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3  
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF BAKER

6 ELKHORN BAPTIST CHURCH, An  
7 Oregon Non-Profit Corporation, *et al.*,

8  
9 Plaintiffs,

10 v.

11 KATHERINE BROWN, Governor of  
12 the State of Oregon; and DOES 1  
13 THROUGH 50, Inclusive,

14 Defendants.

Case No. 20CV17482

INTERVENORS-PLAINTIFFS'  
MEMORANDUM OF POINTS AND  
AUTHORITIES

15 1.

16 Intervenor-Plaintiffs Bill Harvey, et al., (hereinafter "Intervenors"), support the arguments  
17 presented by Plaintiffs in this matter, and add the following Points and Authorities in support of  
18 our claims for relief.

19 2.

20 The nineteen (19) Executive Orders, issued by the Governor, which are contested as to  
21 their current enforceability, are included as an Exhibit set in the Intervenors' Proposed Intervention  
22 Complaint. This will not be duplicated here. Kevin L. Mannix, attorney for Intervenors, has  
prepared his own synopsis of Governor Kate Brown's Executive Orders relating to the coronavirus

1 – INTERVENORS-PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES

1 pandemic. This is attached hereto as background information, from our perspective, as part of our  
2 argument herein. Exhibit 1.

3 3.

4 **The Governor's Executive Orders Themselves Demonstrate that the Coronavirus**  
5 **Pandemic is a Catastrophic Disaster for Oregon.**

6 The public health emergency which constitutes the coronavirus pandemic is harmful and  
7 dangerous, as is evident to people throughout the United States and the world. The actions taken  
8 by the Governor in her Executive Orders themselves reflect an overwhelming economic, social,  
9 and education impact on the people of the state of Oregon. The overall circumstances must  
10 constitute a catastrophic disaster as defined in Article X-A of the Oregon Constitution.

11 4.

12 The following is a list of many of the extraordinary steps taken by the Governor through  
13 her 19 Executive Orders:

14 (a) Prohibiting large social, spiritual, and recreational gatherings of 250 people or more  
15 statewide. Executive Order 20-05.

16 (b) Prohibiting on-premises consumption of food and drink at food and drink establishments;  
17 prohibiting gatherings of 25 people or more. Executive Order 20-07.

18 (c) Closing all public schools; authorizing the Early Learning System Director to establish  
19 requirements for emergency childcare. Executive Order 20-08.

20 (d) Closing all colleges and universities. Executive Order 20-09.

21 ///

22 ///

2 – INTERVENORS-PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES

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1 (e) Canceling all elective and non-urgent medical procedures that use personal protective  
2 equipment (PPE), requiring that they be fully canceled or rescheduled no earlier than June 15,  
3 2020; providing that industries that use PPE are strongly encouraged to cancel or postpone  
4 non-essential use of PPE; prohibiting non-essential visitors to medical facilities. Executive  
5 Order 20-10.

6 (f) Ordering a moratorium on residential evictions. Executive Order 20-11.

7 (g) Ordering Oregonians to stay home, including restrictions on social gatherings unless 6 feet  
8 of social distance can be maintained, and prohibiting the patronization of closed businesses;  
9 closing most businesses; requiring social distancing for certain retail businesses; imposing  
10 workplace restrictions; closing government buildings to the public except for limited  
11 circumstances; requiring that child care providers must close if they cannot maintain stable  
12 groups of 10 or less children in a classroom, that cannot be accessed by other children outside  
13 the group; requiring that child care must be prioritized for certain special groups; closing all  
14 public recreational areas and parks; restricting travel to essential travel. Executive Order  
15 20-12.

16 (h) Prohibiting landlords from terminating rental agreements or evicting tenants for non-  
17 payment. Executive Order 20-13.

18 (i) Changing the requirements for public meetings at all levels of government and moving those  
19 public meetings online. Executive Order 20-16.

20 (j) Prohibiting garnishment of CARES Act recovery rebates except in limited circumstances.  
21 Executive Order 20-18.

22 ///

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1 (k) Requiring that childcare facilities remain closed unless they are approved by or able to  
2 comply with Early Learning Division standards. Executive Order 20-19.

3 (l) Prohibiting in-person classroom instruction, completely. Executive Order 20-20.

4 (m) Prohibiting non-essential visitors to medical facilities and requiring that essential visitors  
5 be screened; selectively allowing certain elective and non-urgent procedures to proceed if they  
6 can comply with rules issued by the Oregon Health Authority. Executive Order 20-21.

7 5.

8 **The Governor’s Executive Orders Are Not Only Draconian In and Of Themselves But**  
9 **Contain Significant Criminal Penalties for Violations of Her Orders**

10 Eleven of the 19 Executive Orders issued by the Governor relating to the coronavirus  
11 pandemic specifically refer to enforcement under the provisions of ORS 401.192 (1). This statute  
12 provides, in pertinent part:

13 “(1) All rules and orders issued under authority conferred by ORS 401.165 to 401.236 shall  
14 have the full force and effect of law both during and after the declaration of a state of  
15 emergency. All existing laws, ordinances, rules and orders inconsistent with ORS 401.165 to  
16 401.236 shall be inoperative during the period of time and to the extent such inconsistencies  
17 exist.”

18 6.

19 This extraordinary conferring of power by statute is compounded by ORS 409.192 (4),  
20 which allows certain powers granted to the Governor by the state of emergency statutes in ORS  
21 401.165 to 401.236 to continue until termination of the state of emergency. ORS 401.193 (4) also  
22 provides that the powers granted to the Governor by ORS 401.185 “may continue beyond the

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1 termination of the state of emergency and shall be terminated by proclamation of the Governor or  
2 by joint resolution of the Legislative Assembly.”

