next provision, Section 5.

This provision does allow the Governor, when declaring a state of emergency under the General Emergency Law, to “implement any action authorized” by the Public Health Emergency Law. But the Public Health Emergency Law actions are limited to 28 days.

This is logical. A terrible storm, flood, or fire, or other disaster, may cause an outbreak of disease, such as typhus or cholera. The recovery from the disaster may well extend beyond 28 days. This includes removal of debris, rebuilding roads and bridges, etc. But the special powers of the Public Health Emergency Law, relating to “the occurrence or imminent threat of an illness or health condition” (ORS 433.442(4)) expire after 14 days, extendable by an additional 14 days. (ORS 433.441(5)). These time limits would serve no purpose if the limits could be overridden by a declaration of a state of emergency under ORS 401.165 *et seq.*, and would result in “meaningless surplusage” within the statutory scheme. *See State v. Stamper*, 197 Or App 413, 418, 106 P3d 172, 175 (2005), rev den, 339 Or 230, 119 P3d 790 (2005).

This is confirmed by ORS 433.448(1)(a), which deals with use of the immunization registry, and which provides, in relevant part:

(1)(a) During a state of public health emergency proclaimed under ORS 433.441 or during a state of emergency declared under ORS 401.165

that is related to a state of public health emergency that has not expired, the immunization registry and tracking and recall system established under ORS 433.094 may be used as a vaccination management and tracking system... (emphasis added).

This statute clearly anticipates that a General Emergency Law situation may exist where the Public Health Emergency Law is called into play – but the powers of the Public Health Emergency Law only exist so long as the “state of public health emergency...has not expired.” This terminology is significant because the Public Health Emergency Law uses the term “expires” in ORS 433.441(5). If the Governor has not already terminated the public health emergency declaration, after 14 days (plus another 14 days if the Governor “expressly” extends the proclamation), the proclamation “expires.” *Id.*

On the other hand, upon declaration of an emergency under the General Emergency Law, the state of emergency does not “expire.” Rather, the General Emergency Law provides for *termination* of the state of emergency; ORS 401.204 provides:

- (1) The Governor shall terminate the state of emergency by proclamation when the emergency no longer exists, or when the threat of an emergency has passed.
- (2) The state of emergency proclaimed by the Governor may be terminated at any time by joint resolution of the Legislative Assembly.

The General Emergency Law and the Public Health Emergency Law overlap, and in the area of the overlap, they relate to the issue as to how to handle a public health emergency. In construing these two statutory systems, each system should be

construed so as to produce a harmonious whole, to the extent possible. *See Cal-Roof Wholesale, Inc., v. State Tax Commission*, 242 Or 435, 410 P2d 233 (1966). Intervenor's analysis of these two statutory systems and the time limits on the exercise of the Governor's emergency powers produces a harmonious result, as presented above. Should this Court find a conflict between the time limits contained in the Public Health Emergency Law as opposed to the no-time-limits aspect of the General Emergency Law, the more particular, special, and specific provisions of the Public Health Emergency Law should take precedence over those of the General Emergency Law, which are general in their terms. *See Colby v. Larson*, 208 Or 121, 297 P2d 1073, rehearing denied, 208 Or 121, 299 P2d 1076 (1956); *See also Hansen v. Abrasive Engineering and Mfg., Inc.*, 317 Or 378, 856 P2d 625 (1993).

If one steps back and takes a look at the provisions of the Public Health Emergency Law as opposed to the provisions of the General Emergency Law, the overlap becomes apparent. The question is whether or not the overlap means that the General Emergency Law trumps the time limitations as to the Public Health Emergency Law. This is not the case.

