

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 nonprofit corporation; PEOPLES CHURCH, an Oregon non-profit corporation; PREPARE THE WAY, an Oregon non-profit corporation; BEND COMMUNITY CHURCH, an Oregon non-profit corporation; COVENANT GRACE CHURCH, an Oregon non-profit corporation; JEDIDIAH MCCAMPBELL, an individual; RONALD OCHS, an individual; BRIAN NICHOLSON, an individual; JAMES B. THWING, an individual; MARK RUSSELL, an individual; PHIL MAGNAN, an individual; RONALD W. RUST, an individual; TRAVIS HUNT, an individual; MASON GOODKNIGHT, an individual; MARK MAYBERRY, an individual; LORI MAYBERRY, an individual; BENJAMIN STEERS, an individual; MICHAEL CARROLL, an individual; KEVIN J. SMITH, an individual; POLLY JOHNSON, an individual; BENJAMIN BOYD, an individual; ANNETTE LATHROP, an individual; ANDREW S. ATANSOFF, an individual; SHERRY L. ATANSOFF, an individual; MICAH AGNEW, an individual; and ANGELA ECKHARDT, an individual, Plaintiffs-Adverse Parties,

and

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

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

V.

KATHERINE BROWN, Governor of the State of Oregon and DOES 1 THROUGH 50,
Defendants-Relaters
Baker County Circuit Court
20CV17482
S067736

**INTERVENORS-ADVERSE PARTIES MEMORANDUM IN OPPOSITION TO
PETITION FOR A PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS**

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STATEMENT OF THE CASE

Intervenors-Adverse Parties (hereinafter “Intervenors”) concur with, and adopt, the Statement of the Case as presented by Plaintiffs-Adverse Parties (hereinafter “Plaintiffs”) in their Memorandum in Opposition to Defendant-Relators’ Mandamus Petition, as supplemented by the Introduction, below.

INTRODUCTION

Plaintiffs filed an action in Baker County Circuit Court seeking, inter alia, a preliminary injunction and declaratory relief, asserting that the Executive Orders issued by the Governor as to the coronavirus pandemic should be set aside. Intervenors filed a Motion to Intervene, and the Motion was allowed. Intervenors filed a Complaint in Intervention. The Circuit Court, after a hearing, entered a preliminary injunction. The Defendants-Relators (hereinafter “Defendants”) filed with this Court a Petition for a Peremptory or Alternative Writ of Mandamus, and moved for an emergency stay of the preliminary injunction order. This Court granted the emergency stay. It directed that Plaintiffs and Intervenors file responses to the mandamus petition no later than May 22, 2020. This Memorandum is the response by Intervenors.

SUMMARY OF ARGUMENT

The General Emergency Law, which has no automatic expiration time limit, does not authorize restrictions or closures as to churches, businesses, or public gatherings. The General Emergency Law can incorporate the provisions of the Public Health Emergency Law, which does authorize restrictions or closures as to churches, businesses, or public gatherings. But those extraordinary powers of the Public Health Emergency Law expire 28 days after the public health emergency is declared. Any Executive Order based on a Public Health Emergency loses all its extraordinary powers after 28 days. This does not prevent the Governor, and the Executive Branch, from exercising ordinary statutory powers in response to the coronavirus pandemic, such as the powers and authority allowed under ORS 431A.005 to 431A.900 (Public Health Programs and Activities). It does prevent the Governor from continuing to exercise extraordinary powers authorized under a declaration of public health emergency pursuant to ORS 433.441, which has a time limit of 14 days, extendable to 28 days, under ORS 433.441(5).

ARGUMENT

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

Mandamus review of a circuit court preliminary injunction decision is only appropriate if the trial court committed a “fundamental legal error” or if “a trial court’s actions are outside the permissible range of discretionary choices open to the trial court.” State ex rel. Keisling v. Norblad, 317 Or 515, 623, 860 P2d 241 (1993). Here, the only “fundamental legal error” that could have been committed by the trial court, in the preliminary injunction context, is weighing the legal likelihood of success. See Id. at 624-34; see generally Lindell v. Kalugin, 353 Or 338, 297 P3d 1266 (2013); Oregon State Hospital v. Butts, 358 Or 49, 359 P3d 1187 (2015); see also State ex rel Anderson v. Miller, 320 Or 316, 324, 882 P2d 1109 (1994). Here, this issue only relates to the trial court’s examination of state of emergency laws in ORS Chapter 401 and ORS Chapter 433.

This Memorandum will demonstrate that the trial court got that examination correct: ORS Chapter 433 is preeminent and its time limits govern in a public health emergency.

The other factors that matter in a preliminary injunction decision such as hardship, public interest, and the balancing of equities, are determinations by a trial court that are well within the legal discretionary choices by a trial court. Overruling

the trial court on these discretionary choices would be contrary to Norblad and its progeny. Nonetheless, this Memorandum confirms that the trial court did balance these factors correctly when making its preliminary injunction decision.

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

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

The powers of Oregon's government are divided into three separate branches: the executive branch, the judicial branch and the legislative branch. The Oregon Constitution provides that "no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided." Oregon Constitution, Article III, Sec. 1. Thus, the Governor

does not have constitutional authority through Executive Orders to exercise the functions of the legislature or the judiciary except as provided by the Constitution.

The legislature delegated to the Governor police powers to address general emergencies. ORS 401.168. However, by enacting the Public Health Emergency Law, the legislature expressly limited the Governor's police powers when addressing public health emergencies. See ORS 433.441. By limiting the Governor's proclamation of a public health emergency to 14 days, with an opportunity to extend the proclamation for an additional 14-day period, the legislature provided a procedure that safeguards against the arbitrary exercise of the Governor's police powers during a prolonged public health emergency such as a pandemic.

To allow the Governor to exercise police powers under ORS 401.165 without adherence to the time limitations and safeguards in ORS 433.441 would allow an arbitrary exercise of the police powers delegated by the legislature. The constitution requires that the legislature establish a procedure for the exercise of its delegated power and that the legislature "furnish adequate safeguards against the arbitrary exercise of the delegated police power." See *MacPherson v. Dep't of Admin. Servs.*, 340 Or 117, 136, 400 P2d 223 (2006) (citing *Warren v. Marion County*, 222 Or 307, 313, 353 P2d 257 (1960)). By enacting ORS 433.441 relating to public health

emergencies, the legislature appropriately delegated its police powers to the Governor to address public health emergencies with detailed safeguards.

To extend the Governor's police powers to address public health emergencies beyond the statutory time periods provided in ORS 433.441, the legislature must exercise or further delegate its police powers as a legislative body. This statutory procedure maintains a separation of powers between the legislative and executive branches during a public health emergency and avoids undue overlap of the exercise of police powers by prescribing specific time-periods during which the Governor is empowered to utilize extraordinary police powers, in accordance with the procedure prescribed by the legislature, to manage the initial emergency response. Without a preliminary injunction, the Governor has nearly unlimited police power through the declaration of a state of emergency under ORS 401.165, and the intended safeguards contained in ORS 433.441, preventing the arbitrary exercise of executive power during a public health emergency, will continue to be ignored.