3 7.

4 This statutory language has its origin in a 1949 statute which defined the Governor’s  
5 powers in a state of emergency. Chapter 573, Oregon Laws 1949. But this statutory scheme  
6 contains its own limitations, which appear to be ignored by the Governor. For example, ORS  
7 401.165 (5) specifically provides:

8 “Any proclamation of a state of emergency must specify the  
9 geographical area covered by the proclamation. Such area shall be  
no larger than necessary to effectively respond to the emergency.”

10 8.

11 The Governor’s Executive Orders relating to the coronavirus pandemic repeatedly declare  
12 that they are imposed statewide. Nowhere does the Governor explain what areas need to be covered  
13 to effectively respond to this emergency. The Governor’s Executive Orders do not recognize that  
14 13 of Oregon’s 36 counties only have, as of May 8, 2020, 26 coronavirus cases among them. These  
15 13 counties have zero deaths. Three of these 13 counties have zero coronavirus positive findings.  
16 Six of these 13 counties have only one coronavirus positive finding, each. The 13 counties are  
17 Baker, Crook, Curry, Gilliam, Grant, Harvey, Lake, Lincoln, Sherman, Tillamook, Union,  
18 Wallowa, and Wheeler. This is documented in the Oregon Health Authority report issued May 8,  
19 2020. Exhibit 2. So, if the Governor is relying on ORS 401.165 et seq., her Executive Orders fail  
20 to address the geographic areas which should be subject to her directives.

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22 ///

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1 9.

2 More significantly, the Governor's orders violate Article X-A of the Oregon Constitution,  
3 which sets a 30 day limit on her capability to exercise such extraordinary powers. Our point is that  
4 Article X-A has already caused the Governor's Executive Orders to be null and void and  
5 unenforceable; if any part of them could have been saved by reference to ORS 401.165, the  
6 Governor should have specifically defined the geographic areas necessary to effectively respond  
7 to a particular emergency.

8 10.

9 Another dramatic demonstration of the impact of the Governor's Executive Orders is the  
10 reference to ORS 401.990 in seven of the Executive Orders, which happen to be Executive Orders  
11 which are most directly aimed at the people of Oregon. These seven Executive Orders are  
12 Executive Orders 20-05, 20-07, 20-10, 20-11, 20-12, 20-13, and 20-22. The Governor's reference  
13 to enforcement under ORS 401.990 in these Executive Orders might seem to be benign -- until one  
14 reads the statute. ORS 401.990 reads:

15 "Any person knowingly violating any provision of this chapter  
16 [Chapter 401], or any of the rules, regulations or orders adopted and  
promulgated under this chapter, shall, upon conviction thereof, be  
guilty of a Class C Misdemeanor."

17 11.

18 The penalties for a Class C Misdemeanor are significant. A person convicted of a Class C  
19 Misdemeanor can be sentenced to a term of imprisonment of up to 30 days. ORS 161.615 (3). A  
20 person convicted of a Class C Misdemeanor may also be sentenced to pay a fine in an amount up  
21 to \$1,250. ORS 161.635 (1)(c).

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12.

So, if the Governor is unhappy that someone has dared to educate a child in a school; dared to go outside his or her home; dared to go into a public park; dared to travel for other than medical services, essential work, or grocery shopping; dared to go into a retail business which is supposed to be closed; dared to operate a business closed by order of the Governor; and so forth, such person can be put in jail for up to 30 days and can be fined up to \$1,250. This, of course, is for each offense. The extraordinary criminal power of the State can be imposed as the Governor directs under her Executive Orders issued in regard to the coronavirus pandemic.

13.

One wonders how these things could happen in a seemingly free democratic society. The answer is that these things are not supposed to happen in the free state of Oregon, based on Article X-A of the Oregon Constitution. Article X-A is a great protector of the people, adopted by the people upon referral to the people by the Legislative Assembly.

14.

Article X-A of the Oregon Constitution was referred to a vote of the people by the Oregon Legislative Assembly during the 2011 Legislative Session. The referral came by way of House Joint Resolution (HJR 7), which was adopted by the Senate with a vote of 30 in favor and 0 against. The House of Representatives adopted HJR-7, as amended by the Senate, by a vote of 57 in favor and 3 against. House Joint Resolution 7, Oregon Laws 2011. The proposed constitutional amendment in HJR-7 was put on the ballot for November 6, 2012 as Measure 77. Oregon voters voted in favor of Measure 77 with 957,646 votes in favor (58.71%) and 673,468 votes against (41.29%). Oregon Secretary of State Blue Book, report on Ballot Measures.

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1 15.

2 According to the Secretary of State Voters' Pamphlet reports, the Ballot Title for  
3 Measure 77 reads:

4 Amends Constitution: Governor May Declare "Catastrophic  
5 Disaster" (defined); requires legislative session; authorizes  
6 suspending specified constitutional spending restrictions.

6 16.

7 The Legislature presented a Legislative Argument in Support of the Measure. There were  
8 no other arguments presented, in favor or in opposition. *Id.* This Measure was designed to address  
9 a major issue – how to handle a major modern disaster. It provides the definitive road map.

10 17.