The provisions of the General Emergency Law do not parallel the provisions of the Public Health Emergency Law when it comes to connectivity. The General Emergency Law provides that, when an element of the general emergency involves invoking the Public Health Emergency Law, the Public Health Emergency Law may

be invoked within the General Emergency Law. But it is clear from the legislative language, discussed above, that those provisions are a package which is carried into the General Emergency Law, and that package still contains the 28-day time limitation as to the unique powers allowed to the Governor under the Public Health Emergency Law. The Executive Orders issued by the Governor in regard to the coronavirus pandemic cite the General Emergency Law as their authority base, and often cite the Public Health Emergency Law as their authority base. But all of the activity relating to the coronavirus pandemic has to do with communicable disease as defined under ORS Chapter 431A as well as under ORS 433.441 *et seq.* There is no indication in the Executive Orders of the Governor that the Governor is addressing other kinds of emergencies, such as fires, floods, or storms – or even earthquakes and volcanic eruptions.

So, the specific powers of the General Emergency Law may be available to carry out the Public Health Emergency Law – but they do not act to extend the 28-day expiration date in the Public Health Emergency Law.

Intervenors note Defendant's assert that a distinction exists between authorization for a "proclamation" and action taken as authorized by the proclamation. Defendant contends that the expiration of the authorization for a "proclamation" does not prevent continued actions pursuant to the proclamation,

even when the legal authorization of the proclamation has expired. (def. Br. 23-24).

To state the proposition is to refute it.

E. The Legislative History of the Laws in Issue Supports Intervenors' Interpretation

Intervenors resubmit their legislative history arguments made in Intervenors' Memorandum. (Intervenors Memorandum 26-33). Intervenors now respond to Defendant's arguments regarding legislative history. Defendant states the legislature intended for ORS Chapter 433 "to supplement" the Governor's emergency power under ORS Chapter 401 before "a chapter 401 emergency exists." (Def. Br. 31). Defendant also contends that the 28-day time limit is only for an impending public health crisis. (Def. Br. 30). Defendant cites extensively to the 2003 legislation (HB 2251 (2003)) to support these conclusions. (Def. Br. 26-31). However, the key piece of legislative history here is the 2007 legislation. HB 2185 (2007), enacted as Oregon Laws 2007, Chapter 445. The 2007 legislative history shows that ORS Chapter 433 governs in a public health emergency and ORS Chapter 401 exists to supplement a public health emergency. The 28-day limit applies to any public health emergency, not just an impending public health crisis.

Defendant acknowledges a key piece legislative history: "The 2007 [amendments to ORS 433.441] replaced the term 'impending public health crisis' with 'public health emergency.'" (Def. Br. 29). Defendant further acknowledges additional substantive legislative changes in 2007: the addition of "the express

gubernatorial powers that appear in ORS 4[3]3.441(3).” (Def. Br. 29). However, according to Defendant, the 2007 changes, “demonstrate[] that the legislature intended to give the Governor a set of tools to deal with public health emergencies that did not necessarily warrant [an ORS Chapter] 401 declaration.” (Def. Br. 30).

The 2003 version of the law should be given little weight today. Intervenors previously addressed the weight of the 2003 amendments and the legislative history of the 2003 amendments. (Intervenors’ Memorandum 28-29). The legislature significantly altered ORS Chapter 433 in 2007, particularly with regard to the use of the phrase “impending public health crisis” versus “public health emergency.” *See* HB 2185 (2007); HB 2251 (2003). Thus, the 2003 legislative history cited by Defendant, about the impending public health crisis, should be given little weight today when interpreting the current law. Defendant states: “The purpose of this law was to allow the state to take certain actions in a public health crisis *before* they reached the level of [an ORS Chapter] 401 emergency.” (Def. Br. 26) (emphasis in original). Whatever the 2003 law meant, the 2007 legislation was crafted to respond to a public health emergency, whether impending or active.