C. Circuit Court's Preliminary Injunction Protects the Right to Appeal Adverse Decisions

The Governor's most recent Executive Order 20-25, addressing the coronavirus pandemic, also significantly limits the powers of the judicial branch by expressly limiting judicial review of decisions made by the Governor pursuant to

Executive Order 20-25 See Governor Kate Brown, Executive Order No. 20-25, May 14, 2020, para 26 (available at:

https://www.oregon.gov/gov/Documents/executive_orders/eo_20-25.pdf).

Paragraph 26 of Executive Order 20-25 provides:

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

By declaring all decisions made pursuant to Executive Order 20-25 discretionary, and declaring that no “right, privilege or benefit” is created, the Governor is attempting to take away the right to appeal adverse decisions made pursuant to the Executive Order. For example, if a county’s application to transition to a Phase I, Phase II or Phase III reopening is denied, Executive Order 20-25 would bar a county from appealing the adverse decision under the Oregon Administrative Procedures Act (OAPA).

Through Executive Order 20-25, the Governor also prohibits individuals from engaging in conduct inconsistent with guidance provided by the Oregon Health Authority (OHA). See Id at Para 2(c). This puts the onus on individuals and businesses to constantly check the OHA website for

guidance, and to understand that guidance, and subjecting individuals and businesses to criminal penalties if the OHA guidance is not adhered to. The OHA's guidance issued in response to the coronavirus pandemic does not follow OAPA emergency rulemaking procedures contained in ORS 183.335, yet through Executive Order 20-25 this guidance has the force of emergency rules without adhering to the emergency rulemaking safeguards contained in both ORS 183.335 and ORS 433.443, and does away with the opportunity for judicial review of adverse decisions rendered by the OHA.

Through Executive Order 20-25, the Governor is removing the power of the judiciary to review adverse decisions made pursuant to the Executive Order. This further obfuscates the core functions of the separation of powers and prevents the judiciary from addressing arbitrary exercises of executive power. By failing to follow the procedure provided by the legislature in ORS 433.441 and ORS 443.443, and by issuing Executive Orders that exercise police powers beyond what was delegated by the legislature, the Governor has concentrated power in the executive branch, creating the potential for the Governor to arbitrarily legislate and adjudicate.

D. The Executive Orders Provide Enforcement with Criminal Penalties, Which Require a Narrow Interpretation of the Legislative Authorization

A dramatic demonstration of the impact of the Governor's Executive Orders is the reliance on enforcement through ORS 401.990 in seven of the first 19 Executive Orders, as to the coronavirus pandemic. These are Executive Orders which are most directly aimed at the people of Oregon. These seven Executive Orders are Executive Orders 20-05, 20-07, 20-10, 20-11, 20-12, 20-13, and 20-22. The Governor's 20th Executive Order, Number 20-25, issued while the Circuit Court hearing in this case was underway, also relies on enforcement under ORS 401.990. The Governor's reference to enforcement under ORS 401.990 in these Executive Orders is not benign. It criminalizes failure to obey the Governor's directives and guidance issued by the Oregon Health Authority. ORS 401.990 reads:

Any person knowingly violating any provision of this chapter [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.

A person convicted of a Class C Misdemeanor can be sentenced to a term of imprisonment of up to 30 days. ORS 161.615 (3). A person convicted of a Class C Misdemeanor can also be sentenced to pay a fine in an amount up to \$1,250. ORS 161.635 (1)(c).

So, if the Governor were unhappy that someone has dared to educate a child in a school; dared to gather with more than 25 others to attend a religious service, 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 business which is supposed to be closed; dared to operate a business closed by order of the Governor; and so forth, such person could 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. This extraordinary delegation to the executive of the legislative function of criminal law can only be appropriate with significant time and place restrictions. One such limit is, by connection between the Public Health Emergency Law and the General Emergency Law, the 28-day time expiration of ORS 433.441 (5).

**E. The Common Law Provides Inherent Police Power to the Sovereign,
but the Legislature has Limited that Power in Oregon**

When we are evaluating the extraordinary exercise of power by the Executive in an emergency situation, we always need to consider whether the Executive is exercising those powers under the Common Law or whether those powers now have been clearly circumscribed and defined by Oregon Law. In Oregon, our Supreme

Court has long recognized that the Common Law was adopted as it existed, as modified and amended by the English statutes passed prior to the American Revolution. *Peery v. Fletcher*, 93 Or 43, 182 P 143 (1919). However, the substantive law contained in the Common Law of England only remains the law of Oregon until it is changed by the Legislature. See *State v Blacker*, 234 Or 131, 380 P2d 789 (1963).

With this in mind, this Court has recognized that the Legislature has the right to abrogate Common Law if it sees fit. *Green v. Leckington*, 192 Or 601, 236 P2d 335 (1951). In addition, Oregon Courts cannot invoke the policy of the Common Law to change the meaning of a clear and unambiguous statement found in statute. *State ex rel. Thornton v. Williams*, 215 Or 639, 336 P2d 68 (1959).

As the presentation in the remainder of this Memorandum will demonstrate, Oregon has developed a comprehensive legislative scheme to address general emergencies, originating in 1949 legislation. It also has developed a comprehensive legislative scheme to address public health emergencies, originating in legislation passed in 2003 and extended and revamped by legislation passed in 2007. The 2003 legislation was adopted in House Bill 2251, which became Chapter 555, Or Laws 2003. The 2007 legislation was adopted in House Bill 2185, which is became Chapter 445, Or Laws 2007.

All of this legislation relates to public health, communicable diseases, and disasters. This comprehensive scheme supplants any possible application of Common Law. In addition, the people of Oregon added more legislation on this topic with the enactment of Article X-A to the Oregon Constitution, adopted in November 2012. This simply adds to the proposition that we need not have redress to the Common Law in order to understand how to address the public health emergency issues raised in the current litigation.

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

Oregon has two statutory systems in place in regard to emergencies. One set of statutes relates to a public health emergency, among other public health issues, and it is contained in ORS 433.441 through 433.466. This statutory scheme, hereinafter collectively referred to as the Public Health Emergency Law, includes a specific definition of “public health emergency.” ORS 433.442(4) provides, in pertinent part:

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

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

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

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

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

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

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

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

A proclamation of a state of emergency must specify:

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

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

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

To the extent that the Governor may rely on ORS 433.407 to 433.423 to justify her declaration of a public health emergency through Executive Order, that power expired 28 days after the triggering proclamation on March 8, 2020.

The general state of emergency statutory scheme is found in ORS 401.165 through 401.236 (hereinafter referred to, collectively, as the General Emergency Law).

A review of the General Emergency Law system shows that it generally contemplates emergencies such as floods, storms, and forest fires. There is no indication in the General Emergency Law that it was designed with a public health emergency in mind other than a reference to “disease” in ORS 401.025. The General Emergency Law has zero references to “public health emergency.” The General Emergency Law does not refer to a “pandemic” or “epidemic.” On the other hand, a review of the Public Health Emergency Law reveals that it refers to “public health emergency” thirty (30) times and contemplates application of the Public Health Emergency Law to “an epidemic of communicable disease” that could result in a large number of deaths. See ORS 443.442(4).