#### 11 **Analysis of Article X-A**

12 In her Executive Orders relating to the coronavirus pandemic, Governor Kate Brown cites  
13 and relies upon ORS 401.165, *et seq.* This statutory scheme first became law in 1949. Chapter  
14 573, Or Laws 1949. This statutory scheme is now circumscribed by the Oregon Constitution as to  
15 any public health emergency which is so extensive as to constitute a "catastrophic disaster."

16 18.

17 Article X-A provides, in Sections 1 and 2, as follows:

18 ///

19 ///

20 ///

21 ///

22 ///



1  
2 “(1) As used in this Article, ‘catastrophic disaster’ means a natural or human-caused event that:

3 (a) Results in extraordinary levels of death, injury, property  
4 damage or disruption of daily life in this state; and

5 (b) Severely affects the population, infrastructure, environment,  
6 economy or government functioning of this state.

7 “(2) As used in this Article, ‘catastrophic disaster’ includes, but is not  
8 limited to, any of the following events if the event meets the criteria  
9 listed in subsection (1) of this section: ...

10 (d) Public health emergency... ”

11 19.

12 Next, Article X-A, Section 1, parts 3 to 5, provide:

13 (3) The Governor may invoke the provisions of this Article if the Governor finds  
14 and declares that a catastrophic disaster has occurred. A finding required by this  
15 subsection shall specify the nature of the catastrophic disaster.

16 (4) At the time the Governor invokes the provisions of this Article under  
17 subsection (3) of this section, the Governor shall issue a proclamation convening  
18 the Legislative Assembly under section 12, Article V of this Constitution, unless:  
19

20 (a) The Legislative Assembly is in session at the time the catastrophic disaster is  
21 declared; or  
22

23 (b) The Legislative Assembly is scheduled to convene in regular session within 30  
24 days  
25 after the date the catastrophic disaster is declared.  
26

27 (5) If the Governor declares that a catastrophic disaster has occurred, the  
28 Governor shall manage the immediate response to the disaster. The actions of the  
29 Legislative Assembly under sections 3 and 4 of this Article are limited to actions  
30 necessary to implement the Governor’s immediate response to the disaster and to  
31 actions necessary to aid recovery from the disaster.”  
32  
33

20.

Article X-A of the Oregon Constitution contains detailed procedural requirements for the process by which the Legislative Assembly may meet and enact necessary laws during the existence of and recovery from the catastrophic disaster. It contains extraordinary provisions in regard to changes in quorum requirements, allowance of attendance by members by electronic means, allowance of the Legislative Assembly to meet at sites other than the Capitol, etc. These provisions are in Sections 3, 4, and 5 of Article X-A.

21.

Section 6 of Article X-A limits the time frame allowed to the Governor to exercise extraordinary powers in the case of a catastrophic disaster. Section 6, subsection 1, provides that the actions taken by the Governor “once invoked, shall cease to be operative not later than 30 days following the date the Governor invoked the provisions of sections 1 to 5 of this Article, or on an earlier date recommended by the Governor and determined by the Legislative Assembly. The Governor may not recommend a date under this subsection unless the Governor finds and declares that the immediate response to the catastrophic disaster has ended.” (emphasis supplied).

22.

The only extension allowed is covered in Article X-A, (Section 6, subsection (2)), which allows the Legislative Assembly to extend the Governor’s extraordinary powers “beyond the 30-day limit upon the approval of three-fifths of the members of each house who are able to attend a session described in subsection (3) of section 3 of this Article.”

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1 23.

2 In essence, the Governor is empowered by Article X-A to take extraordinary measures to  
3 respond to a public health emergency constituting a catastrophic disaster, but her powers only exist  
4 for 30 days from the invocation of such powers and can be extended only by approval of the  
5 Legislative Assembly, which can only extend those powers beyond the 30-day limit with approval  
6 of three-fifths of House and Senate Members who are able to participate.

7 24.

8 Further, Article X-A, Section 6, subsection 5, specifically provides:

9 “The Governor may not invoke the provisions of sections 1 to 5 of this  
10 Article more than one time with respect to the same catastrophic disaster.”

11 25.

12 The Governor ignores Article X-A of the Oregon Constitution in her Executive Orders  
13 relating to the coronavirus pandemic. Instead, she relies on the current version of the vintage –  
14 1949 law granting her emergency powers, now in ORS 401.165 *et seq.* It may be that the statutory  
15 scheme cited by the Governor, ORS 401.165, *et seq.*, could be applied in a context of localized or  
16 regional short-term emergencies, but the coronavirus pandemic is, by the very terms invoked by  
17 the Governor in her Executive Orders, of such consequence that it must be a public health  
18 emergency which constitutes a catastrophic disaster. This means that the Governor’s response, in  
19 these circumstances, is limited to the invocation of Article X-A for 30 days, and to convening the  
20 Legislative Assembly to address further action to be taken (including deciding any extension of  
21 the Governor’s extraordinary powers beyond the initial 30 days).

22 ///

11 – INTERVENORS-PLAINTIFFS’ MEMORANDUM OF POINTS AND AUTHORITIES

1 26.

2 Accordingly, under the terms of Article X-A of the Oregon constitution, the Governor's  
3 extraordinary powers invoked by Executive Order 20-03 on March 8, 2020, triggered a 30-day  
4 time limit for the Governor's actions to have full force and effect, during which time the Governor  
5 should have initiated the convening of the Legislature, since it was not in session. Her powers  
6 under Article X-A expired on April 8, 2020.

7 27.

