



## GUBERNATORIAL EMERGENCY POWERS

This memorandum addresses the emergency power authority of the governor of North Dakota.

### CONSTITUTIONAL AND STATUTORY AUTHORITY

As the chief executive of the state, the governor has the responsibility to see that the state's business is well administered pursuant to Section 7 of Article V of the Constitution of North Dakota. The governor also serves as the commander-in-chief of the state's military forces and may mobilize those forces to execute laws and maintain order. In times of disasters or emergencies, the governor has broad statutory authority under North Dakota Century Code Chapter 37-17.1, the North Dakota Disaster Act. A "disaster" is defined in Section 37-17.1-04 as:

[T]he occurrence of widespread or severe damage, injury or loss of life or property resulting from any natural or manmade cause, including fire, flood, . . . **epidemic** . . . or cyber attack which is determined by the governor to require state or state and federal assistance or actions to supplement the recovery efforts of local governments in alleviating the damage, loss, hardship, or suffering caused thereby. **(emphasis supplied)**

A disaster or emergency must be declared by executive order or proclamation of the governor, pursuant to Section 37-17.1-05. Executive orders, proclamations, and regulations issued by the governor have the force of law. Once declared, the state of disaster or emergency continues until the governor determines the threat of an emergency has passed or the disaster has been dealt with to the extent the emergency conditions no longer exist. However, the Legislative Assembly by concurrent resolution has the power to terminate a state of disaster or emergency.

Pursuant to Section 37-17.1-05(6), during times of emergencies, the governor has the power to:

- a. Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency.
- b. Utilize all available resources of the state government as reasonably necessary to manage the disaster or emergency and of each political subdivision of the state.
- c. Transfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency management activities.
- d. Subject to any applicable requirements for compensation under section 37-17.1-12, commandeer or utilize any private property if the governor finds this necessary to manage the disaster or emergency.
- e. Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster or emergency mitigation, response, or recovery.
- f. Prescribe routes, modes of transportation, and destinations in connection with an evacuation.
- g. Control ingress and egress in a designated disaster or emergency area, the movement of persons within the area, and the occupancy of premises therein.
- h. Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles, not including ammunition.
- i. Make provision for the availability and use of temporary emergency housing.
- j. Make provisions for the control, allocation, and the use of quotas for critical shortages of fuel or other life and property sustaining commodities.
- k. Designate members of the highway patrol, North Dakota national guard, or others trained in law enforcement, as peace officers.

Any person who willfully violates a provision of an executive order or proclamation issued by the governor is guilty of an infraction.

## **HISTORY OF GUBERNATORIAL EMERGENCY POWERS**

Many of the governor's emergency powers stem from the Cold War era. Following World War II, the United States was the only nation to possess atomic weapons. This remained the case until 1949 when the Soviet Union detonated an atomic bomb and sent the two countries down the path of a dangerous arms race. On January 12, 1951, mounting tensions between the two nations led President Harry S. Truman to approve H.R. 9798, the Federal Civil Defense Act of 1950. The Act provided a basic framework for preparations aimed at minimizing the effects of a nuclear or other attack on the civilian population and managing the immediate emergency conditions an attack would create. North Dakota's Civil Defense Act was enacted shortly thereafter by House Bill No. 197 (1951). The Act established the state's Civil Defense Council, which was chaired by the governor, and Civil Defense Agency. The stated purpose of the Act was to provide a means to assist and cooperate with the federal government in matters relating to the civil defense effort and establish a framework for defending the state; protecting the public peace, health, and safety; and preserving the lives and property of the people of the state. The Act also authorized the governor to accept federal aid provided for civil defense purposes. The Act was to remain in effect until terminated by the Legislative Assembly or until the existing national emergency was terminated by the President or Congress.