The provisions of the General Emergency Law authorize complete authority over all executive agencies of state government within the area designated in the proclamation and authorize exercise of all “public powers vested in the state by the Oregon Constitution in order to effectuate the purposes of this chapter.” ORS

401.168 (1) (emphasis supplied). The General Emergency Law also gives the Governor authority to suspend the provisions of any order or rule of any state agency” if the order or rule “would in any way prevent, hinder, or delay mitigation of the effects of the emergency.” ORS 401.168.

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

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

Under the General Emergency Law, the Governor may waive the one-week waiting period for unemployment compensation. ORS 401.186. This provision,

enacted in 2008, is the only statutory change to the General Emergency Law since 1983. ORS 401.165 to 401.204.

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

In fact, it extends the powers of the General Emergency Law when a public health emergency exists contemporaneously with the general emergency. But the declaration of public health emergency itself only exists for 28 days, whether or not a general emergency continues.

There is no provision in the General Emergency law in regard to control of premises, use of facilities for businesses, etc. The Public Health Emergency law contains a specific provision as to this subject. ORS 433.441 (3) provides:

During a public health emergency the Governor may:

...

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

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

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

This provision establishes that the Public Health Emergency Law does not limit the “authority” of the Governor to “declare” a state of emergency under the General Emergency Law. It does not provide that the General Emergency Law extends the 28-day time limits contained in the very next provision, Section 5.

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

This is logical. A terrible storm, flood, or fire, or other disaster, may cause an outbreak of disease, such as typhus or cholera. The recovery from the disaster may

well extend beyond 28 days. This includes removal of debris, rebuilding roads and bridges, etc. But the special powers of the Public Health Emergency Law, relating to “the occurrence or imminent threat of an illness or health condition” (ORS 443.442 (4)) expire after 14 days, extendable by an additional 14 days. (ORS 433.441 (5)).

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

(1)(a) During a state of public health emergency proclaimed under ORS 433.441 or during a state of emergency declared under ORS 401.165 that is related to a state of public health emergency that has not expired, the immunization registry and tracking and recall system established under ORS 433.094 may be used as a vaccination management and tracking system... (emphasis supplied).

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

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

(1) The Governor shall terminate the state of emergency by proclamation when the emergency no longer exists, or when the threat of an emergency has passed.

(2) The state of emergency proclaimed by the Governor may be terminated at any time by joint resolution of the Legislative Assembly.

The General Emergency Law and the Public Health Emergency Law overlap, and in the area of the overlap, they relate to the issue as to how to handle a public health emergency. In construing these two statutory systems, each system should be construed so as to produce a harmonious whole, to the extent possible. See Cal-Roof Wholesale, Inc., v. State Tax Commission, 242 Or 435, 410 P2d 233 (1966). Our analysis of these two statutory systems and the time limits on the exercise of the Governor’s emergency powers produces a harmonious result, as presented above. Should this Court find a conflict between the time limits contained in the Public Health Emergency Law as opposed to the no-time-limits aspect of the General Emergency Law, the more particular, special and specific provisions of the Public Health Emergency Law should take precedence over those of the General Emergency Law, which are general in their terms. See Colby v. Larson, 208 Or 121,

297 P2d 1073, rehearing denied, 208 Or 121, 299 P2d 1076 (1956). See also Hansen v. Abrasive Engineering and Mfg., Inc., 317 Or 378, 856 P2d 625 (1993).

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

The provisions of the General Emergency Law do not parallel the provisions of the Public Health Emergency Law when it comes to connectivity. The General Emergency Law provides that, when an element of the general emergency involves invoking the Public Health Emergency Law, the Public Health Emergency Law may be invoked within the General Emergency Law. But it is clear from the legislative language, discussed above, that those provisions are a package which is carried into the General Emergency Law, and that package still contains the 28-day time limitation as to the unique powers allowed to the Governor under the Public Health Emergency Law. The Executive Orders issued by the Governor in regard to the coronavirus pandemic cite the General Emergency Law as their authority base, and often cite the Public Health Emergency Law as their authority base. But all of the activity relating to the coronavirus pandemic has to do with communicable disease as defined under the Public Health Emergency Law. There is no indication in the

Executive Orders of the Governor that the Governor is addressing other kinds of emergencies, such as fires, floods, or storms – or even earthquakes and volcanic eruptions.

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

G. If the Coronavirus Pandemic Were Even Worse, the Governor's Powers Would Expire in 30 days Absent Legislative Action

The worst possible public health emergency would allow the Governor to use the powers delegated to her for a “catastrophic disaster” under Article X-A of the Oregon Constitution. This addition to the Oregon Constitution was referred to a vote of the people by the Oregon Legislative Assembly during the 2011 Legislative Session. 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, and Oregon voters approved it. Oregon Secretary of State Blue Book, Report on Ballot Measures.

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

Amends Constitution: Governor May Declare “Catastrophic Disaster” (defined); requires legislative session; authorizes suspending specified constitutional spending restrictions.

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

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

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

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

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

(d) Public health emergency...

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

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

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

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

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

(5) If the Governor declares that a catastrophic disaster has occurred, the Governor shall manage the immediate response to the disaster. The actions of the Legislative Assembly under sections 3 and 4 of this Article are limited to actions necessary to implement the Governor's immediate response to the disaster and to actions necessary to aid recovery from the disaster."

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, subsections (1) and (2), provide:

(1) Except as provided in subsection (2) of this section, the provisions of sections 1 to 5 of this Article, 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.

(2) Prior to expiration of the 30-day limit established in subsection (1) of this section, the Legislative Assembly may extend the operation of sections 1 to 5 of this Article 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.

In essence, the Governor is empowered by Article X-A to take extraordinary measures to respond to a public health emergency constituting a catastrophic disaster, but her powers only exist for 30 days from the invocation of such powers

and can be extended only by approval of the Legislative Assembly, which can only extend those powers beyond the 30-day limit with approval of three-fifths of House and Senate Members who are able to participate.

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

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

It defies logic for the Governor to be limited to 30 days of extraordinary powers when the worst kind of public health emergency – a “catastrophic disaster” – is declared, yet the Governor would be subject to no time limits under the statutory public health emergency, even though the Public Health Emergency Law itself contains extraordinary powers. This is especially true when the Public Health Emergency Law incorporates the powers of the General Emergency Law. Yet, the Governor continues to assert that the 28-day time limit does not apply in these circumstances.

H. The Legislative History of the Laws in Issue Supports the Circuit Court’s Determination that a 28-day Time Limit Applied to the Governor’s Exercise of Extraordinary Powers in a Public Health Emergency

When interpreting a statute this Court must determine legislative intent. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Per *Gaines*, there are two first level

considerations is this determination: (1) The text and context of a statute “must be given primary weight in the analysis;” and (2) Legislative history may be offered by the parties, but “the extent of the court’s consideration of that history, and the evaluative weight that the court gives it, is for the court to determine.” *Id.* at 172. The second level consideration is that, if an ambiguity remains after consideration of text, context, and legislative history, “the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.” *Id.* There are certain rules of statutory construction that interpreters have followed in analyzing the statutes applicable to this case:

1. [W]ords of common usage typically should be given their plain, natural, and ordinary meaning.” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143, 1146 (1993).