8 At this time, the Governor's Executive Orders, which have taken on the powers of new  
9 laws, should be declared to be of no effect and unenforceable as to current and ongoing activities  
10 by the people of Oregon. The Governor has the opportunity and power to call a special session of  
11 the Legislative Assembly under Article V, Section 12 of the Oregon Constitution, to call upon the  
12 representatives of the people to enact appropriate legislation to address the coronavirus pandemic.  
13 The Governor might issue advisory guidelines. But the Governor no longer has any extraordinary  
14 powers to act alone to issue orders or prohibitions to the people of this state as to the coronavirus  
15 pandemic.

16 28.

17 **Freedom of Religion**

18 The complaint filed on behalf of Elkhorn Baptist Church, et al, by Attorney Ray Hacke,  
19 presents a comprehensive discussion of the violation of freedom of religion and other rights under  
20 the United States Constitution as a result of Governor Brown's Executive Orders relating to the  
21 coronavirus pandemic. We note the totality of impact of all 19 Executive Orders and ask this court  
22 to take remedial action as to all of these orders. We join the original Plaintiffs in their objections

12 – INTERVENORS-PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES

1 to the restrictions on freedom of religion and other freedoms resulting from the Governor's  
2 Executive Orders. We supplement those objections as presented above, and as follows.

3 29.

4 We need to put all of the Governor's Executive Orders in the context of the Oregon  
5 Constitution. Earlier in this document we discussed the specific requirements of Article X-A of  
6 the Oregon Constitution, which have been absolutely and completely ignored by the Governor in  
7 issuing her Executive Orders. As to religious freedom, we simply note the language of Article I,  
8 Section 2 of the Oregon Constitution:

9 "All men shall be secure in the Natural Right, to worship Almighty  
10 God according to the dictates of their own consciences."

11 30.

12 We also need to keep in mind the Executive Branch powers defined in the Constitution,  
13 which contains the following specific authorization and constraint upon the Governor in Article  
14 V, Section 10:

15 "He shall take care that the Laws be faithfully executed."

16 31.

17 The faithful execution of the laws includes obeying the protocols and procedures established by  
18 Article X-A of the Oregon Constitution, which was adopted in November 2012 and which  
19 circumscribes the 1949 emergency declaration statute, as modified over the years.

20 32.

21 None of the statutory schemes relied upon by the Governor in her Executive Orders – ORS  
22 401.165 *et seq.* and ORS 443.441 *et seq.* – can be read, applied, or executed without recognition

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1 of the freedom of religion terms of Article I, Section 2 and the Article V, Section 10 obligation of  
2 the Governor to see that the laws, including constitutional provisions, be faithfully executed as  
3 provided in Article 5, Section 10. Now we also have the protections of Article X-A of the  
4 Constitution, which the Governor must also “faithfully execute.”

5 33.

6 When one examines the dramatic breadth and depth of the orders imposed by the Governor  
7 on the people of Oregon – not just government agencies but every man, woman, and child  
8 throughout the entire state – one needs to understand that the nature of the coronavirus pandemic  
9 and the response to it can only be defined as a “catastrophic disaster.” The Governor can only  
10 exercise the kind of extraordinary powers and make the extraordinary demands listed in the above  
11 Executive Orders in a “catastrophic disaster” situation.

12 34.

13 In its totality, the coronavirus pandemic and its effect on society is clearly a natural event  
14 that results in extraordinary levels of death, injury, property damage, or disruption of daily life in  
15 the state, and which severely affects the population, infrastructure, environment, economy, or  
16 government functioning of the state. The coronavirus pandemic also certainly constitutes a public  
17 health emergency. All of this is classically included in the provisions of Article X-A, Sections 1  
18 and 2 of the Oregon Constitution. If the circumstances confronting Oregon society relating to the  
19 coronavirus pandemic do not constitute a catastrophic disaster relating to a public health  
20 emergency, when could a public health emergency constituting a catastrophic disaster ever occur?

21 ///

22 ///

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1 35.

2 With this in mind, we recognize that the Governor had a 30-day window to take  
3 extraordinary measures in these circumstances. But within that 30-day window she was also  
4 obligated to convene the Legislative Assembly or see her powers end on the 30<sup>th</sup> day. She has not  
5 convened the Legislative Assembly so her extraordinary powers to address this public health  
6 emergency through Executive Orders have terminated. Her only solution at this time is to call a  
7 Special Session of the Oregon Legislative Assembly so that the elected representatives of all the  
8 people may come together to address the coronavirus pandemic and how this state should respond  
9 to it. The Governor has the power, under Article V, Section 12 of the Oregon Constitution to take  
10 such action:

11 “He may on extraordinary occasions convene the Legislative Assembly  
12 by proclamation, and shall state to both Houses when assembled, the  
13 purpose for which they shall have been convened.”

14 36.

15 This is what the Governor must do now if the Governor wishes to see any other  
16 extraordinary action taken in regard to the coronavirus pandemic.

17 37.

18 **The Governor’s Statutory Authority for Public Health Emergencies is Limited**

19 Separate from the provisions in the Oregon Constitution, in Article X-A, Oregon has two  
20 statutory systems in place in regard to emergencies. One set of statutes relates to a public health  
21 emergency, among other public health issues, and it is contained in ORS 433.441 through 433-

1 466. This statutory scheme includes a clear definition of “public health emergency.” ORS  
2 433.442(4) provides as follows:

3 “ ‘Public Health Emergency’ means an occurrence or imminent threat of an illness or health  
4 condition that:

5 (a) Is believed to be caused any of the following:

6 ... (C) an epidemic of communicable disease... and

7 (b) poses a high probability of any of the following harms:

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

9 (B) A large number of serious or long-term disabilities in the affected population; or

10 (C) Widespread exposure to an infectious or toxic agent that poses a significant risk of  
11 substantial future harm to a large number of persons in the affected population.”

