

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; PEOPLE'S 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 individual; POLLY JOHNSON, an individual; BENJAMIN BOYD, an individual; ANNETTE LATHROP, an individual; ANDREWS S. ATANSOFF, an individual; SHERRY S. 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, JACOE A. BROWN, SAMUEL N. BROWN, VIRGINIA STEGEMILLER, B. DAVID HURLEY, and DOUGLAS W. HILLS, Intervenor-Adverse Parties,

v.

KATHERINE BROWN, Governor of the State of Oregon, and DOES 1 THROUGH 50, Defendants-Relators.

Baker County Circuit Court
20CV17482
S067736

**BRIEF OF NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE SUPPORTING
ADVERSE PARTIES AND OPPOSING RELATORS' MANDAMUS PETITION**

Ray D. Hacke, # 173647
Pacific Justice Institute
PO Box 5229
1850 45th Ave. NE, Suite 33
Salem, OR 97305
Telephone: 408-966-1072
Email: rhacke@pji.org

Attorney for Plaintiffs-Adverse Parties

Ellen F. Rosenblum, # 753239
Attorney General
Benjamin Gutman, #160599
Solicitor General
1162 Court St., NE
Salem, OR 97301-4096
Telephone: 503-378-4402
Email:
benjamin.gutman@doj.state.or.us

Attorneys for Defendants-Relators

Kevin L. Mannix, #742021
Kevin L Mannix PC
2009 State Street
Salem, OR 97301
Telephone: 503-364-1913
Email: kevin@mannixlawfirm.com

Attorney for Intervenors-Adverse Parties

Aruna A. Masih, #973241
Bennett Hartman,
Attorneys at Law, LLP
210 SW Morrison St., Suite 500
Portland, OR 97204
Telephone: 503-227-4600
Email:
Aruna@bennetthartman.com

Attorney for *Amicus Curiae*
Oregon Nurses Association

Luke D. Miller, OSB No. 175051
Military Disability Lawyer, LLC
1567 Edgewater St. NW, PMB 43
Salem, OR 97304
Telephone: 800-392-5682
Email:
luke@militarydisabilitylawyer.com

Attorney for *Amicus Curiae*
New Civil Liberties Alliance

June 2020

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND INTERESTS OF <i>AMICUS CURIAE</i>	1
QUESTIONS PRESENTED ON APPEAL	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. CHAPTERS 401 AND 433 DO NOT AUTHORIZE THE GOVERNOR TO ADOPT THE EMERGENCY MEASURES CHALLENGED BY PLAINTIFFS	8
A. The Powers Enumerated in Chapter 401 Do Not Include the Power to Control the Movement of Citizens and Gatherings ...	10
B. Chapter 433 Authorizes the Governor to Exercise Her Unilateral “Public Health Emergency” Powers for a Maximum of 28 Days	14
C. Article X-A of the Oregon Constitution Confirms that before the Governor May Impose Extraordinary Public-Health Measures on a Long-Term Basis, She Must Obtain the Legislature’s Approval	19
II. THE OREGON CONSTITUTION PROHIBITS THE GOVERNOR FROM EXERCISING HER CLAIMED POWERS IN THE ABSENCE OF AUTHORIZATION FROM THE LEGISLATURE.	21
CONCLUSION.	24

TABLE OF AUTHORITIES

	Page(s)
Oregon Supreme Court Cases:	
<i>Crystal Communications, Inc. v. Dept. of Revenue</i> , 353 Ore. 300 (2013)	19
<i>La Forge v. Ellis</i> , 175 Or. 545 (1945)	24
<i>Lewis v. CIGNA Ins. Co.</i> , 338 Or. 342 (2005)	13, 14
<i>Schmidt v. Mt. Angel Abbey</i> , 347 Or. 389 (2009)	13
<i>State v. McCullough</i> , 347 Or. 350 (2009)	14
<i>Union Pac. R. Co. v. Bean</i> , 167 Or. 535 (1941)	19
<i>U.S. Automobile Service Club v. Van Winkle</i> , 128 Or. 274 (1929)	12
<i>Van Winkle v. Fred Meyer, Inc.</i> , 151 Or. 455 (1935)	24
Statutes and Constitutional Provisions:	
U.S. Const., Arts. I & II	22
Or. Const., Arts. III and IV	23
Or. Const., Art. III, § 2	22
Or. Const., Art. IV, § 1	8, 22