2. “As a general rule, we construe a statute in a manner that gives effect, if possible, to all its provisions.” *Crystal Communications, Inc. v. Dept. of Rev.*, 353 Or 300, 311, 297 P3d 1256, 1261 (2013); *see also Capital One Auto Finance, Inc. v. Dept. of Rev.*, 363 Or 441, 451, 423 P3d 80, 86 (2018). Further, as a corollary to this rule, “[W]e assume that the legislature did not intend any portion of its enactments to be meaningless surplusage.” *State v. Stamper*, 197 Or App 413, 418, 106 P3d 172, 175 (2005), *rev den*, 339 Or 230, P3d 790 (2005).

3. Statutes should be read consistent with settled rules of grammar and syntax. *See Delgado v. Souders*, 334 Or 122, 131-33, 46 P3d 729, 737-38 (2002).

Intervenors have applied traditional rules of statutory construction in our analysis of the meaning and application of the 28-day time limit as to the use of extraordinary powers under the Public Health Emergency Law and the Governor's declaration of a public health emergency. If one delves into the Legislative history, our analysis is reinforced.

This Court pronounced in *Gaines*:

A party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis. *Gaines*, at 172.

Intervenors have applied the modern Public Health Emergency legislative history of law because it is useful as to this Court's analysis of ORS 433.441 and ORS 401.165.

The legislature passed the modern pieces of legislation relative to health emergency laws in 2003, 2007, and 2013. The 2013 changes largely dealt with vaccinations against young adults and are not entirely relevant to the analysis as to the Public Health Emergency Law and the General Emergency Law. *See* Senate Bill (SB) 167 (2013), enacted as Chapter 332, Or laws 2013.

The Legislature first developed comprehensive legislation as to public health emergencies in 2003. On February 14, 2003, the House Health and Human Services Committee first considered HB 2251, which established ORS 433.441. Audio Recording, House Committee on Health and Human Services, HB 2251, Feb. 14, 2003, at 23:06-1:24:24

<http://records.sos.state.or.us/ORSOSWebDrawer/Record/4168558> (accessed May 19, 2020). The Oregon Medical Association, Oregon Emergency Management, and Oregon Public Health (then Health Services under Oregon DHS) came together to work on and propose the bill. *See* Minutes, House Committee on Health and Human Services, Feb. 14, 2003, 3-4. Initially, this health emergency law was the Governor's tool for an "impending public health crisis." *See* House Bill (HB) 2251 (2003). The legislative history from 2003 indicates that ORS 433.441 was first introduced as a method for the Governor to deal with an *impending* public health crisis, i.e., before the crisis gets to the level that would require an emergency declaration under Chapter 401. Thus, Chapter 401 largely remained the way to deal with a pandemic of proportion except for the emergency powers outlined in HB 2251. *See Generally* Audio Records, House Committee on Health and Human Services, HB 2251, Apr. 30, 2003, at 0:49-14:28

<http://records.sos.state.or.us/ORSOSWebDrawer/Record/4168693> (accessed May 19, 2020).

One important element was the 28-day time limit. The adopted language, which became ORS 443.441(4), read: “A proclamation of a state of impending public health crisis expires when terminated by a declaration of the Governor or 14 days after the date it is proclaimed unless the proclamation is expressly extended for an additional 14-day period by the Governor.”

A key comment on 28-day limit was made in 2003:

I like the idea that you can move quickly if there's an emergency— let's work to get something that really establishes an immediate response. But I on the other hand, and I didn't see this until just a minute ago, there is a definite end to the emergency too because that could be a major problem—if it goes on and on and on, the emergency is over, and yet you can access records and do things that could be really detrimental. I think with the 14 days or with an extension period—that does give some end to this crisis, emergency, whatever.

Audio Recording, Feb. 14, 2003, at 1:11:45-1:12:21 (statement of Representative Gordon Anderson). The limit provision remained largely unchanged in 2007 besides redefining “impending public health emergency” as “public health

emergency” in the 2007 amendment. HB 2185, § 23(5) (2007), enacted as Chapter 445, Or laws 2007.

In 2007 the Legislature restructured the public health process as a result of collaboration between hospitals, law enforcement, public health officials, medical providers, and others. This was a comprehensive approach. It included enforcement mechanisms, and was meant to be a guide in a public health emergency, down to the level of individual patient care in the event of a pandemic or other public health emergency. *See Generally* Audio Testimony, Joint Committee on Emergency Preparedness and Ocean Policy, HB 2185, Apr. 24, 2007 at 57:57-1:37:05 http://oregon.granicus.com/MediaPlayer.php?clip_id=16806 (accessed May 19, 2020). The 2007 legislation addressed clear “gaps” in state law, provided for fair quarantine and isolation procedures, established a comprehensive and fair state response to a public health emergency, set standards for human remains disposal, standards and procedures for toxic hazards, and addressed some potential liability in a public health emergency. *Id.* at 59:37-1:05:27 (statement of Dr. Susan Allan, Public Health Director). Dr. Allen further described the bill as:

This bill addresses ability to respond to public health and medical aspects of emergencies. Developed in part in response to concerns raised by local health depts, hospitals and physicians about the need during emergencies to have

a consistent approach to the tough decisions - consistent for fairness, and also for liability protection.

....

So maybe we'll be lucky enough not to need any of these provisions beyond managing an occasional tuberculosis patient. But if something does happen - a pandemic, a "SARS II" outbreak, a chemical accident resulting in the release of a large toxic cloud sweeping across a city - we want to have the tools in place to do the best we can, to respond quickly and clearly, to protect people and to save lives.

....

Current laws do not protect individuals (due process) or communities (ability to respond to many of the situations that might arise). Do not provide for ability to manage large numbers of dead. And do not adequately provide for ability to assess possible toxic hazards. Current laws are also confusing in some instances, and the public health laws that address emergency powers are currently scattered in different sections of the state code.

....

From the beginning [of the legislative process], [we] worked closely with others who need to be part of planning and responding to public health and medical emergencies.

Exhibit A, Joint Committee on Emergency Preparedness and Ocean Policy, HB 2185, Apr. 24, 2007 (accompanying statement of Dr. Susan Allan).

Clearly, the bill was meant to be a comprehensive response and guide in a pandemic. This is evidenced by further testimony. The 2007 amendment was also described as follows:

“HB 2185 addresses an important concern for state and local public health authorities. Public health officials need the ability to manage multi-community events in a consistent and coordinated manner. Oregon law does not provide a clear and effective way for us to do that now. In fact, current law creates some barriers to assuring the health security of Oregonians in an emergency.

....

Local health departments have been active partners in developing this proposed revision of public health laws for managing emergencies. Public health officials on all levels have worked together for several years to coordinate the emergency operations reflecting in this bill.

....

This bill also improves quarantine and isolation laws. It outlines more comprehensive and modern procedures that recognize the rights of individuals. It adds provision for quarantine and isolation of groups for those rare instances in which such responses might be needed. In light of global travel and emerging infectious diseases such as SARS, clear laws allowing health officials to enact policies in a coordinated fashion without delay is essential.

Most importantly, HB 2185 improves the ability of state and local public health authorities to protect individuals and communities. Public health law revisions are necessary for me to do my job effectively. I urge you to enact these changes.”