12 38.

13 The availability of the public health emergency powers provided in this set of statutes is  
14 limited in terms of geography and time. Under ORS 433.441(1) the Governor may declare a state  
15 of public health emergency as authorized by ORS 433.441 to 433.452 “to protect the public  
16 health.” ORS 433.441(2) requires that a proclamation of a state of public health emergency must  
17 specify:

18 “(a) the nature of the public health emergency;

19 (b) the political subdivision or geographic area subject to the  
20 proclamation;

21 (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.”

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1 39.

2 Not only is the Governor required to specify the geographic areas subject to the  
3 proclamation but the Governor is limited in the amount of time in which the proclamation can  
4 remain in effect. ORS 433.441(5) provides:

5 “A proclamation of a state of public health emergency expires  
6 when terminated by a declaration of the Governor or no more than  
7 14 days after the date the public health emergency is proclaimed  
8 unless the Governor expressly extends the proclamation for an  
9 additional 14-day period.”

10 40.

11 To the extent that the Governor may rely on ORS 433.407 to 433.423 to justify her  
12 declaration of a public health emergency through Executive Order, that power expired 28 days  
13 after the triggering proclamation.

14 41.

15 The general state of emergency statutory scheme is found in ORS 401.165 through  
16 401.204. This is the statutory scheme which the Governor regularly cites, in addition to her citation  
17 in some of her Executive Orders to the public health emergency statutes. Under this general  
18 system, ORS 401.168(1) provides that the Governor is given “all police powers vested in the state  
19 by the Oregon Constitution in order to effectuate the purposes of this chapter.”

20 42.

21 A review of the general state of emergency statute system (ORS 401.165 through 401.204)  
shows that it generally contemplates emergencies such as floods and forest fires. There is no  
indication in this system that it was designed with a public health emergency in mind. The

1 statutory scheme which specifically addresses a public health emergency is ORS 433.441 through  
2 433.466

3 43.

4 Since the specific controls the general in terms of statutory interpretation, the specific time  
5 limitations of ORS 433.441(5) would apply to a general state of emergency declaration, under  
6 statutory power, issued by the Governor as to a public health emergency. Those statutory time  
7 limits are 14 days twice over, for a total of 28 days. ORS 433.441(5). Accordingly, if the  
8 Governor's Executive Orders relate to a public health emergency – as indeed they do – then the  
9 28 days of time limits should apply to any Executive Orders issued by the Governor.

10 44.

11 More significantly, the Governor's police powers granted under ORS 401.168(1) relate to  
12 "all police powers invested in the state by the Oregon Constitution..." This brings us back to  
13 Article X-A of the Oregon Constitution, which specifically addresses a public health emergency  
14 which constitutes a "catastrophic disaster."

15 45.

16 As noted earlier in this memorandum, the total circumstances underlying the Governor's  
17 Executive Orders, and defining her course of action, clearly constitutes a catastrophic disaster. Her  
18 actions and her Executive Orders are subject to the constraints of Article X-A of the Oregon  
19 Constitution. The Governor may have statutory authority as to a public health emergency,  
20 subservient to that constitutional provision, but the Governor does not have emergency powers,  
21 for a catastrophic disaster, outside of that constitutional provision. That constitutional provision  
22 clearly limits the Governor's extraordinary police powers to the first 30 days of the Governor's

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1 declaration of a public health emergency which constitutes a catastrophic disaster. Then, the  
2 balancing act of democracy comes in, and the Legislature must be convened to determine what  
3 next is to be done. This power is not in the hands of the Governor.

4 46.

5 If for any reason this Court decides that the coronavirus pandemic does not constitute a  
6 catastrophic disaster, triggering the powers – and time limitations – of Article X-A, then the  
7 Governor’s Executive Orders under Oregon statutes must at least relate to an ordinary (if we can  
8 use that word) public health emergency. The Governor’s powers as to an ordinary public health  
9 emergency expired after 28 days.

10 47.

11 In summary, the coronavirus pandemic is a public health emergency which constitutes a  
12 catastrophic disaster, and the powers of Article X-A of the Oregon Constitution apply. Those  
13 powers expired within 30 days of the original declaration. If this public health emergency does not  
14 constitute a catastrophic disaster, the public health emergency statutory provisions apply, and the  
15 Governor’s powers expired within 28 days of the original declaration. All the Governor can do  
16 now is issue advisory guidelines and convene the Legislative Assembly.

17 DATED: May 12, 2020.

18 /s/ Kevin L. Mannix

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# Governor Kate Brown's Executive Orders Relating to the Coronavirus Pandemic

Governor Kate Brown has issued 19 Executive Orders relating to the coronavirus pandemic between March 8, 2020 and May 1, 2020. These Orders themselves demonstrate that the Governor is addressing a public health emergency constituting a catastrophic disaster as defined in Article X-A of the Oregon Constitution.

The following is a synopsis of these 19 Executive Orders.

## **Executive Order 20-03.**

The Governor found that the novel infectious coronavirus has created a threat to public health and safety and constitutes a statewide emergency. The Governor noted that COVID-19 presents a high potential public health threat. The Governor directed the Oregon Health Authority and the State Public Health Director to take all actions necessary and authorized under state law to respond to, control, mitigate, and recover from the state of emergency, including but not limited to deploying emergency volunteer health care professionals, designating emergency health care centers, creating and requiring the use of diagnostic and treatment guidelines, and issuing guidelines for private businesses regarding appropriate work restrictions. The Order contained additional provisions authorizing agencies to take action. The Order declared that the state of emergency shall exist for 60 days from the date of the Executive Order unless extended or terminated earlier by the Governor. The Order was entered on March 8, 2020.