In 1960, the Legislative Research Committee's Subcommittee on State, Federal, and Local Government conducted a study of the state's civil defense laws, as directed by Senate Concurrent Resolution "0" (1959), to determine whether the laws provided the greatest possible protection for the lives and property of the people of the state in the event of a natural disaster or foreign attack. The subcommittee's work resulted in House Bill No. 547 (1961), which broadened the responsibility and authority of the governor and the Civil Defense Agency to act in the event of a natural disaster, foreign attack, or the imminent danger of such an attack. The bill vested authority for civil defense actions in the governor and the Civil Defense Director because the Legislative Research Committee's study determined it was too cumbersome for a council comprised of multiple individuals to take effective action in times of emergencies. The bill also placed the office of Civil Defense within the Adjutant General's office and required the Director of the Civil Defense office to be an active or retired National Guard officer. This requirement was put in place to ensure the director would have knowledge of the capabilities of the National Guard in relation to its ability to aid local civil defense agencies, especially in instances in which the governor may need to declare martial law and place the National Guard in charge of disaster areas.

In 1973, the chapter containing the state's civil defense laws was repealed and replaced with Chapter 37-17.1, which created the North Dakota Disaster Act. Testimony provided on House Bill No. 1223 (1973) indicated many states were revising their civil defense laws, which were based largely on model civil defense acts proposed in the 1950s. The North Dakota Disaster Act modernized and expanded the previous civil defense laws, which primarily focused on nuclear or natural disasters. The Act pertained to any disaster, manmade or natural, and allowed for response to disasters that had occurred and disasters that were imminent but had not yet occurred, such as an approaching snowstorm. The Act provided a more complete and precise list of the governor's powers during a disaster because testimony indicated the previous civil defense laws were too broad and state officials, local agencies, and the general public would be served better by laws flexible enough to allow for creative administration but as complete and precise as is practically appropriate. The Act also provided the maximum term of a disaster declared by the governor, which was 30 days unless renewed, and the method for terminating a disaster declaration.

Several changes were made to the governor's powers under the North Dakota Disaster Act following its enactment in 1973. House Bill No. 1265 (1983) expanded the powers of the governor in times of emergencies or disasters to allow the governor to provide for the temporary control and allocation of fuel or other life and property sustaining commodities in times of critical shortages. Senate Bill No. 2147 (1983) provided a person willfully violating a provision of an executive order, proclamation, or regulation issued by the governor during a time of disaster is guilty of an infraction. House Bill 1252 (1985) updated, improved, and clarified the language of the North Dakota Disaster Act. The bill amended the definition of a "disaster" to exclude from the definition the imminent threat of a disaster and to require the governor to determine if the event would require state or state and federal assistance to supplement the recovery efforts of local governments in alleviating the damage, loss, hardship, or suffering caused by the event for the event to meet the definition of a "disaster." The bill added a definition for an "emergency," which was defined as a situation "determined by the governor to require state or state and federal response or mitigation actions to immediately supplement local governments to protect lives and property, to provide for public health and safety, or to avert or lessen the threat of a disaster." The bill removed the 30-day expiration date applied to a governor's disaster declaration, absent a renewal, and expanded the governor's powers to allow the governor to designate members of the Highway Patrol, North Dakota National Guard, or others trained in law enforcement as peace officers during times of emergencies. House Bill No. 1016 (2005) created the Department of Emergency

Services, which consisted of the Division of State Radio and a Division of Homeland Security, of which the adjutant general serves as the director. The bill replaced references to the Division of Emergency Management with references to the newly created department. Senate Bill No. 2071 (2011) allowed the adjutant general to recall to active duty, on a volunteer basis, former members of the National Guard who are qualified to address a disaster or emergency. House Bill No. 1467 (2013) removed the governor's ability to suspend or limit the sale of firearms or ammunition during a disaster or emergency.

### LIMITATIONS ON EXECUTIVE ORDER AUTHORITY

The authority of a governor to issue legally enforceable executive orders may be limited by state and federal law. To be legally enforceable, a gubernatorial executive order must not be preempted by federal law, may not constitute legislation or contravene enacted legislation, and must stem from a provision of the constitution or a statute.