Exhibit H, Joint Committee on Emergency Preparedness and Ocean Policy,

HB 2185, Apr. 24, 2007 (accompanying statement of Dr. Tom Eversole, Health Administrator, Benton County Public Health Department, on behalf of Conference

of Local Health Officials, and on behalf of the Public Health Emergency Preparedness Committee).

The 2007 amendment was also described as:

[A] key element in improving the preparedness posture of the State [of] Oregon. The overall concept is to clearly define the roles and responsibilities of the State Public Health Director.

Exhibit K, Joint Committee on Emergency Preparedness and Ocean Policy, HB 2185, Apr. 24, 2007 (written testimony of Kenneth D. Murphy, Director, Oregon Emergency Management).

It is also significant that HB 2185 enacted comprehensive public health standards, protocols, and anything for intervention before a “public health emergency” is declared. These are presented in ORS Chapter 431A, which is not the basis for the Governor’s Executive Orders.

Section one of HB 2185 amended ORS 431.035 to allow the director of human services to appoint a Public Health Director to perform the duties and exercise authority over public health matters in the state.

This legislation defined various terms such as communicable disease, condition of public health importance, disease outbreak, and epidemic. The Act gives the power to enforce public health laws to the Department of Human Services

and local public health administrators. The Act outlines the public health director's role and duties in the absence of the governor's declaration of a public health emergency under ORS 433.441. This includes comprehensive authority for the public health director to work with local public health officials to address a wide range of communicable disease circumstances, absent the declaration of a public health emergency. These provisions are so comprehensive that they now are reflected in an entirely separate Chapter of Oregon Law: Chapter 431A, which encompasses ORS 431A.005 through 431A.900. The point is that public officials are empowered to carry out a wide range of actions to address communicable diseases – even epidemics – without a declaration of a public health emergency. The 28-day limit on the Governor's extraordinary powers, as exercised by the Governor's Executive Orders subject to this litigation, does not leave society defenseless. It just protects the rights of Oregonians.

I. The Executive Orders Represent Extraordinary Restrictions on the Freedom of Oregonians

The actions taken by the Governor in her Executive Orders reflect extraordinary economic, social, religious, and education restrictions on the people of the state of Oregon.

The following presents many of the extraordinary powers asserted by the Governor through her 19 Executive Orders, which preceded the Circuit Court hearing in this case:

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

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

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

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

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

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

(g) Ordering Oregonians to stay home, including restrictions on social gatherings unless 6 feet of social distance can be maintained, and prohibiting the patronization of closed businesses; closing most businesses; requiring social distancing for certain retail businesses; imposing workplace restrictions; closing government buildings to the public except for limited circumstances; requiring that child care providers must close if they cannot maintain stable groups of 10 or less children in a classroom, that cannot be accessed by other children outside the group; requiring that child care must be prioritized for certain special groups; closing all public

recreational areas and parks; restricting travel to essential travel. Executive Order

20-12.

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

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

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

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

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

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

In Executive Order 20-25, the Governor continues to assert extraordinary powers over the lives of Oregonians – and over county governments. In detailing her Phase 1 Reopening Plan, the Governor reaffirms many of her restrictive social distancing measures. Executive Order 20-25 limits cultural, civic, and faith-based gatherings to a maximum size of 25, whereas social and recreational gatherings are limited to a maximum of 10, with six-foot social distancing measures remaining a contingency for all gatherings. Pending Phase 1 approval, the Governor also mandates the continued closure of more than 40 different types of businesses

throughout the state, including those already most severely affected by the statewide shutdown, such as restaurants, breweries, wineries, and many retail businesses. Executive Order 20-25 also demands that retail businesses and non-profits must continue to facilitate telework and work-at-home opportunities, further compromising the already-dwindling resources of many small business owners throughout the state. Perhaps most shockingly, Executive Order 20-25 attempts to ban all outdoor activity in which the six-foot social distancing guideline cannot be met.

The Governor attempts to unilaterally maintain control over the entire state's economic and social outcomes, but also attempts to curtail the rights of individuals – and entire counties – to participate in the economy and worship within their own communities; the oppression of businesses, churches, and the individual rights of Oregonians will continue with drastically negative effects so long as the Governor is permitted to assert extraordinary powers beyond the time limits of the Public Health Emergency Law.

J. The Executive Orders Impose Shutdowns and Restrictions Which Cause Irreparable Harm to Oregon's Economy, Businesses, and Workers

Of the many industries harmed throughout Oregon as a result of Governor Brown's Executive Orders, the hospitality industry – primarily restaurants,

breweries, and wineries – has been one of the most severely affected. Since March, 4% of restaurants throughout the state have closed permanently as a result of the Executive Order shutdowns; that number is expected to grow to 10% by the end of this month. Michael Russell, “These Oregon Restaurants and Bars Have Closed Permanently during Coronavirus Crisis.” *OregonLive*, The Oregonian, 18 May 2020, at www.oregonlive.com/coronavirus/2020/05/oregon-restaurants-and-bars-that-closed-permanent-during-coronavirus-crisis.html.

One article cited 21 restaurants across eight Oregon cities that suffered severe financial losses as a result of the shutdowns and were forced to close permanently, with the list expanding daily. *Id.* Another article cited 57 restaurants in the Portland area that were forced to close temporarily or severely reduce their services as a direct result of Executive Order 20-07. Brooke Jackson-Glidden, and Alex Frane, “A Number of Restaurants Once Open For Takeout and Delivery Have Closed Last Week.” *Eater Portland*, Vox Media, 13 Mar. 2020, at <https://pdx.eater.com/2020/3/13/21178995/covid-19-coronavirus-closures-portland>.

According to researchers from Linfield College, Oregon wineries have lost an average of \$44,000 in revenue every month since March, with one winery citing monthly losses exceeding \$700,000. Andrew Selsky, “Oregon Aims to Include Brewpubs, Wineries in Reopening.” *ABC News*, ABC News Network, 30 Apr. 2020,

at www.abcnews.go.com/Health/wireStory/oregon-aims-include-brewpubs-wineries-reopening-70440189. Moreover, breweries throughout the state have terminated thousands of employees since the shutdown in March. *Id.* The Deschutes Brewery in Bend laid off more than 300 employees as a direct result of the shutdowns, approximately 65-70% of its workforce. Andre Meunier, “Deschutes Brewery Lays off over 300 as Coronavirus Effects Pummel Craft-Beer Industry.” OregonLive, The Oregonian, 25 Mar. 2020, at www.oregonlive.com/beer/2020/03/deschutes-brewery-lays-off-over-300-as-coronavirus-effects-pummel-craft-beer-industry.html.

Oregon’s unemployment rate was at a record low of 3.3% at the beginning of March 2020; the unemployment rate has since ballooned to more than 18%, with numbers projected to exceed 20% by the end of May. Bill Poehler, “Oregon Unemployment, at 362,000, Is Twice That of Great Recession.” Statesman Journal, Salem Statesman Journal, 30 Apr. 2020, at www.statesmanjournal.com/story/news/2020/04/30/oregon-unemployment-claims-twice-during-great-recession/3057236001/.