	Page(s)
Or. Const., Art. X-A	7, 19, 20
Or. Const., Art. X-A, § 1	20
Or. Const., Art. X-A, § 6	20
ORS 174.010	19
ORS Chapter 401	8, 9, 10, 11, 14, 15, 17, 18, 21
ORS 401.165	3, 6, 8, 9, 17
ORS 401.168	12, 14
ORS 401.168(1)	11, 12, 13, 23
ORS 401.168(2)	10
ORS 401.168(3)	10
ORS 401.175	14
ORS 401.175(1)	10
ORS 401.175(2)	10
ORS 401.175(3)	10
ORS 401.175(4)	11
ORS 401.175(5)	11
ORS Chapter 433	9, 14, 15, 17, 18, 19, 20, 21
ORS 433.441 to 433.452	6, 7, 17, 18
ORS 433.441	3, 5, 6

	Page(s)
ORS 433.441(3)	5, 15, 16, 17, 18
ORS 433.441(3)(a)	15
ORS 433.441(3)(b)	16
ORS 433.441(3)(f)	16
ORS 433.441(4)	6, 17
ORS 433.441(5)	5, 16, 18
 Federal Cases:	
<i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019)	22
<i>Morrison v. Olson</i> , 487 U.S. 654, 697 (1988)	23
 Miscellaneous:	
<i>The Federalist</i> No. 47, p. 302 (C. Rossiter ed. 1961) (Madison)	22
12 C.J. § 440	13

INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a non-partisan, nonprofit organization devoted to defending constitutional freedoms from violations by the administrative state.¹ The “civil liberties” of the organization’s name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation’s elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, executive branch officials, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Oregon and U.S. Constitutions were designed to prevent. This unconstitutional administrative state within federal and state governments is the focus of NCLA’s concern.

¹ NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

Oregon is facing a largely unprecedented public health emergency. In anticipation of the possibility of such crises, the State adopted comprehensive constitutional and statutory provisions spelling out the means by which public officials can and should respond. Those provisions grant the Governor vast but temporary powers to act quickly to safeguard public health. They also specify that if the Governor concludes that emergency measures should remain in place for an extended period of time, she must first obtain authorization from the legislature. NCLA is concerned that Governor Brown has unilaterally extended her emergency declaration beyond the authorized time periods without ever requesting the legislature to sanction her unprecedented measures.

The Oregon Constitution wisely allocates the powers of government among three separate branches. It vests the legislative power solely in the Oregon legislature. Governor Brown violates those separation-of-powers principles by arrogating to herself the authority to both write the law and enforce it. She no doubt sincerely believes that she is acting in the public interest. But good intentions cannot justify the severe threat to liberty that is created whenever, as here, the legislative and executive powers are placed in the same hands. History demonstrates that tyrants routinely seize upon perceived crises as a justification for suspending democratic norms. If Governor Brown believes that the public-health emergency justifies suspending

civil liberties for an extended period of time, she should be required to make that case to the legislature rather than acting unilaterally.

QUESTIONS PRESENTED ON APPEAL

NCLA addresses the following question only:

Did Governor Brown violate statutory and constitutional limits on her emergency powers—imposed under ORS 433.441(5) and Article X-A, § 6 of the Oregon Constitution—by extending her March 8, 2020 state-of-emergency declaration to at least July and issuing a series of Executive Orders that significantly restrict civil liberties throughout that period?

STATEMENT OF THE CASE

In response to the COVID-19 pandemic, Governor Brown declared a state of emergency in Oregon on March 8, 2020, citing her authority under two statutes: ORS 401.165 (entitled “Procedure for declaration of state of emergency”) and ORS 433.441 (entitled “State of public health emergency; proclamation; authority of governor”). Executive Order (EO) 20-03 declared that the state of emergency would continue for 60 days—that is, until May 7.

Purporting to act under her emergency powers, Governor Brown issued a series of orders designed to slow the spread of COVID-19. Many of those orders imposed severe restrictions on the civil liberties of Oregonians, restrictions she determined were justified on an emergency basis by public-

health considerations. Those restrictions limit the right of citizens to leave their homes, prohibit the operation of many businesses deemed non-essential, prohibit all gatherings of 25 or more people, and prohibit *all* non-essential social and recreational gatherings outside the home regardless of the number of people involved unless proper “social distancing” can be maintained.