An executive order is invalid under the Supremacy Clause of the United States Constitution if the order is preempted by federal law.<sup>1</sup> The Supremacy Clause preempts a state law or gubernatorial executive order if: (1) Congress expressly displaces state law; (2) Congress intends federal law should regulate a particular legislative field exclusively; or (3) state and federal law conflict.<sup>2</sup>

An executive order may not constitute legislation<sup>3</sup> or be contrary to the express or implied will of the legislative body.<sup>4</sup> Under Section 1 of Article III and Section 13 of Article IV of the Constitution of North Dakota, all legislative power, except that reserved to the people, is vested in the Legislative Assembly. An executive order that legislates or contravenes enacted legislation would violate the separation of powers doctrine.<sup>5</sup> Moreover, if an executive order is contrary to enacted legislation, the executive order effectively would constitute a veto without giving the Legislative Assembly an opportunity to override it.<sup>6</sup> This likely would violate the veto provisions of Section 9 of Article V of the Constitution of North Dakota.

An executive order, like any exercise of the governor's authority, must be issued pursuant to constitutional or statutory authority.<sup>7</sup> The governor's constitutional authority is limited to executing or administering the laws of the state. A governor may not create laws or interpret laws without violating the separation of powers doctrine that precludes the exercise of those powers by anyone other than the legislative and judicial branches.

The governor's statutory authority for issuing executive orders is circumscribed to a handful of specific situations, which include times of disaster or emergency. Though the governor may not create or interpret laws, pursuant to Section 37-17.1-05(6), the governor may:

[s]uspend the provisions of **any regulatory statute** prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency. **(emphasis supplied)**

Century Code does not provide the definition of a "regulatory statute." The term briefly was mentioned in a 1958 case,<sup>8</sup> which noted Chapter 192, Session Laws N.D. 1919 was the first comprehensive regulatory statute pertaining to rates, charges, and services of public utilities. Interpreting the meaning of the term in relation to the governor's emergency powers seems to suggest regulatory statutes are those statutes that serve to regulate or prescribe the procedures for conducting state business. The governor's power to suspend regulatory statutes in North Dakota is narrower than the authority provided in comparable provisions in other states. For instance, the governor in Connecticut is authorized to "modify or suspend in whole or in part . . . **any statute**, regulation or requirement" the

<sup>1</sup> Duke Energy Trading and Marketing, L.L.C. v. Davis, 267 F.3d 1042 (9<sup>th</sup> Cir. 2001) (federal energy law preempted executive order); New Hampshire Health Care Ass'n v. Governor, 13 A.3d 145, 163 (N.H. 2011) (federal Medicaid law preempted executive order).

<sup>2</sup> Altria Group, Inc. v. Good, 555 U.S. 70 (2008).

<sup>3</sup> Markham v. Wolf, 147 A.3d 1259, 1272 (Pa. 2016); State ex rel. Lichtscheidl v. Moeller, 249 N.W. 330 (Minn. 1933).

<sup>4</sup> Markham v. Wolf, 147 A.3d 1259, 1272 (Pa. 2016); In re Highlands Master Plan, 25 A.3d 1172, 1179 (N.J. Super. 2011).

<sup>5</sup> Fletcher v. Com., 163 S.W.3d 852 (Ky. 2005).

<sup>6</sup> O'Neil v. Thomson, 316 A.2d 168, 173 (N.H. 1974) (an executive order that frustrates legislation would have the effect of a line item veto without giving the legislative body an opportunity to override it).

<sup>7</sup> State v. Johnson, 16 N.W.2d 873 (N.D. 1944); Louisiana Hosp. Ass'n v. State, 168 So.3d 676 (La. Ct. App. 2014); Rapp v. Carey, 375 N.E.2d 565 (Ct App. N.Y. 1978); O'Neil v. Thomson, at 173 (invalidating executive orders that were not supported by constitutional or statutory authority); Gerald Benjamin et al., Executive Orders and Gubernatorial Authority to Reorganize State Government, 74 Alb. L. Rev. 1613, 1614 (2010-11).