These unemployment percentages are more than double those seen during the Great Recession of 2010. *Id.* The greatest increase in unemployment filings occurred between March 14 and March 21, where weekly filings increased from 4,800 to

76,500; since then, there has been a steady decrease in the number of weekly unemployment claims. *Id.*

According to a May 14 publication from the Oregon Employment Department (OED), 396,000 unemployment claims have been filed since March 15. Gail Krumenauer, “Initial Claims and Unemployment Benefits in Oregon”. State of Oregon Employment Department, 14 May 2020, *at*

https://www.oregon.gov/employ/Documents/05.14.20%20Initial%20Claims%20and%20Agency%20Response%20News%20Release_FINAL.pdf.

March 15 serves as the OED’s original date of analysis for coronavirus-related unemployment figures as the date occurs exactly one week after Governor Brown’s signing of Executive Order 20-03. *Id.* Since March 15, Oregon’s leisure and hospitality (77,131 claims), transportation and utilities (52,689 claims), education and health service (50,255 claims), and manufacturing (29,732 claims) industries have seen the highest number of unemployment claims. *Id.*

The sudden influx of unemployment claims to the OED has resulted in massive backlogging and lengthy wait times in processing, distributing, and receiving benefits. Despite Governor Brown’s expanding of OED claim-handling staff from 106 in March to more than 600 in May, the workload continues to exceed the capacity of the OED. Poehler, “Oregon Unemployment, at 362,000, Is Twice That of Great Recession.” Approximately 14%, or 53,175 claims remain

unprocessed, with wait times for some filers exceeding six to seven weeks. Krumenauer, “Initial Claims and Unemployment Benefits in Oregon”. Those seeking information on claim status over the phone can expect to wait anywhere from 171 to 215 minutes – or approximately 3 to 3.5 hours – for their call to be answered. “COVID-19 Related Business Layoffs, Closures, and Unemployment Insurance Benefits.” *GovStatus*, State of Oregon Employment Department, 15 Mar. 2020, available at <https://govstatus.egov.com/ORUnemployment COVID19>.

To provide context on the severity of current unemployment in Oregon, the OED stated, “Unemployment Insurance would now be the largest paying subsector of Oregon’s economy. By comparison, unemployment benefits would have ranked 37th by payroll prior to the COVID-19 closures.” *Id.*

Oregon’s economic and revenue forecast, published four times a year in March, June, September, and December, was released on May 20, 2020. (Available at: <https://www.oregon.gov/das/OEA/Documents/forecast0620.pdf>. Economic models and assumptions are reviewed by the Department of Administrative Services (DAS) Economic Advisory Committee and by the Governor’s Council of Economic Advisor. The results from the economic model are used to provide preliminary forecast for state tax revenues. *Id.*

According to analysts, Oregon is in an “extremely severe” recession and will take years for a complete recovery. This recession is the deepest on record, going

back to 1939 in Oregon history. Permanent damage to the economy during the shutdown phase is expected to be limited, as long as the number of firms closed, and the number of workers displaced, are limited. *Id.*

Oregon's economy is subject to "boom-bust swings" and state revenues are typically more volatile than others states because they are dependent on personal and corporate income taxes. *Id.* The requirement for isolation has led to a decrease in consumer spending, which has resulted in low sales-based taxes from lodging, gasoline, vehicle purchases, video lottery, and marijuana sales. *Id.*

K. Irreparable Harm as Seen by Intervenors

The eleven Intervenors in this case reflect individual and localized examples of the irreparable harm which is being caused by allowing the Governor's Executive Orders as to the coronavirus pandemic to remain enforceable beyond the original 28-day time frame allowed under the Public Health Emergency Law. To wit:

Bill Harvey, Chair of the Baker County Commission, reports that the home construction, agriculture, and tourism communities in his county have been hard hit by the Governor's Executive Orders. ER-83. Sam Palmer, a member of the Grant County Commission, reports that his county has had one of the worst unemployment rates in Oregon for the last 30-40 years, and that the Governor's Executive Orders

“have placed additional extraordinary burdens on our local businesses such that the impact is devastating and may destroy the capacities of some of these businesses to survive.” ER-85.

Sheriff Glenn Palmer of Grant County reports that the Executive Orders’ effect is that work of his Sheriff’s Department has been hindered, revenue has been reduced by more than 80%, and businesses in his county have been unable to operate because they have been ordered closed or placed under considerable restriction – even though, as he signed his Affidavit on May 11, 2020, Grant County only had one positive finding of coronavirus on one person. ER-87.

Jerry R. Shaw, Jr. owns the Inland Café in Baker City. His café’s dining operations have been eliminated so the café is limited to take-out and delivery services. He has had to reduce 20 employees to extremely limited part-time hours of about one day a week. ER-89.

Matthew R. Cunningham is a member of St. Francis de Sales Parish in Baker County. His family previously attended public Mass at the church, without fail, on Sundays and Holy Days of Obligation. They have been unable to attend because of the closure orders. ER-91.

Donald A. Jay is a parishioner of St. Francis of Assisi Parish in Bend, Deschutes County. Because of the Executive Orders, Masses have not been offered so that members of the parish have been unable to attend. ER-92.

Jacob A. Brown and Samuel H. Brown are brothers and co-owners of a construction company in Baker City. As a result of restrictions on business activity by the Executive Orders, their business operations have been reduced, resulting in loss of revenue and requiring layoff of employees. ER-93, 94.

Virginia Stegemiller and her husband operate a mixed-use business center in Grants Pass, Josephine County. Under the Governor's Executive Orders, five of the eleven tenants have requested rent deferral or abatement, and one has requested early lease termination. The Stegemillers' accommodation of these tenants has caused their business to lose money. ER-95.

B. David Hurley and his wife own two lodging businesses in Wallowa County. As a result of the Governor's Executive Orders, current lodging rentals have decreased by two-thirds. Their reservations for the summer, which is their busiest season and critical to their business's survival, have all but ceased. ER-96.

Douglass W. Hills owns three small businesses in Baker City. As a result of restrictions imposed by the Governor's Executive Orders, his auto parts store has suffered reduced sales and had to lay off three people; his auto repair shop has

reduced business and reduced income; both of his only two employees of his towing company have been laid off due to loss of business. ER-97.

The above reports bring home the direct impact of the exercise of extraordinary powers by a Governor in a public health emergency. Oregon law is designed to provide a 28-day time limit on such damage. The preliminary injunction requires observance of the time limit.

L. The Executive Orders Create Irreparable Harm for Those Who Wish to Exercise Their Religious Beliefs, and the Orders Demonstrate How Unbridled Power Can Be Arbitrary

The Governor's orders may be well-intentioned, but they significantly burden religious rights without basis in science, data, and public health as claimed. The orders contain an underbelly of religious prejudice that is both unconstitutional and inconsistent with who we are as tolerant Oregonians. The discriminatory nature of the orders inflicts significant public harm if allowed to continue, and it actually undermines the state's reliance on alleged harm to public health from religious gatherings.

Both the Oregon and United States Constitutions protect the right to religious freedom. The First Amendment's "Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity*

Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 533 (1993)). Laws may not “regulate or outlaw conduct because it is religiously motivated.” *Trinity Lutheran*, 137 S. Ct. 2012.

Any government limits on religious freedom must survive the high standard of strict scrutiny unless they are neutral and generally applicable. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). Thus, “government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief,” such as “fail[ing] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than” the prohibited religious conduct. *Lukumi*, 508 U.S. at 534.