On May 4, Governor Brown issued EO 20-24, which extended the public health emergency declaration—and many of its attendant restrictions on civil liberties—for an additional 60 days, to July 6. Throughout the state of emergency, the Oregon legislature has not been in session, and the Governor has not sought to reconvene it.

Plaintiffs-Adverse Parties (collectively, “Elkhorn”) are several churches and church members who contend: (1) Governor Brown acted in excess of her statutory and constitutional authority by extending her emergency declaration beyond early May; (2) the restrictions imposed by her various Executive Orders violate their constitutionally protected freedoms of religion and assembly. A group of citizens (collectively, “Harvey”) intervened in Elkhorn’s lawsuit and raised similar claims. All plaintiffs seek declaratory and injunctive relief.

On May 18, the Baker County Circuit Court issued a preliminary injunction, temporarily barring Governor Brown from enforcing the civil-liberty restrictions imposed in connection with her emergency declaration. The

court held that Elkhorn and Harvey were likely to prevail on their claims that ORS 433.441(5) does not permit the Governor to impose such restrictions for a period exceeding 28 days in the absence of additional authorization from the Oregon legislature. It also held that the plaintiffs were likely to suffer irreparable harm to their constitutional rights unless enforcement of the civil-liberties restrictions (which are backed by the threat of criminal sanctions) was immediately enjoined.

Later that same day, the Governor filed a petition for a peremptory writ of mandamus, asking this Court to direct the circuit court to vacate its preliminary injunction. The Court has stayed enforcement of the injunction pending resolution of the mandamus petition.

SUMMARY OF ARGUMENT

The Oregon legislature has granted the Governor broad emergency powers to act quickly to address a “public health emergency.” ORS 433.441. The statute authorizes the Governor, among other things, to “[c]lose ... any facility” and to “[t]ake any other action that may be necessary ... to protect the public during a public health emergency.” ORS 433.441(3). The statute arguably authorizes the Governor to impose restrictions that implicate rights (such as freedom of religion and assembly) protected by the Oregon and U.S. Constitutions. But the statute is strictly time limited; a “public health

emergency” declaration automatically expires 14 days after it is issued and can be renewed for only one additional 14-day period. ORS 433.441(5). Because more than 28 days have elapsed since Governor Brown declared a public health emergency on March 8, her authority to exercise the powers conferred under the statute have lapsed.

There is no merit to the Governor’s claims that her drastic measures are authorized under ORS 401.165. That statute authorizes the Governor to declare a “state of emergency” (but makes no mention of a “public health” emergency) and provides a list of the powers bestowed on her during that state of emergency. But while the enumerated powers authorize the Governor to marshal a wide range of state resources, ORS 401.165 (unlike ORS 433.441) contains no language suggesting the power to curtail civil liberties.

Governor Brown seeks to rely on the final sentence of ORS 433.441(4), which states, “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.” That reliance is misplaced. The quoted language indicates that until April 5 the Governor was authorized, in connection with a “state of emergency” declared under ORS 401.165, to implement any of the actions specified in ORS 433.441 to 433.452. But the 28-day time limitation of ORS 433.441(5) means that ORS 433.441(4) was rendered inoperative after April 5,

because after that date there no longer were “any action[s] authorized by ORS 433.441 to 433.452.”

As interpreted by the circuit court, the two emergency-power statutes do not prevent Oregon from responding forcefully to public health emergencies that last more than 28 days. Rather, the statutes authorize the Governor to act decisively on her own in the period immediately following the onset of a public health emergency but require that adoption of any extraordinary measures on a longer-term basis requires approval from the legislature. Governor Brown has had more than sufficient time to seek authority from the legislature for such measures.

The Oregon Constitution confirms that the Governor must seek approval from the legislature before implementing extraordinary measures on a longer-term basis. Article X-A of the Constitution authorizes the Governor to invoke powers specified therein if she “finds that a catastrophic disaster has occurred.” But if the Governor makes such a finding (and she has not done so in connection with the COVID-19 pandemic), then she is required to convene the legislature. The powers conferred to the Governor by virtue of the catastrophic-disaster finding become inoperative 30 days after the finding is made, unless the legislature by a 3/5th vote approves their extension.