<sup>8</sup> State ex rel. Pub. Serv. Comm'n v. Montana-Dakota Utilities Co., 89 N.W.2d 94, 97-98 (N.D. 1958).

governor deems in conflict with the "efficient and expeditious execution of civil preparedness functions or the protection of the public health."<sup>9</sup> **(emphasis supplied)** In addition, the governor of New York may, by executive order, "temporarily suspend specific provisions of **any statute**, local law, ordinance, or orders, rules or regulations or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster."<sup>10</sup> **(emphasis supplied)**

An executive order issued outside constitutional or statutory authority "cannot be considered more than a directive from the governor to his subordinates in the executive branch for the carrying out of their official duties" and is unenforceable otherwise.<sup>11</sup>

## USE OF EXECUTIVE ORDERS

Gubernatorial executive orders responding to disaster or emergency situations have been issued in several states. One example involves the 2015 HIV outbreak in Scott County, Indiana. After health officials determined the outbreak was linked to syringe-sharing for purposes of injecting opioid oxycodone, then-Governor Mike Pence declared an emergency on March 26, 2015, which allowed him to issue an executive order suspending all statutes that would hinder the operation of a needle exchange program.<sup>12</sup> The temporary suspension allowed the appropriate officials to respond to the outbreak immediately, while giving the state legislature time to develop a more long-term solution.<sup>13</sup> While Governor Pence's executive order was not challenged in this instance, executive orders issued by various other governors have been.

## Judicial Rulings

State and federal judicial decisions limiting or affirming executive order powers generally are based on constitutional principles.

### Hurricane Disaster

On August 24, 1992, Hurricane Andrew devastated Dade County, Florida causing widespread damage to infrastructure, property, and power and communication sources.<sup>14</sup> In anticipation of the disaster, then-Governor Lawton Chiles issued an executive order on August 23, 1992, declaring a state of emergency.<sup>15</sup> Governor Chiles amended the order the following day to allow Miami city and Metropolitan Dade County officials to impose curfews, which remained in place until November 16, 1992.<sup>16</sup> Several residents of Dade County filed a suit for damages against the county and county manager alleging the curfew violated their right to travel, expression, and free exercise of religion under the Constitution of the United States.<sup>17</sup> The court denied the plaintiff's motion for summary judgment and the defendant's motion to dismiss holding the curfew was not unconstitutionally vague or overbroad.<sup>18</sup> On appeal, the court affirmed the lower court's ruling noting during a state of emergency, "governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency."<sup>19</sup> The court further held when the constitutionality of the actions taken by an executive during an emergency are challenged, the scope of the court's review is limited to determining whether there was a factual basis for the actions taken, the actions were taken in good faith, and the actions were necessary to maintain order.<sup>20</sup>

### Jail Overcrowding Emergency

In 1981, former New Jersey Governor Brendan Byrne, invoking his emergency powers under New Jersey's Disaster Control Act, issued an executive order<sup>21</sup> declaring a statewide emergency due to prison overcrowding and authorizing the Commissioner of Corrections to house state prisoners in county jails.<sup>22</sup> The executive order was renewed a number of times over the next 11 years.<sup>23</sup> The governor's authority to declare prison overcrowding as

<sup>9</sup> Conn. Gen. Stat. § 28-9(a) (1975).

<sup>10</sup> N.Y. Executive Law § 29-a (1978).

<sup>11</sup> *Kinder v. Holden*, 92 S.W.3d 793, 807 (Mo. Ct. App. 2002) (internal citations omitted).

<sup>12</sup> Ind. Exec. Order No. 15-05 (Mar. 26, 2015), <http://www.in.gov/legislative/iac/20150401-IR-GOV150079EOA.xml.pdf>.

<sup>13</sup> Gregory Sunshine, *The Case for Streamlining Emergency Declaration Authorities and Adapting Legal Requirements to Ever-Changing Public Health Threats*, 67 Emory L.J. 397, 412 (2018).

<sup>14</sup> *Smith v. Avino*, 866 F. Supp. 1399, 1401 (S.D. Fla. 1994), *aff'd*, 91 F.3d 105 (11th Cir. 1996).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1402.