The United States Court of Appeals for the Sixth Circuit found that Kentucky’s numerous exceptions to their COVID-19-motivated gathering ban removed it from the safe harbor of generally applicable laws. *Theodore Roberts, et al v. Robert Neace, et al*, No. 20-5465 (6th Cir. May 9, 2020) (granting injunction pending appeal) (“At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.”)(citations omitted). Another federal court observed: “evidence that the risk of [COVID-19] contagion is heightened in a religious setting any more

than a secular one is lacking.” *Tabernacle Baptist Church, Inc. of Nicholasville, Kentucky v. Andrew Beshear*, No. 3:20-cv-00033-GFVT at *10 (E.D. Ky. May 8, 2020) (blocking ban on religious gatherings).

The Governor’s Executive Orders burden religious practice as they completely ban most faith gatherings. Further, the orders are the very opposite of neutral and generally applicable—they create an inconsistent web of content-based restrictions and carve-outs that are not narrowly tailored to any public health interest but penalize conduct due to religious motivations. Executive Order 20-25 prohibits “cultural, civic, and faith-based gatherings of more than 25 people” and “social and recreational” gatherings of more than 10 people. However, it broadly exempts “essential businesses and services, including but not limited to workplaces, grocery stores, retail stores, convenience stores, banks and credit unions, gas stations, hotels or motels, health care facilities, pharmacies, child care facilities, schools, higher education institutions, and state or local government.” Malls, clubs, restaurants, pubs, gyms, hair salons, and other entities are also currently exempt under ever-changing OHA “phase one” guidelines—but not religious entities.

This creates discriminatory results: 26 people can gather for eight hours in a bank to work but not in a church for a half-hour to pray; 26 people can gather in a recreational marijuana shop, but not in a mosque for congregational prayer; 26 people can gather in a smoke shop—which facilitates activity that actually

increases risk from COVID-19—but not at a Sikh temple for scripture recitation.

See Oregon Health Authority, *COVID-19: Frequently Asked Questions*,

<https://www.oregon.gov/oha/PH/DISEASESCONDITIONS/DISEASESAZ/Pages/COVID19-FAQ.aspx?wp1284=1:50> (accessed May 21, 2020).

Phase one of reopening—cited by the Defendants as proof of using “the best available data about what is safe”—determined that quintessential secular gathering places can safely operate but not equivalent religious gathering places. This leads to highly arbitrary results that are entirely divorced from science, data, or reason: 26 people can gather at a club to watch a strip show but not at Mass to listen to a homily; 26 people can gather at a sports bar to raucously cheer on a game but not at a Buddhist meditation retreat; 26 people can gather in a mall to shop for non-essentials but not in a Baha’i center to study religious teachings; 26 people can gather huffing and puffing at exercise machines in a gym, but not at a synagogue.

If the virus doesn’t care about religious motivations, then why do the Governor’s orders? This type of discriminatory treatment indisputably violates religious freedoms protected under the United States and Oregon Constitutions.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Intervenors (and Plaintiffs-Adverse parties) want to gather for corporate worship—to freely exercise their deeply held religious beliefs which are essential to

their faith. The Governor's Executive Orders violate their rights and cannot be fully remedied with money damages, or a post-hoc apology. Plaintiffs-Adverse Parties, Intervenors, and every Oregonian who wishes to participate in a religious gathering faces the catch-22 of either (1) losing their constitutional rights, violating their conscience, and suffering emotional and spiritual turmoil or (2) civil fines and criminal prosecution. The Governor's public embrace of religious discrimination harms the entire public by undermining our core values of tolerance and equality under the law.

Defendants claim that religious entities have sufficient alternatives for religious observance. However, the Governor is not, and should never be, the arbiter of what religious observance is required by a person's faith. The Defendants' argument attempts to quite literally "play God" in determining matters of religious doctrine. It is not for the state to interpret the meaning of religious duties such as "not forsaking the assembling of ourselves together" Hebrews 10:25. *See Theodore Roberts* at 9. The Governor's discriminatory orders are immensely harmful and not supported by public health.

M. The Latest Executive Order, 20-25, Reflects an Unrelenting Assertion of Authority Over Oregonians via the Exercise of Extraordinary Powers

On May 14, 2020, at 8 a.m. just when the Baker County Circuit Court was initiating the three-hour hearing to consider the issuance of a preliminary injunction in this matter, the Governor issued Executive Order 20-25. This Executive Order is the 20th Executive Order issued by the Governor since March 8, 2020. The Executive Order itself reveals continued micro-management of various aspects of Oregon churches, businesses, organizations, and citizens. In this respect, the Executive Order speaks for itself. Executive Order 20-25 May 14, 2020, para 26 (available at: https://www.oregon.gov/gov/Documents/executive_orders/eo_20-25.pdf).

Executive Order 20-25 cites as its authority ORS 433.441 but also cites ORS 401.168, 401.175, 401.188, and subsections of those statutes.

It is noteworthy that, in the 19 Executive Orders issued by the Governor between March 8, 2020 and May 1, 2020, in regard to the coronavirus pandemic, the Governor cited ORS 433.441 (the Public Health Emergency Law) 22 times in 13 of these 19 Executive Orders. In the first Executive Order on this issue, entered on March 8, 2020, the Governor mentions “public health emergency” two times in the Governor’s discussion. In the Order portion, under item 6, the Governor specifically states: “this declaration serves as a public health emergency” for purposes of public employee sick leave statutes. Executive Order 20-03.

The newest Executive Order, Number 20-25, nowhere refers to a “public health emergency.” Here, the closest the Governor comes to describing a public health emergency is the Governor’s report that the World Health Organization “considers COVID-19 to be a global pandemic.” Executive Order 20-25, page 3. This Executive Order contains an extensive list of restrictions on activities which Oregonians can engage in, “subject to the penalties described in ORS 401.990.” Executive Order 20-25, page 5. The Governor also cites ORS 401.192(1) and directs: “the directives set forth in this Executive Order shall have the full force and effect of the law...” Executive Order 20-25, page 15. Significantly, the Governor also strongly empowers the Oregon Health Authority (OHA) to act as a policing agency. She directs that the failure to follow “guidance issued by OHA” to be subject to the penalties described in ORS 401.990.” Executive Order 20-25, page 15. These “penalties” are criminal misdemeanor charges.

In essence, the Governor is proceeding full blast with her assertion of comprehensive statewide controlling power, with criminal penalties, for anyone not following her directives as to how to respond to the coronavirus pandemic. The Governor continues to exercise legislative power well beyond the power actually provided to her in the time-limited Public Health Emergency Law. The powers asserted in Executive Order 20-25 are nowhere contemplated by the original General Emergency Law.

The only protective barrier left to Oregonians in regard to this extraordinary assertion of powers is the willingness of the Oregon judicial branch to serve as a shield to protect against an assertion of extraordinary power, without respecting time limits. The Oregon Supreme Court can protect the judiciary, and legislative authority, by setting aside this Court's temporary stay and by allowing the preliminary injunction issued by the Baker County Circuit Court to remain in place. This line also needs to be drawn because of the Governor's elimination of recourse to the Administrative Procedures Act, in Executive Order 20-25.