In the absence of authorization from the legislature, the Governor may not act on her own to adopt regulations governing private conduct during the pandemic. The Oregon Constitution vests the State’s legislative power in “a Legislative Assembly, consisting of a Senate and a House of Representatives.” Or. Const., Art. IV, § 1. The Governor is authorized to execute laws established by the legislature; but to permit the Governor to execute laws of her own making would violate fundamental separation-of-powers principles.

Nor can ORS 401.165 plausibly be interpreted as a delegation to the Governor of unlimited legislative authority to adopt whatever long-term measures she deems necessary to address public-health emergencies. Any such interpretation would render ORS 401.165 invalid as a constitutionally impermissible divestment of the legislative powers assigned exclusively to the Oregon legislature by Article IV, § 1.

ARGUMENT

I. CHAPTERS 401 AND 433 DO NOT AUTHORIZE THE GOVERNOR TO ADOPT THE EMERGENCY MEASURES CHALLENGED BY PLAINTIFFS

ORS Chapter 401 authorizes the Governor to declare a state of emergency and, during the state of emergency, to adopt measures enumerated in the statute. The actions of the Governor challenged by Plaintiffs Elkhorn and Harvey are not among the measures authorized by Chapter 401. Because

those challenged actions are unauthorized and because Elkhorn and Harvey demonstrated that they will be irreparably harmed in the absence of an injunction, the circuit court appropriately issued a preliminary injunction against the challenged actions.

In challenging the circuit court’s interpretation of Chapter 401, the Governor faults the court for allegedly incorporating ORS 433.441(5)’s 28-day time limit into Chapter 401. Brown Brief at 23, 26 (stating that “the 14-day time limit on public health emergencies under chapter 433 was not intended to restrict the Governor’s authority during a chapter 401 emergency.”). The Governor is raising a strawman argument; the circuit court never held that the 28-day limitation period applies to emergencies declared under ORS 401.165. Rather, the court held that the actions authorized under Chapter 401 do not include the actions challenged by Elkhorn and Harvey:

[ORS 401.165] has no expiration clause other than upon declaration of the Governor or legislative assembly. The limitations are only in the statutory scope of authority given to the Governor. ... The general provisions of ORS 401.165 have allowed Governors since 1949 to direct state resources in times of emergencies. ...However, *the statute does not grant the Governor power directly over the movement of citizens and gatherings.*

May 18, 2020 Op. at 2-4 (emphasis added).

The circuit court correctly determined that Chapter 433 is the only statute that authorizes the Governor during an emergency to exercise control

“over the movement of citizens and gatherings.” And because the time period during which the Governor could exercise such controls under Chapter 433 has indisputably lapsed, the court properly enjoined the Governor’s subsequent *ultra vires* actions.

A. The Powers Enumerated in Chapter 401 Do Not Include the Power to Control the Movement of Citizens and Gatherings

Since its adoption in 1949, ORS Chapter 401 has authorized Governors to adopt a wide array of measures designed to address emergencies within the State. Those measures are expressly enumerated in Chapter 401; they include:

- authority to “suspend provisions of any order or rule of any state agency, if the Governor determines and declares that strict compliance with the provisions of the order or rule would in any way prevent, hinder, or delay mitigation of the effects of the emergency,” ORS 401.168(2);
- authority to “direct any agencies in the state government to utilize and employ state personnel, equipment and facilities for the performance of any activities designed to prevent or alleviate actual or threatened damage due to the emergency,” ORS 401.168(3);
- authority to “[a]ssume complete control of all emergency operations in the area specified in a proclamation of a state of emergency,” ORS 401.175(1);
- authority to “[a]ssume control of all police and law enforcement activities in such area, including the activities of all local police and peace officers,” ORS 401.175(2);
- authority to “[c]lose all roads and highways in such area to traffic,” ORS 401.175(3);

- authority to “[d]esignate persons to coordinate the work of public and private relief agencies operating in such area and exclude from such area any person or agency refusing to cooperate with and work under such coordinator or to cooperate with other agencies engaged in emergency work,” ORS 401.175(4); and
- authority to “require the aid and assistance of any state or other public or quasi-public agencies in the performance of duties and work attendant upon the emergency conditions in such area,” ORS 401.175(5).