Defendant’s own contention about ORS 433.441(3) is important to that conclusion. (Def. Br. 29). These were the express gubernatorial powers that were added in 2007. These powers were addressed earlier in this brief in the context of examining the interplay between ORS Chapter 401 and ORS Chapter 433. However,

Intervenors submit them here to note the extensive changes made in 2007. HB 2185, §23(3) (2007). Intervenors also reference the entirety of HB 2185 to note the extensive changes made in 2007. *See* HB 2185 (2007); (Intervenors' Memorandum 28-33).

Intervenors now turn to the legislative history on the interplay between ORS Chapter 401 and ORS Chapter 433. The context and surrounding events of a public health emergency are important. The interplay of ORS Chapter 401 and ORS Chapter 433 occurs when there is an ORS Chapter 401 event and a public health emergency (for example, an earthquake causing a disease outbreak resulting from sewage exposure). This is supported by the 2007 legislative history Defendant cites to:

These are for situations where less than a full declaration of emergency is needed. Even with the anthrax events, which involved *a very large number of people*, it remained *a health and medical issue*, not a widespread community *infrastructure* issue, and governors and mayors did not make declarations of emergency in that event. Similarly with SARS, with monkey pox, and others.

See also (Def. Br. 30) (quoting Dr. Susan Allan, then State Public Health Director). Defendant omits a key element of Dr. Allan's testimony, which is her opening statement:

I appreciate very much the opportunity to come talk about this bill, which we believe will help move the emergency preparedness for the State of Oregon considerably forward, especially with respect to our ability to address the health, public health, and medical aspects of an emergency.

Audio Testimony, Joint Committee on Emergency Preparedness and Ocean Policy, HB 2185, Mar. 2, 2007, at 8:57-9:20 (Dr. Susan Allan), http://oregon.granicus.com/MediaPlayer.php?clip_id=18016 (accessed Jun. 1, 2020) (emphasis added). Further, Defendant omits Dr. Allan’s written testimony:

If something does happen – a pandemic, a “SARS II” outbreak, a chemical accident resulting in the release of a large toxic cloud sweeping across a city – we want to have the tools in place to do the best we can, to respond quickly and clearly, to protect people and to save lives.

Exhibit A, Joint Committee on Emergency Preparedness and Ocean Policy, HB 2185, Mar. 2, 2007 (accompanying statement of Dr. Allan).

The written testimony is instructive: the coronavirus pandemic is exactly the type of pandemic contemplated by the 2007 amendments to ORS Chapter 433. HB 2185 was designed to address the health and medical aspects of such a pandemic. The coronavirus pandemic is largely a health and medical issue, and not a disease outbreak in conjunction with a larger emergency such as an earthquake. The coronavirus is not a widespread community infrastructure issue that would result from an earthquake, flood, or fire. The coronavirus pandemic is exactly the emergency scenario which ORS Chapter 433 was designed to govern.

Defendant’s argument that the legislative history supports a conclusion that Chapter 433 is intended to supplement Chapter 401 is backwards. Dr. Allan

discussed the interplay between ORS Chapter 401 and ORS Chapter 433 on April 24, 2007. The 2007 amendment, in the legislative process, took out a provision that allowed the Governor to take over hospitals. Audio Testimony, Joint Committee on Emergency Preparedness and Ocean Policy, HB 2185 Apr. 24, 2007 at 1:31:05-1:33:00 http://oregon.granicus.com/MediaPlayer.php?clip_id=16806 (accessed Jun. 1, 2020). During this testimony, it was discussed as to whether the Governor still had that authority absent the bill. *Id.* Dr. Allan posited that the Governor may still have that power under ORS Chapter 401 and that the 2007 amendment did not “erase that power.” *Id.* This testimony by Dr. Allan is instructive: in a public health emergency ORS Chapter 433 controls and ORS Chapter 401 is the supplement. Defendant is correct to point out the interplay between ORS Chapter 401 and ORS Chapter 433, Defendant just has the interplay reversed.