## **Executive Order 20-05.**

This Executive Order, entered on March 12, 2020, noted that the Oregon Health Authority had made recommendations based on which the Department of Human Services imposed restrictions and protective measures to limit visitors to long term care facilities to only essential personnel. The Order noted that the World Health Organization had announced that COVID-19 is a global pandemic. The order noted that, in order to slow the spread of the disease, and to protect Oregonians who are at highest risk for contracting the disease, the Governor found that immediate implementation of social distancing and community mitigation measures are necessary. Accordingly, the Governor prohibited large social, spiritual and recreational gatherings of 250 people or more, statewide; described the prohibited gatherings to include, but not be limited to, community, civic, public, leisure, faith-based, and sporting events, concerts, conventions, fundraisers, and any similar events or activities if a distance of at least (3) feet between individuals cannot be maintained. In that Order, the Governor directed that it did not apply to school attendance, places of employment, grocery stores, or retail stores. The Governor ordered that, beginning March 16, 2020, any person found in violation of the order is subject to the penalties described in ORS 401.990. The Order was stated to remain in effect until April 8, 2020.

**Executive Order 20-06.**

On March 17, 2020 the Governor entered a third Executive Order relating to the coronavirus pandemic. The Governor reiterated the recognition that there was a high potential public health threat to citizens of Oregon due to respiratory disease from the novel coronavirus, which has the potential to cause serious illness or loss of life. The Governor recognized that the World Health Organization had declared the pandemic a public health emergency of international concern. The Governor recognized an abnormal disruption of the market where the emergency prevented ready availability of essential consumer goods and services. Accordingly, the Governor provided that persons who believe that they had been subjected to unconscionably excessive prices for essential consumer goods due to this disruption should report that conduct to the Oregon Department of Justice. This Executive Order was designated as remaining in effect for 30 days.

**Executive Order 20-07.**

The Governor reiterated her earlier actions in Executive Orders. She stated the intent to slow the spread of COVID-19 to protect Oregonians who are at highest risk for contracting the disease, and to help avoid overwhelming local and regional health care capacity. She found that immediate implementation of social distancing and community mitigation measures are necessary. She stated an intention to reduce person to person interaction with the goal of restricting transmission. Accordingly, she ordered that restaurants, bars, taverns, brew pubs, wine bars, cafes, food courts, coffee shops, clubs, “or other similar establishments that offer food or drink” may not offer or allow on-premises consumption of food or drink. She ordered that this prohibition apply statewide.

The Governor further ordered that establishments may offer food or drink for off-premises consumption or for delivery. As to such establishments, she required that they implement social distancing protocols of at least three feet between customers ordering, waiting, or in line. She also ordered that establishments must implement similar social distancing protocols for staff, whenever possible. She allowed exemptions for health care facilities, child care facilities, work places, essential government buildings, essential emergency response facilities, essential school based food programs, and essential shelter and meal programs serving vulnerable populations.

The Governor also prohibited social, spiritual, and recreational gatherings of 25 people or more. She required that this prohibition be applied statewide. This Executive Order rescinded Executive Order 20-05, prohibiting large gatherings, and replaced it with the directives of Executive Order 20-07. This Executive Order went into effect on March 17, 2020 and was placed in effect through April 14, 2020. The Governor ordered that the Executive Order be considered a public health law and that it may be enforced with any person found to be in violation of the Executive Order to be subject to the penalties described in ORS 401.990.

**Executive Order 20-08.**

The Governor ordered that all public schools be closed to students from March 16, 2020, through April 28, 2020. The Governor ordered that public schools continue to receive allocations from the State School Fund, as if they were actually in session during the closure period.

The Governor ordered that public school meal programs continue, and that the schools provide for supplemental services and emergency management services, such as provision of child care for first responders, emergency workers, and health care professionals.

The Governor also ordered that public schools continue to regularly pay all employees of public schools, and public schools may require their employees to report to work to assist with the provision of supplemental services and emergency management activities. The Executive Order also provided that the Early Learning System Director was directed and authorized to waive, suspend, or amend existing administrative rules pertaining to child care, and to establish requirements for emergency child care. Finally, the Executive Order provided that the directives in the Executive Order shall have the full force and effect of law, and any existing laws, ordinances, rules and orders shall be inoperative in the extent that they are inconsistent with the Executive Order. This Order was entered on March 17, 2020.

**Executive Order 20-09.**

This Executive Order, entered on March 19, 2020, ordered that Oregon colleges and universities maintain academic continuity with students by conducting courses through remote and online learning. The Governor ordered that colleges and universities be prohibited from conducting in person classroom, laboratory, and other instruction from March 21, 2020 through April 28, 2020. She provided an exemption to colleges and universities providing clinical, laboratory, or other in person instruction associated with courses required for the completion of health care related certificates, licenses, or degrees, or other certificates, licenses, or degrees, that are essential to emergency response and resiliency efforts, where no remote or online alternative is practicable. The Governor ordered that colleges and universities limit on-campus operations only to critical functions and shall employ social distancing measures, consistent with guidance from the Oregon Health Authority, for all on campus employees and residents. In what is a pattern for these Executive Orders, the Governor again provided: “the directives set forth in this Executive Order shall have the full force and effect of law, and any existing laws, ordinances, rules and orders shall be inoperative to the extent they are inconsistent with the exercise of the Governor’s emergency powers.”