<sup>18</sup> *Id.* at 1406.

<sup>19</sup> *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996).

<sup>20</sup> *Id.*

<sup>21</sup> Executive Order No. 106.

<sup>22</sup> *County of Gloucester v. State*, 623 A.2d 763, 765 (N.J. 1993).

<sup>23</sup> *Id.* at 767.

an "emergency" was first challenged in 1982 in *Worthington v. Fauver*.<sup>24</sup> The court found prison overcrowding constituted an "emergency" under the Disaster Control Act, and the governor had the power to address prison overcrowding on a temporary emergency basis, but the Act did not grant the governor the permanent authority to do so.<sup>25</sup> The governor's authority was challenged again in *Gloucester v. State*, after an additional 14 executive orders had been issued, extending the state of "emergency" for nearly 12 years.<sup>26</sup> The court recognized prison overcrowding remained a "pervasive problem" and determining whether an "emergency" exists under the Disaster Control Act requires a fact-specific analysis, including consideration of the passage of time and "other factors such as the extent to which the problem is within the government's control and the extent to which remedial efforts have been undertaken."<sup>27</sup> Ultimately, the court found prison overcrowding was no longer an "emergency" under the Disaster Control Act and noted the "long-term problem of prison overcrowding calls for an executive and legislative solution rather than an executive order under the Disaster Control Act."<sup>28</sup> The court also noted the legislature could address the problem by declaring a "continuing 'emergency'" and explicitly providing the governor authority to address the issue by executive order.<sup>29</sup>

### Judicial Rulings Related to the Coronavirus Outbreak

Multiple executive orders have been issued by state governors since March 11, 2020, when the World Health Organization classified the novel coronavirus (COVID-19) as a global pandemic. A common goal behind many of the orders issued is to limit human interaction to stem the spread of COVID-19 and conserve personal protective equipment needed when treating patients infected with the virus. These orders have ranged in scope from bans on large gatherings, limits on the operation of nonessential businesses, and bans on licensed medical personnel performing nonessential medical procedures.

#### New Hampshire Ban on Large Gatherings

On March 16, 2020, New Hampshire Governor Chris Sununu issued an executive order<sup>30</sup> prohibiting all social, spiritual, and recreational gatherings of 50 people or more to attempt to reduce the spread of COVID-19. Individuals who planned to attend upcoming political and religious events filed a motion for a preliminary injunction to prohibit the enforcement of the executive order.<sup>31</sup> The plaintiffs claimed the executive order is unconstitutional because it violates their First Amendment right to assemble and right to religious freedom granted under the Constitution of the United States. The plaintiffs also asserted the governor does not have authority to issue the executive order because the spread of COVID-19 does not amount to an emergency. The court denied the plaintiffs' motion for a preliminary injunction after determining the plaintiffs were unlikely to succeed on the merits of their claim because the executive order "is content neutral, narrowly tailored to serve the government's interest in slowing the spread of COVID-19, of a limited duration, and allows for alternative methods of speech, assembly, and association."<sup>32</sup> The court determined there was overwhelming factual and legal support for the governor's authority to declare a state of emergency and stated it "would be irrational to find that the governor must wait for the health care system of New Hampshire to be overwhelmed with patients suffering from COVID-19 before he is authorized to declare a state of emergency and take preventative measures to slow the spread of a highly contagious and potentially deadly disease."<sup>33</sup>

#### Pennsylvania Limits on Nonessential Businesses

On March 19, 2020, Pennsylvania Governor Tom Wolf issued an executive order<sup>34</sup> mandating all non-life-sustaining businesses close their physical locations to help limit contact between individuals to stem the spread of COVID-19. Before the order took effect, several groups filed an emergency injunction petition with the Pennsylvania Supreme Court which challenged the constitutionality and statutory authority for Governor Wolf's order.<sup>35</sup> Those seeking injunctive relief from the executive order included a law firm and a firearms dealer. Representatives for the law firm argued the executive order infringed on the Supreme Court's exclusive authority to regulate the practice of law. Representatives for the firearms dealer argued the executive order violated the inherent right to bear arms provided in the Constitution of Pennsylvania and the Constitution of the United States. The court

<sup>24</sup> 440 A.2d 1128 (N.J. 1982).