Defendant argues the 28-day limit’s meaning did not change in 2007 (Def. Br. 28). Intervenors resubmit previously submitted legislative history to interpret the time limit provision’s meaning. (Intervenors’ Memorandum 28-29). However, Intervenors make an additional point about the 2007 changes. There was a crucial change in 2007: the replacement of “impending public health crisis” with “public health emergency.” Defendant argues that this change caused no “change in the meaning of the 14-day time limit.” (Def. Br. 30). If the legislature intended this result, “impending public health crisis” would not have been replaced with “public

health emergency.” Thus, the meaning of the time limit provision changed in 2007 to focus on an ongoing public health emergency, not just an impending public health crisis.

As discussed, the key piece of legislative history here involves the 2007 changes. The 2007 legislative history shows that ORS Chapter 433 governs in a public health emergency and ORS Chapter 401 exists to supplement a public health emergency. The 28-day limit applies to any public health emergency and the 2007 changes were crucial to this conclusion.

F. If the Coronavirus Pandemic Were Even Worse, the Governor’s Powers Would Expire in 30 Days Absent Legislative Action

Article X-A of the Oregon Constitution delegates extraordinary powers to the Governor to address a “catastrophic disaster.” Notably, even in the event of a catastrophic disaster, the powers delegated to the Governor only exist for 30 days from the Governor’s initial declaration of a catastrophic disaster. That 30-day time limit on the powers delegated through the Oregon Constitution can then be extended by approval of three-fifths of House and Senate Members who are able to participate in a vote.

Article X-A was referred to a vote of the people by the Oregon Legislative Assembly during the 2011 Legislative Session. HJR 7 (2011). This amendment to the Oregon Constitution, referred by the legislature and approved by Oregon voters, further demonstrates the intent to place a time limit on the Governor’s extraordinary

police powers when addressing emergencies such as catastrophic disasters and public health emergencies.

G. The Executive Orders Impose Shutdowns and Restrictions Which Cause Irreparable Harm to Oregonians

The Governor's arbitrary exercise of delegated power has inflicted irreparable harm on Intervenors and all Oregonians. The eleven Intervenors in this case unfortunately showcase the irreparable harm being felt by many throughout the state.

Intervenors have provided substantial briefing regarding the continuing harms felt by intervenors and Oregonians. (Intervenors' Memorandum at 31-46). Recognizing the severity of these harms, the Circuit Court properly issued a preliminary injunction on the Governor's Executive Orders addressing the coronavirus pandemic. While some restrictions on Oregonians may be necessary to address the coronavirus pandemic, these tools are available under ORS Chapter 431A, as discussed above. The Governor has failed to properly exercise the unique extraordinary powers of ORS Chapter 433 delegated by the legislature to address the coronavirus public health emergency. Intervenors and all Oregonians are subjected to a legal harm that will continue until the judicial branch requires that the Governor comply with Oregon law.

Defendant and Amicus Curiae parties appearing in support of defendant improperly argue that science demonstrates the preliminary injunction ordered by the trial court will create a harm greater than the harm it seeks to avoid. As

Intervenors argued in Intervenors' Memorandum, this case is about law and the legally recognizable harms experienced by Intervenors and Oregonians as a result of the Governor's failure to obey legal restrictions as to the time limit imposing unique, extraordinary powers while addressing the coronavirus public health emergency. (Intervenors' Memorandum 50-53). When science and data support executive action, the law (in this case ORS 433.441) provides the procedure and time limits under which the Governor can appropriately exercise police powers.

With the preliminary injunction in place, the Governor may still engage in a wide range of action pursuant to Oregon laws, including ORS Chapter 431A. But the Governor can no longer enforce the unique, extraordinary powers – especially the closure powers – of ORS 433.441(3).

CONCLUSION

The Circuit Court did not abuse its discretion in granting the preliminary injunction and denying the motion to dismiss.

Accordingly, the Defendant's Petition should be denied.