**Executive Order 20-10.**

The Governor found that personal protective equipment (PPE) is essential to diagnosing and treating COVID-19 and in caring for individuals with COVID-19. The Governor found that there is a severe shortage of PPE in Oregon and across the nation. In order to conserve PPE and other health care resources for the State’s COVID-19 emergency response, the Governor directed that, no later than March 23, 2020, all elective and non-urgent procedures across all care settings that utilize PPE, including but not limited to, hospitals, ambulatory surgery centers, outpatient clinics, dental clinics and veterinary clinics, shall be cancelled. The Governor defined procedures or surgeries that would be exempt from these limitations. The Executive Order provided that it is effective immediately, and remains in effect for 90 days. This Order was entered on March 19, 2020.

**Executive Order 20-11.**

The Governor found that people being evicted from their homes creates an additional risk for the transmission of COVID-19. The Governor ordered that law enforcement officers in Oregon were prohibited from serving, delivering, or acting on any notice, order or writ of termination of tenancy or the equivalent or any judicial action, that relates to residential evictions for non-payment. The Order, entered on March 22, 2020, was effective immediately and remains in effect for 90 days.

**Executive Order 20-12.**

The Governor indicated that some Oregonians are not adhering to social distancing guidance provided by the Oregon Health Authority. The Governor ordered that nonessential social and recreational gatherings of individuals outside of a home or place of residence are prohibited immediately, regardless of size, if a distance of at least 6 feet between individuals cannot be maintained. The Governor ordered that individuals are prohibited from patronizing businesses that are closed pursuant to this Executive Order.

The Governor ordered that when individuals need to leave their homes or residences, they should at all times maintain social distancing of at least 6 feet from any person who is not a member of their immediate household, to the greatest extent possible. The Governor stated that failure to comply with any of the provisions of this Executive Order “constitutes an imminent threat and creates an immediate danger to public health.”

This Executive Order also prohibited the operation of a list of businesses. This extraordinary list of businesses specifically included amusement parks, aquariums, arcades, art galleries, barbershops, hair salons, bowling alleys, cosmetic stores, dance studios, esthetician practices, fraternal organization facilities, furniture stores, gyms, fitness studios, hookah bars, indoor and outdoor malls, indoor party places, jewelry shops, boutiques, medical spas, facial spas, day spas,

and nonmedical massage therapy services, museums, nail and tanning salons, nontribal card rooms, skating rinks, senior activity centers, ski resorts, social and private clubs, tattoo/piercing parlors, tennis clubs, theaters, yoga studios, and youth clubs.

The Governor provided that indoor and outdoor malls are not prohibited from operating to provide food, grocery, health care, medical, pharmacy, or pet store services. The Governor authorized the Oregon Health Authority to determine if additional business closures are necessary. The Governor exempted grocery, health care, medical, or pharmacy services from the closures ordered by this Executive Order.

The Governor also ordered all businesses and nonprofit entities with offices in Oregon to facilitate telework and work at home by employees to the maximum extent possible. The Governor ordered that work in offices is prohibited whenever telework and work at home options are available. The Executive Order also contained a number of restrictions on government office operations. The Order allowed child care facilities to remain open if they met specific limitations described in the Executive Order, but otherwise ordered that child care facilities be closed.

The Governor also ordered that all public and private campgrounds be closed. The Governor authorized the Oregon Parks and Recreation Department to close any property or facility when proper social distancing cannot be maintained. The Governor ordered the immediate closure of all pools, skate parks, outdoor sports courts, and playground equipment areas. This Executive Order also directed individuals to minimize travel, other than essential travel to or from a home, residence, or workplace. All of the directives in this Executive Order were applied statewide, as has occurred in all these Executive Orders. The Executive Order was effective immediately when issued on March 23, 2020 and indicated that it remains in effect until terminated by the Governor.

#### **Executive Order 20-13.**

The Governor indicated that further action is necessary to prevent termination of residential leases and the initiation of eviction proceedings during this emergency. The Governor ordered that landlords of residential properties in Oregon shall not, for reason of non-payment, terminate any tenants rental agreement or take any action to implement residential evictions. The Governor also ordered that landlords of nonresidential properties in Oregon shall not, for reason of non-payment, terminate any tenants lease or take any action to interfere with a tenant's right to possession of the leased premises. The Order, entered April 1, 2020, was effective immediately and remains in effect for 90 days.

#### **Executive Order 20-14.**

This Executive Order, entered on April 7, 2020, changed the termination date of Executive Order 20-07, which prohibited on-premises consumption of food or drink. Under this new Executive Order, Executive Order 20-07 remains in effect until terminated by the Governor.



**Executive Order 20-15.**

This Executive Order, entered on April 7, 2020, eliminated the termination date in Executive Order 20-06 and instead provides that Executive Order 20-06 remains in effect until terminated by the Governor. The only limitation is that the Governor periodically notify the Attorney General that the abnormal disruption of the market continues to exist.

**Executive Order 20-16.**

The Governor found that, during this emergency, public meetings should be held via telephone, video, electronic or other virtual means, whenever possible, to keep Oregonians safe and to mitigate the spread of COVID-19. The Governor ordered that public meetings of government bodies be restricted to meetings by telephone, video, or through some other electronic or virtual means, with minimal exceptions. The Governor modified the publication notification requirements as to public meetings, and authorized municipal corporations, to make reasonable expenditures for the continued operation of the municipal corporation, despite other restrictions that may exist. The Governor modified provisions as to hearings relating to tax supervising and conservation commissions and made other modifications to public hearing requirements. The Order, issued April 15, 2020, was effective immediately and remains in effect until terminated by the Governor.