A common focus of all of these enumerated powers is the resources of the state government. The enumerated powers authorize the Governor to take direct control of all of these resources in order to better coordinate Oregon’s response to the emergency. The Governor’s power to control all police and law enforcement authority ensures that no one will be permitted to interfere with the State’s response plans—whether a response to fire, flood, earthquake, storm, or pandemic. But none of the enumerated powers so much as suggests that the Governor has been granted the power to interfere with the civil liberties of citizens, such as by confining them to their homes or barring them from assembling for worship services. That omission is strong evidence that Chapter 401 does not authorize the restrictions challenged in this case.

The Governor’s contrary interpretation of Chapter 401 is based entirely on the second clause of ORS 401.168(1), which grants the Governor “the right to exercise, within the area designated in the [emergency] proclamation, all police powers vested in the state by the Oregon Constitution.” The Governor

contends that this clause grants her authority to suspend all otherwise-protected civil liberties when, in her judgment, suspension is required to respond to the declared emergency. Brown Brief at 15.

That contention is not a reasonable interpretation of ORS 401.168(1). The statute does not provide any definition of the “police powers” it confers on the Governor. But the most reasonable interpretation is that the legislature intended to confer the sorts of “police powers” normally exercised in Oregon by state and local officials, not the extraordinary powers (*e.g.*, stay-at-home orders, bans on public assembly) being challenged here.²

Contrary to the Governor’s contention, the term “police powers” is not a “term of art under Oregon law that had a well-settled meaning” when ORS 401.168(1) was adopted. Brown Brief at 21. Rather, this Court has recognized that although the “police power” is “broad and far reaching, there are limits to the valid exercise of the power” and that those limits “are hard to define.” *U.S. Automobile Service Club v. Van Winkle*, 128 Or. 274, 283 (1929) (emphasis added). The Court added, “[H]owever broad the scope of the police power may be, ‘it is always subject to the rule that the legislature may not exercise any

² The language of ORS 401.168 includes cues that the legislature intended to impose limits on the authority conveyed; *e.g.*, it authorizes exercise of the police power only “within the area designated in the [emergency] proclamation.” In light of those cues, it is not reasonable to interpret the provision as a grant of unlimited power for an unlimited period of time.

power that is expressly or impliedly forbidden to it by the state constitution.”

Id. at 284 (quoting 12 C.J. § 440). There is no reason to conclude that ORS 401.168(1) intended to confer on the Governor the authority to suspend civil liberties in a manner that implicates a broad range of rights protected by the U.S. and Oregon Constitutions and that arguably is constitutionally prohibited.

Moreover, the measures expressly authorized by Chapter 401 indicate that the legislature did not intend the term “police powers” to be construed as broadly as the Governor asserts. Because all of those measures entail the marshaling of the State’s resources, there is every reason to conclude that the legislature had similar marshaling activities in mind when it authorized the Governor to use Oregon’s “police powers.” A venerable canon of statutory construction, *ejusdem generis* (Latin for “of the same kind”) is applicable here. As the Court recently explained that canon, “When, as here, the legislature uses a general term in a statute and also provides specific examples, those specific example provide useful context for interpreting the general term.” *Schmidt v. Mt. Angel Abbey*, 347 Or. 389, 406 (2009). For example, in *Lewis v. CIGNA Ins. Co.*, 339 Or. 342 (2005), the Court applied the canon in interpreting a general term included in a list of more specific terms within the same statute, stating:

[W]hen the legislature chooses to state both a general standard and a list of specifics, the specifics do more than place their particular subjects beyond dispute; they also refer the scope of the general standards to matters of the same kind, often phrased in Latin as “*ejusdem generis*.”

Id. at 350 (citation omitted). Indeed, had the legislature intended “police powers” to be interpreted as broadly as the Governor contends, it would have had no reason to include *any* other enumerated powers in Chapter 401; the term “police powers” would by itself have provided the Governor with authority to respond to an emergency in virtually any manner she desired.³

In sum, the circuit court correctly determined that Chapter 401 “does not grant the Governor power directly over the movement of citizens and gatherings.” May 18 Order at 4. The Governor can only look to Chapter 433 as the source of such power.