N. Re-Establishment of the Preliminary Injunction Does Not Leave the Governor Without Capability to Address the Coronavirus Pandemic

Absent the extraordinary Executive Orders issued by the Governor between March 8, 2020 and May 14, 2020, the Governor still has her standard statutory powers to work to protect Oregonians. State agencies still have their standard regulatory powers, including the powers in ORS Chapter 431A. These powers have been prescribed by the Legislature in statutes.

If the Governor believes that she needs additional powers in order to address the coronavirus pandemic, the Governor can convene a Special Session of the Oregon Legislature and present her policy proposals to that legislative session. The

Governor can present her own interpretation as to what is the “correct science” in dealing with the coronavirus pandemic.

This is not a false solution. We have searched the Oregon Secretary of State reports in regard to Special Legislative Sessions in Oregon. From 1860 to the present day, there have been 56 Special Sessions of the Oregon Legislature. The Governor is herself presently anticipating calling a Special Session of the Legislature to deal with budget shortfalls (ironically, significantly created by the crushing effects on the Oregon economy by the lockdown orders imposed by the Governor, thereby resulting in reduced tax revenues). If the Governor wishes that the Orders and Prohibitions contained in Executive Order 20-25, and the earlier Executive Orders addressing the coronavirus pandemic, need to be continued, she can present these to the Legislature, in the form of proposed legislation. Then the elected representatives of the people can carry out their proper legislative function.

**O. Defendants’ Reliance on “Science” is a Political and Policy Issue,
Not a Legal Standard**

Defendants argue in Section 3 of their Memorandum in Support of Petition for a Peremptory or Alternative Writ of Mandamus that “whatever harm plaintiffs may experience if the executive orders remain in force pales in comparison to the undisputed harm to the state and the public if the orders are enjoined.” In support of

this argument, Defendants cite to scientific information from the Centers for Disease Control and Prevention (CDC) and the Kaiser Family Foundation. Defendants offer no specific expert testimony or other scientific evidence in support of the argument that the continued infringement on fundamental rights from the Governor's mandates is necessary to stop the spread of the novel coronavirus in Oregon.

Furthermore, the preliminary injunction ordered by the Baker County Circuit Court does not create a "renewed public-health crisis" as alleged by Defendants. The same information and guidance from the CDC and Kaiser Family Foundation is available to the general public and Intervenors. Intervenors are not advocating that Oregonians ignore medical experts and guidance from the Governor, but rather are advocating that legal procedure and restrictions cannot be ignored. The impacts of the novel coronavirus have been widely publicized, as have ways in which individuals, businesses and churches can take measures to reduce the spread of the novel coronavirus. Oregonians are free to voluntarily practice social distancing to protect themselves and others in the absence of mandates. If the legislature, or local governments, believe further mandates are necessary to protect the public in the absence of Executive Orders, the legislature or local governments can properly exercise police powers to protect the public.

Defendants are asking this Court to take judicial notice of disputed scientific facts and are asking the court to determine that the Governor's mandates are the most

appropriate scientifically supported social response to the coronavirus pandemic. In accordance with ORS 40.065, this Court should not take judicial notice of the scientific information presented by defendants, as the information presented is subject to reasonable dispute.

The global nature of the coronavirus pandemic has forced nations throughout the world to combat the spread of the novel coronavirus innovatively, and different approaches to contain the virus have had varying levels of success. Some countries, such as the United States, have stressed the importance of social distancing and self-isolation. These social distancing directives, as applied in Oregon, have been extremely restrictive, and as a result, detrimental to local employment, the economy and religious practices. See e.g. Bill Poehler, “Oregon Unemployment, at 362,000, is twice that of Great Recession,” *Salem Statesman Journal*, Apr. 30, 2020 (available at:

<https://www.statesmanjournal.com/story/news/2020/04/30/oregon-unemployment-claims-twice-during-great-recession/3057236001/>). Other countries, such as Hong Kong, Israel, Denmark, and South Korea, have pushed for contact isolation, which has also been reported as successful in controlling the spread of the virus. See e.g. Stone, Lyman, “The Key Tool to a Safe Opening Is Not Social Distancing,” *The Washington Post*, 18 May 2020 (available at

www.washingtonpost.com/opinions/2020/05/18/key-tool-safe-opening-is-not-social-distancing/). Asking this Court to make a scientific determination about the speculative harm Defendants allege will occur, should the Court void the Executive Orders at issue in this matter, is inappropriate. It is the law that is at issue in this case, not the science. Again, in accordance with ORS 40.065, this Court should not take judicial notice of the scientific information presented by defendants, as the information presented is subject to reasonable dispute.

Defendants improperly argue that science demonstrates the preliminary injunction ordered by the trial court will create a harm greater than the harm it seeks to avoid. In response to the Supreme Court's emergency ruling in this matter, the Governor proclaimed that "[f]rom the beginning of this crisis, I have worked within my authority, using science and data as my guide, heeding the advice of medical experts." See, Governor Kate Brown, "Governor Kate Brown Statement on Oregon Supreme Court Ruling, News Release, May 18, 2020 (available at: <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36655>).

Intervenors are not alleging that the Governor has failed to rely on science and data, rather that the Governor has failed to follow appropriate legislative restrictions, especially as to time limits, in issuing Executive Orders related to the coronavirus pandemic. When science and data support executive action, the law (in this case

ORS 433.441) provides the procedure and time limits under which the Governor can appropriately exercise police powers.

Intervenors did not file for an injunction to dispute the science and data relied on by the Governor, but to dispute application of the law to Intervenors (and all Oregonians similarly situated). Intervenors have and will continue to suffer the legal and consequential harms caused by the Governor's failure to obey statutory restrictions. When the Governor failed to renew the declaration of a public health emergency after 14 days from the date of the declaration, and then exceeded the 14-day additional time allowed before her Public Health Emergency Law powers expired, a legal harm occurred, with great consequences, and continues to occur every day that passes. Intervenors do not dispute the efficacy of the governor's initial decision to declare a public health emergency, but rather the Governor's failure to follow the procedure that the legislature prescribed. To validly issue public emergency declarations restricting the rights of Oregonians and subjecting Oregonians to criminal penalties, the Governor was required to follow the procedure described in ORS 433.441(5). Legal procedure was not adhered to by the Governor. In the absence of a legally permissible procedural correction – the preliminary injunction herein -- the harm to Intervenors (and Oregonians) continues.

CONCLUSION

The Circuit Court did not abuse its discretion in granting the preliminary injunction. Accordingly, the Petition for Peremptory or Alternate Writ of Mandamus should be denied.

Respectfully submitted,

/s /Kevin L. Mannix

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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) that the word count of this brief is below 14,000 words. I further hereby 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).

CERTIFICATE OF FILING

I hereby certify that on or about May 22, 2020, I filed the original of this Intervenor-Adverse Parties' Memorandum in Opposition to Petition for a Peremptory or Alternative Writ of Mandamus via electronic filing through the court's e-filing system at the following address:

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As to both documents:
DATED: May 22, 2020

/s/ Kevin L. Mannix
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CERTIFICATE OF SERVICE

I certify that on the 22nd day of May 2020, I directed the foregoing INTERVENORS-
ADVERSE PARTIES MEMORANDUM IN OPPOSITION TO PETITION FOR A
PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS dated May 22, 2020, to be served
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