**Executive Order 20-17.**

This Executive Order modified Executive Order 20-09 to prohibit colleges and universities from conducting in person classroom, laboratory, and other instruction from March 21, 2020 through June 13, 2020. The Order was issued on April 17, 2020.

**Executive Order 20-18.**

The Governor noted that eligible Oregonians will soon receive CARES Act recovery rebate payments. The Governor found that these payments are needed by vulnerable Oregonians to help pay for housing, food, medical, and other essential needs. The Governor ordered that all CARES Act Recovery Rebates shall be exempt from garnishment. The Executive Order contains some exceptions as to judgments in criminal actions that require the defendant to pay restitution or civil judgments against persons who have been convicted of criminal offenses. This Order was issued on April 17, 2020, and remains in effect until terminated by the Governor.

**Executive Order 20-19.**

The Governor found that continued restrictions on the provision of child care are necessary to preserve public health and safety. This Executive Order extended the restrictions on licensed child care facilities set forth in Executive Order 20-12. It also extended and expanded the Early Learning Division’s authority to provide child care facilities to provide emergency child care services and other necessary services, in light of the needs of the ongoing public health emergency. This Order was entered on April 23, 2020.

**Executive Order 20-20.**

The Governor ordered, pursuant to her powers as Superintendent of Public Instruction, and her emergency powers as Governor, that public schools and private schools are prohibited from conducting in-person classroom instruction during the effective period, designated as April 28, 2020 through June 30, 2020. The Executive Order contains detailed directives to public schools as to how they should operate and how they should continue to provide certain services. This Executive Order replaced the directives of Executive Order 20-08. This new Executive Order was entered April 23, 2020.

**Executive Order 20-22.**

The Governor indicated that Oregon is at the point where it is possible to gradually resume elective and nonurgent medical procedures. The Governor ordered that elective and nonurgent procedures across all care settings that utilize PPE, shall not occur unless they meet the requirements of this Executive Order. The Governor ordered that on or after May 1, 2020 elective and nonurgent procedures across all care settings that utilize PPE are allowed, but only to the extent they comply with guidance or administrative rules issued by the Oregon Health Authority. The Governor continued her delegation of authority to the Oregon Health Authority to provide guidance regarding limitations and screening requirements for visitors to hospitals and ambulatory surgical centers. This Executive Order rescinded Executive Order 20-10 and replaced it. This Executive Order was entered on April 27, 2020.

**Executive Order 20-24.**

This Executive Order noted that Executive Order 20-03 declared a state of emergency due to the COVID-19 outbreak in Oregon. It noted that Executive Order 20-03 was issued on March 8, 2020 and declared a statewide emergency for 60 days, through May 7, 2020. The Governor found that the novel infectious coronavirus continues to threaten public health and safety, and remains a statewide emergency. The Governor extended the state of emergency for an additional 60 days through July 6, 2020. This Executive Order was entered on May 1, 2020.

COVID-19 Cases in Oregon

County	Positive†	Deaths*	Negative
Baker	1	0	93
Benton	43	5	2274
Clackamas	250	8	6776
Clatsop	27	0	696
Columbia	15	0	881
Coos	29	0	729
Crook	1	0	275
Curry	4	0	201
Deschutes	84	0	2453
Douglas	24	0	1324
Gilliam	0	0	29
Grant	1	0	64
Harney	1	0	80
Hood River	11	0	666
Jackson	49	0	4582
Jefferson	22	0	404
Josephine	24	1	1245
Klamath	39	0	2389
Lake	0	0	76
Lane	59	2	5123
Lincoln	6	0	717
Linn	100	7	2401
Malheur	13	0	321
Marion	626	23	5234
Morrow	12	0	96
Multnomah	839	52	15529
Polk	80	5	1030
Sherman	1	0	41
Tillamook	6	0	383
Umatilla	80	1	858
Union	4	0	155
Wallowa	1	0	46
Wasco	15	1	730
Washington	556	12	9996
Wheeler	0	0	14
Yamhill	45	7	1707
<b>Total</b>	<b>3068</b>	<b>124</b>	<b>69618</b>

Exhibit 2  
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CERTIFICATE OF SERVICE

I certify that on the 12<sup>th</sup> day of May 2020, I directed the foregoing PROPOSED INTERVENORS-PLAINTIFFS' MOTION TO INTERVENE, PROPOSED INTERVENORS COMPLAINT, AND INTERVENORS-PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES, dated May 12, 2020, to be served upon the parties hereto by the method indicated below and addressed to the following:

Mr. Ray D Hacke  
Pacific Justice Institute  
1850 45th Ave NE  
Salem OR 97305  
Phone 408 966-1072  
Email [rhacke@pji.org](mailto:rhacke@pji.org)

HAND DELIVERY  
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 ELECTRONIC MAIL  
 ELECTRONIC FILING

Mr. Marc Abrams  
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Portland OR 97201  
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HAND DELIVERY  
 U.S. MAIL  
 OVERNIGHT MAIL  
 FACSIMILE  
 ELECTRONIC MAIL  
 ELECTRONIC FILING

/s/ Kevin L. Mannix

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Kevin L. Mannix, P.C.  
Of Attorneys for Intervenors