Respectfully submitted,

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APPENDIX



EXECUTIVE ORDER NO. 09 - 17

GRANTING STATE PUBLIC HEALTH DIRECTOR ADDITIONAL AUTHORITY TO RESPOND TO PANDEMIC H1N1 INFLUENZA

Pandemic H1N1 influenza (once referred to as "swine flu"), a new flu virus that causes respiratory illness in people, is widespread throughout Oregon.

The Centers for Disease Control and Prevention (CDC) first detected the H1N1 virus in the United States in April 2009. In June 2009, the World Health Organization (WHO) declared that an H1N1 pandemic is underway, which means this infectious disease is spreading among people throughout the world.

On October 24, 2009, President Obama signed a National Emergency Declaration on H1N1. The National Emergency Declaration on H1N1 allows healthcare systems to quickly implement disaster plans should they become overwhelmed, by applying for and obtaining federal waivers under the Social Security Act. To date, within Oregon, Josephine County has declared a state of emergency due to H1N1. Since September 1, 2009, Oregon has experienced 745 hospitalizations and 20 deaths as a result of H1N1 influenza.

In Oregon, the Department of Human Services (DHS) Public Health Division is leading the State's response to pandemic H1N1 flu. Since September 1, 2009, the Public Health Division has consulted with counties regarding ten presumed H1N1 outbreaks, and responded to approximately thirty other calls from county health departments related to H1N1. The Division has also worked to fill county and tribal orders for medication and personal protective equipment, providing approximately 4,240 courses of antiviral medications, 129,091 N95 face masks, 141,000 surgical masks, 810 gowns, 9,700 gloves, and 1,716 face shields.

As this situation develops, the Public Health Division is working to share information about pandemic H1N1, promote influenza vaccinations, and support Oregon's healthcare system. This Order provides the Public Health Director with additional authority to respond proactively to pandemic H1N1 influenza, as the disease spreads.

Oregon's tribal and local governments play crucial public health roles, and have the ability to take swift action at a local level. This Order directs DHS to work with tribal and local governments to fully implement an H1N1 influenza response. Local governments have independent power to initiate quarantines and isolate individuals with communicable pandemic H1N1 influenza as needs require.



EXECUTIVE ORDER NO. 09 - 17

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NOW THEREFORE, IT IS HEREBY DIRECTED AND ORDERED:

1. Pursuant to ORS 431.264(1), the Public Health Director has found that a communicable disease, pandemic H1N1 influenza, is reported in Oregon, is an issue of significant regional and national concern, and is an issue for which there is significant involvement from federal authorities requiring state-federal coordination.
2. Accordingly, I hereby authorize the Public Health Director, to take any of the public health actions outlined in ORS 431.264(2), as needed, to proactively implement Oregon's public health response to pandemic H1N1 influenza. These actions include, but are not limited to:
 - a. Coordinating the public health response across jurisdictions.
 - b. Prescribing measures for the:
 - i. Identification, assessment and control of the communicable disease or reportable disease, disease outbreak, epidemic or other condition of public health importance; and
 - ii. Allocation and distribution of antitoxins, serums, vaccines, immunizing agents, antibiotics, antidotes and other pharmaceutical agents, medical supplies or personal protective equipment.
 - c. After consultation with appropriate medical experts, creating and requiring the use of diagnostic and treatment guidelines and provide notice of those guidelines to health care providers, institutions and facilities.
 - d. Directing a person to use appropriate prophylactic measures to prevent the introduction or spread of pandemic H1N1 influenza, with certain exceptions.
 - e. Directing a district school board to close a children's facility or school under the jurisdiction of the board.
 - f. Issuing guidelines for private businesses regarding appropriate work restrictions.
 - g. Organizing public information activities regarding the public health response to pandemic H1N1 influenza.
 - h. Adopting reporting requirements for, and providing notice of those reporting requirements to, health care providers, institutions and facilities for the purpose of obtaining information directly related to pandemic H1N1 influenza.