B. Chapter 433 Authorizes the Governor to Exercise Her Unilateral “Public Health Emergency” Powers for a Maximum of 28 Days

ORS Chapter 401, the statute granting the Governor authority to declare a state of emergency and exercise enumerated emergency powers, has been on the statute books since 1949. More than half a century later, the legislature

³ A related canon of statutory construction, *nocitur a sociis* (words are interpreted based on the company they keep), is also applicable here. *See State v. McCullough*, 347 Or. 350, 361 (2009). To the extent that the Court deems the phrase “police powers” ambiguous, it should be assigned a meaning consistent with the relatively modest scope of other provisions in ORS 401.168 and 401.175 that grant power to the Governor.

adopted ORS Chapter 433, which authorizes the Governor to declare a “state of public health emergency.” The new statute could have had only one purpose: to expand the scope of the Governor’s powers when faced with a public health emergency, beyond the scope of the powers she already possessed under Chapter 401.

The powers delegated to the Governor under ORS 433.441(3) are far broader than those available under Chapter 401.⁴ While Chapter 401 authorizes the Governor to take control of the resources of state government, ORS 433.441(3) authorizes the Governor to impose significant restrictions on the activities of private citizens. Among other things, the statute authorizes the Governor during a public-health emergency to:

- “Close, order the evacuation of or the decontamination of any facility the Governor has reasonable cause to believe may endanger the public health,” ORS 433.441(3)(a);

⁴ The Governor resists that conclusion and suggests that Chapter 433 may have been adopted as a mechanism for dealing with minor public-health crises “*before* they reached the level of a chapter 401 emergency.” Brown Brief at 26. But both the statutory language and the legislative history cited by the Governor support the opposite conclusion: that the legislature determined that the tools available under Chapter 401 might be insufficient to deal with a major public-health crisis and thus that new tools should be provided. *See, e.g., id.* 27 (quoting testimony of the State Public Health Officer that Section 433 would provide the Governor with an “additional tool” for addressing public health emergencies).

- “Regulate or restrict by any means necessary the use, sale or distribution of food, fuel, medical supplies, medicines or other goods and services,” ORS 433-441(3)(b);
- “Take any other action that may be necessary for the management of resources, or to protect the public during a public health emergency,” ORS 433.441(3)(f).

ORS 433.441(3)’s broad delegation of powers authorized the Governor to impose each of the restrictions on civil liberties included in her response to the COVID-19 pandemic.⁵ But the statute is strictly time limited; a “public health emergency” declaration automatically expires 14 days after it is issued and can be renewed for only one additional 14-day period. ORS 433.441(5). Because more than 28 days have elapsed since Governor Brown declared a public health emergency on March 8, her authority to exercise the powers conferred under the statute have lapsed.

Indeed, given the sweeping nature of the powers conferred on the Governor by ORS 433.441(3), it would be surprising if the legislature had *not* imposed strict time limits on what amounts to dictatorial powers. The point of granting “emergency” powers is to ensure that an executive is capable of responding in a timely fashion to the emergency while other government officials may be unavailable to assist, not to suspend our normal government

⁵Whether those restrictions could survive challenge under the U.S. and Oregon Constitutions is an issue not now before the Court.

structure indefinitely and allow a single person to dictate government policy for however long that person deems the emergency to be continuing.

The Governor points repeatedly to the first sentence in ORS 433.441(4) which states, “Nothing in [Chapter 433] limits the authority of the Governor to declare a state of emergency under ORS 401.165.” But that provision provides no support for the Governor’s interpretation of Chapters 401 and 433. In ruling that the Governor’s restrictions on civil liberties are *ultra vires*, the circuit court did not hold that Chapter 433 imposes any limitations on the Governor’s pre-existing powers under Chapter 401. Rather, the court held that nothing in ORS 401.165 authorizes the Governor to control the movement of citizens and gatherings.

The Governor also relies on the second sentence of ORS 433.441(4), which states, “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.” The Governor argues: (1) this sentence incorporates into Chapter 401 the very broad powers authorized by ORS 433.441(3); and (2) because there is no statutory time limit on the exercise of gubernatorial powers during a Chapter 401 emergency, there is no time limit on exercise of the incorporated powers. Brown Brief at 24.