<sup>25</sup> Id. at 1137-1138.

<sup>26</sup> *Gloucester v. State*, supra note 22, at 767.

<sup>27</sup> Id. at 767-768 (internal citations omitted).

<sup>28</sup> Id. at 768.

<sup>29</sup> Id.

<sup>30</sup> Emergency Order #2 was issued pursuant to Executive Order 2020-04.

<sup>31</sup> *Binford et. al. v. Governor Sununu*, Docket No. 217-2020-CV-00152. Order available at: <https://www.courts.state.nh.us/caseinfo/pdf/civil/Sununu/032520Sununu-order.pdf>.

<sup>32</sup> Id. at 19.

<sup>33</sup> Id. at 7.

<sup>34</sup> Order available at: <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order>.

<sup>35</sup> *Civil Rights Def. Firm, P.C. v. Wolf*, No. 63 MM 2020, 2020 WL 1329008, (Pa. Mar. 22, 2020).

dismissed the law firm's motion as moot following clarification by the governor that lawyers could access their offices for purposes of participating in court functions deemed essential by the courts. The court denied the injunctive relief requested by the firearms dealer without elaborating on the reasoning for the denial.

### **Texas Ban on Nonessential Medical Procedures**

On March 22, 2020, Texas Governor Greg Abbott issued an executive order<sup>36</sup> requiring all licensed health care professionals and licensed health care facilities postpone surgeries and procedures not immediately medically necessary to correct a serious medical condition or preserve the life of the patient. The intent of the order was to preserve scarce personal protective equipment needed to respond to the influx of COVID-19 patients. Texas Attorney General Ken Paxton later interpreted the executive order to include a ban on abortions unless the procedure was medically necessary to preserve the life or health of the mother. Planned Parenthood and other abortion providers sought a temporary restraining order to bar enforcement of the executive order ban as it applied to non-emergency abortions.<sup>37</sup> The U.S. District Court for the Western District of Texas granted the temporary restraining order stating the executive order ban is inconsistent with Supreme Court precedent which prohibits a ban on a woman's right to a pre-fetal-viability abortion.<sup>38</sup>

## **NORTH DAKOTA EXECUTIVE ORDERS**

North Dakota Governor Doug Burgum issued [Executive Order 2020-03](#) on March 13, 2020, to declare a state of emergency in response to the public health crisis arising from the COVID-19 pandemic and activate the North Dakota State Emergency Operations Plan. The governor has issued multiple orders since March 13 which cover topics ranging from school closures to the suspension of licensing requirements for hospitals and other health care facilities. A full list of Governor Burgum's executive orders issued in response to the COVID-19 pandemic is available on the [Legislative Council's website](#).

## **CONCLUSION**

Governors have broad authority to issue executive orders for the public good in preparing for and responding to disasters and emergencies. While many state laws originally were crafted to allow governors to respond to an enemy attack, governors' powers have broadened over time to encompass the ability to respond to natural and manmade disasters. The COVID-19 pandemic, which has permeated every state in the nation, likely will result in a wave of changes to state constitutions and statutes at a level not seen since the Cold War. However, unlike the Cold War threat that never came to fruition, the COVID-19 pandemic is forcing governors to take rapid action that has resulted in the issuance of executive orders at an unprecedented pace. The legislative and judicial response to the executive orders issued during the duration of the pandemic likely will provide ample precedence to outline the true boundaries of executive order authority.

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<sup>36</sup> Executive Order No. GA-09 is available at:

[https://gov.texas.gov/uploads/files/press/EO-GA\\_09\\_COVID-19\\_hospital\\_capacity\\_IMAGE\\_03-22-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf).

<sup>37</sup> Planned Parenthood Ctr. for Choice v. Abbott, No. A-20-CV-323-LY, 2020 WL 1502102, (W.D. Tex. Mar. 30, 2020).

<sup>38</sup> Id.