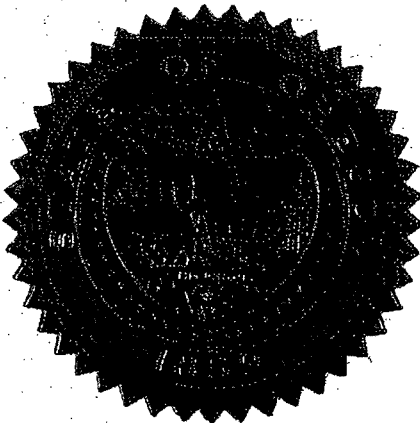


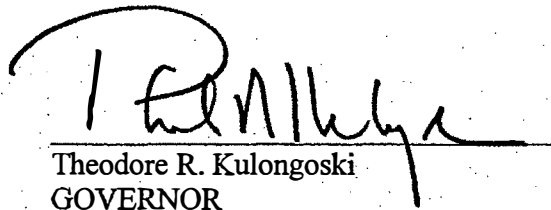


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PAGE THREE

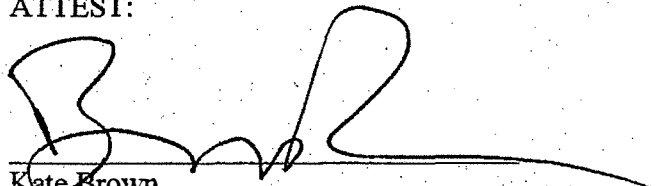
- i. Taking control of antitoxins, serums, vaccines, immunizing agents, antibiotics, antidotes and other pharmaceutical agents, medical supplies or personal protective equipment.
3. DHS Public Health Division shall continue to promptly respond to tribal and local governments' specific requests for additional technical support, staffing, equipment, and medications, with information and support as needed. Specific county and tribal requests may include but are not limited to requests for antiviral medications, N95 face masks, surgical masks, gowns, gloves, and face shields.
4. This Order expires on July 1, 2010.

Done on this 4th day of November, 2009, in Salem, Oregon




Theodore R. Kulongoski
GOVERNOR

ATTEST:


Kate Brown
SECRETARY OF STATE



**CERTIFICATE OF COMPLAINE WITH BRIEF LENGTH
AND TYPE REQUIREMENTS**

I hereby certify that (1) this brief complies with the word-count limitation set forth in ORAP 9.05(3)(a); and (2) the word count for this brief is 8,152. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(1)(d)(ii) and ORAP 5.05(3)(b)(ii).

DATED: June 2, 2020

KEVIN L. MANNIX, P.C.

/s/ Kevin L. Mannix

Kevin L. Mannix

OSB No. 742021

kevin@mannixlawfirm.com

Attorney for Intervenors-Adverse Parties

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on June 2, 2020, I filed the original of this RESPONSE BRIEF OF INTERVENORS-ADVERSE PARTIES via electronic filing through the court's e-filing system at the following address:

Appellate Court Administrator
ATTN: Records Section
Oregon Court of Appeals
1163 State Street
Salem, OR 97301-2563

I further certify that on June 2, 2020, I electronically served copies of the brief on Benjamin Gutman (Attorney for Defendant-Relator), Ray D. Hacke (Attorney for Plaintiffs-Adverse Parties), Thomas K. Doyle/Aruna A. Masih (Attorneys for Amicus Curiae Oregon Nurses Association), and Luke Miller (Attorney for New Civil Liberties Alliance). I further certify that on June 2, 2020, I served two copies of the brief on the Honorable Matthew B. Shirtcliff by placing two copies in the U.S. Mail, postage prepaid, addressed to:

The Honorable Matthew B. Shirtcliff #0944368
Baker County Circuit Court
1995 3rd Street, Suite 220
Baker City, OR 97814

I declare under penalty of perjury under the laws of the State of Oregon that the above is true and correct.

/s/ Kevin L. Mannix
Kevin L. Mannix