That argument makes little sense. The statute states that when acting under a Chapter 401 state of emergency, the Governor may implement an action that is “authorized by ORS 433.441 to 433.452.” That is, the action must be authorized not only by ORS 433.441(3) (which grants power to restrict civil liberties during a “public health emergency”) *but also* by ORS 433.441(5) (which provides that the Governor’s power to act unilaterally during a “public health emergency” may be exercised only during the first 28 days following the Governor’s declaration of the emergency). Because the Governor lacked authority under Chapter 433 to exercise her ORS 433.441(3) powers after April 5 (the 28th day following her March 8 declaration of a public health emergency), there were no longer any powers “authorized by ORS 433.441 to 433.452” that could be exercised in connection with the on-going Chapter 401 state of emergency.

The Governor’s contrary interpretation would deprive ORS 433.441(5)’s strict 28-day limitation of all meaning. If the powers conferred by ORS 433.441(3) can always be incorporated into a Chapter 401 state of emergency without regard to the time elapsed following declaration of the emergency, then there will never be a situation to which ORS 433.441(5) applies. Whenever a public-health crisis arises, the Governor will declare an emergency under ORS Chapter 401 instead of Chapter 433 and thereby take advantage of Chapter

433’s expansive authorizations of power while avoiding Chapter 433’s time limits.

Interpreting statutes in a manner that renders a portion of the statute superfluous is highly disfavored. *Crystal Communications, Inc. v. Dept. of Revenue*, 353 Or. 300, 311 (2013) (“As a general rule, we construe a statute in a manner that gives effect, if possible, to all its provisions.”) (citing ORS 174.010); *Union Pac. R. Co. v. Bean*, 167 Or. 535, 549 (1941) (“It is a cardinal rule of statutory construction that significance and effect shall, if possible, be afforded to every section, clause, word or part of the act.”) It simply is not plausible that the legislature went to the trouble of inserting a 28-day time limit into its grant of expanded emergency powers under Chapter 433 yet intended to permit the Governor to render that time limit inoperative with the flick of her pen.

C. Article X-A of the Oregon Constitution Confirms that before the Governor May Impose Extraordinary Public-Health Measures on a Long-Term Basis, She Must Obtain the Legislature’s Approval

Section 1 of Article X-A of the Oregon Constitution authorizes the Governor to declare a “catastrophic disaster” (defined to include a “public health emergency”) and to “manage the immediate response” to the disaster. Governor Brown has not declared a “catastrophic disaster” and thus (as the

circuit court recognized) the scope of her powers under this constitutional provision is not at issue in these proceedings.

Article X-A nonetheless provides the Court with considerable guidance regarding the Governor's proper role in a public health emergency. In particular, Article X-A contemplates that the Oregon legislature should play a major role in the State's response to such an emergency. If the legislature is not in session (and is not about to convene) at the time a catastrophic disaster is declared, Section 1(4) of Article X-A requires the Governor simultaneously to issue a proclamation convening the Legislative Assembly. The Governor has no power to keep the declaration of a catastrophic disaster in place for more than 30 days; it "shall cease to be operative" after 30 days, unless by a 3/5th vote of each house, the Oregon legislature votes to extend the declaration. Or. Const., Art. X-A, § 6.

Article X-A reinforces the principal thrust of ORS Chapter 433: the Governor is authorized on her own to issue extraordinary lifesaving edicts in the first days after a public health emergency arises, but she must look to the Oregon legislature for guidance once time permits the legislature to gather and begin exercising its legislative powers. The legislature was not in session when the Governor declared a public health emergency on March 8. She has not exercised her constitutional authority to convene the legislature in the

ensuing three months despite having ample opportunity to do so. Instead she has chosen to act unilaterally to adopt rules significantly restricting the civil liberties of all Oregon citizens. She asserts that the State will be irreparably harmed if her orders are enjoined, but she has only herself to blame for failing to take the steps required to obtain authorization for her actions.

As interpreted by the circuit court, ORS Chapters 401 and 433 (the two emergency-power statutes) do not prevent Oregon from responding forcefully to public health emergencies that last more than 28 days. Rather, the statutes authorize the Governor to act decisively on her own in the period immediately following the onset of a public health emergency but provide that adoption of any extraordinary measures on a longer-term basis requires approval from the legislature. That statutory interpretation is consistent with Article X-A, which contemplates that the Governor's unilateral suspension of civil liberties in response to a catastrophic disaster is permissible for a very limited time only. If the Governor wishes to extend those measures, the option of turning to the legislature remains open to her.

II. THE OREGON CONSTITUTION PROHIBITS THE GOVERNOR FROM EXERCISING HER CLAIMED POWERS IN THE ABSENCE OF AUTHORIZATION FROM THE LEGISLATURE

In the absence of authorization from the legislature, the Governor may not act on her own to adopt regulations governing private conduct during the

pandemic. The Oregon Constitution vests the State’s legislative power in “a Legislative Assembly, consisting of a Senate and a House of Representatives.” Or. Const., Art. IV, § 1. The Governor is authorized to execute laws established by the legislature; but to permit the Governor to execute laws of her own making would violate fundamental separation-of-powers principles.

The Framers of the U.S. Constitution believed that “the new federal government’s most dangerous power was the power to enact laws restricting the people’s liberty,” *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, dissenting), and that “there can be no liberty where the legislative and executive powers are united in the same person.” *The Federalist* No. 47, p. 302 (C. Rossiter ed. 1961) (Madison). To guard against the unification of those powers, the Framers vested *all* of the legislative power in Congress, and they vested executive power in a President who is not part of the legislative branch. U.S. Const., Arts. I & II.

For similar reasons, the Oregon Constitution strictly separates legislative power from executive power. Section 1 of Article III of the Constitution (entitled “Separation of Powers”) states unequivocally, “The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these three branches shall

exercise any of the functions of another, except as in the Constitution expressly provided.” By issuing orders that significantly restrict the civil liberties of Oregon citizens without express authorization from the legislature, the Governor is attempting to exercise legislative powers in violation of Articles III and IV.

The Governor contends that her legislative activity is necessary to save lives during a public-health emergency. But it is also a direct assault on separation-of-powers principles that James Madison and other Framers viewed as essential to the preservation of liberty. By decreeing severe restrictions on civil liberties without bothering (for an extended period of time) to seek authority from the Oregon legislature, the Governor has struck a severe blow to democratic principles. As U.S. Supreme Court Justice Antonin Scalia warned, in a dissenting opinion now widely praised, “Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.” *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

Nor can ORS 401.168(1) plausibly be interpreted as a delegation to the Governor of *unlimited* legislative authority to adopt whatever long-term measures she deems necessary to address public health emergencies. Any such

interpretation would render ORS 401.168(1) invalid as a constitutionally impermissible divestment of the legislative powers assigned exclusively to the Oregon legislature by Article IV, § 1. *La Forge v. Ellis*, 175 Or. 545 (1945); *Van Winkle v. Fred Meyer, Inc.*, 151 Or. 455 (1935).

CONCLUSION

The New Civil Liberties Alliance respectfully requests that the Court deny the Petition for a peremptory writ of mandamus.

Respectfully submitted,

Military Disability Lawyer, LLC

/s/ Luke D. Miller

Luke D. Miller

OSB No. 175051

luke@militarydisabilitylawyer.com

Attorney for *Amicus Curiae*

New Civil Liberties Alliance

**CERTIFICATE OF COMPLIANCE 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 5,334. 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

Military Disability Lawyer, LLC

/s/ Luke D. Miller

Luke D. Miller

OSB No. 175051

luke@militarydisabilitylawyer.com

Attorney for *Amicus Curiae*
New Civil Liberties Alliance

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON June 2, 2020, I filed the original of this BRIEF OF NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE SUPPORTING ADVERSE PARTIES AND OPPOSING RELATORS' MANDAMUS PETITION 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 St.
Salem, OR 97301-2563

I further certify that on June 2, 2020, I electronically served copies of the brief on Benjamin Gutman (attorney for relator), Ray D. Hacke and Kevin L. Mannix (attorneys for adverse parties), and Aruna Masih (attorney for *amicus curiae* Oregon Nurses Association). 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:

- Honorable Matthew B. Shirtcliff #944368
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. Executed on June 2, 2020.

/s/ Luke D. Miller
Luke D. Miller